

Let's agree to disagree

In the matter of Leslie Muir Holdings Pty Limited [2019] NSWSC 1519

By Benjamin Goodyear

Black J has held that a heads of agreement reached at a mediation, although binding, was so uncertain as to be unenforceable. In so finding, this decision emphasises the need to take care in preparing documentation to give effect to an agreement to settle a proceeding reached at a mediation.

Background

Ms Ross (the Plaintiff) and her older brother Mr Muir (the First Defendant) each held 40% of the shares in a company (the Third Defendant, 'LMH') of which Mr Muir was the sole director. The remaining 20% was held by another company in its capacity as trustee of a family testamentary trust (the Second Defendant). The arrangements turned sour. Ms Ross filed an oppression suit seeking declaratory relief and orders that she be bought out, or that LMH be wound up: at [4].

The parties attended a mediation. At the conclusion of the mediation, heads of agreement (HoA) were signed, clause 1 of which provided (at [7], italics added):

Terms of agreement

1. [Ms Ross] agrees to sell and [Mr Muir] or his nominee agrees to purchase [Ms Ross'] 40% interest in LMH, to be paid for by:
 - (a) [Mr Muir] or his nominee paying the following cash amounts to [Ms Ross] or her nominee:
 - (i) ...
 - (b) LMH transferring its beneficial interest in Lot 41 Yamba to [Ms Ross] or her nominee, either by transfer of the land or LMH's shares in Bate & Leslie Pty Ltd ['BLPL'] *having regard to the advice contemplated in clause 2 of this HoA.*

The italicised passage referred to an advice foreshadowed by cl 2 and 3 of the HoA, which provided (at [8], italics added):

Taxation and structural advice

2. Within 7 days of the signing of this HoA, the parties will jointly engage Auswils and Grant Thornton to



jointly undertake *tax and structuring advice* with respect to the transactions referred to in clause 1 of this HoA.

Deed of settlement and transaction documents

3. Within 6 weeks of the date of this HoA:
 - (a) advice from Auswils and Grant Thornton is to be procured;
 - (b) *having regard to that advice*, a deed of settlement is to be executed; and
 - (c) all transaction documents are to be executed,
 to give effect to the agreement in clause 1.

Clause 4 provided for Mr Muir to procure that a specified company release a specified amount to Ms Ross or her nominee 'on account of the payment' referred to in cl 1(a) (i) of the HoA.

After the mediation

Auswils and Grant Thornton (Accountants) were engaged, as were MinterEllison to provide taxation advice. But progress became bogged down. Sticking points arose in respect of the intended structure, and taxation consequences, of any proposed settlement: at [15]-[20]. Ms Ross brought a motion seeking, among other things, a declaration that the HoA was binding and enforceable.

Reasoning

Justice Black accepted that a binding agreement had been formed, but took the view that the agreement 'is so uncertain, in essential respects, that it is not enforceable': at [26].

In finding the HoA was binding, Black J noted a number of characteristics: at [32]. First, the HoA provided for payment of a substantial cash amount 'on account' of the amount payable under the HoA. Secondly, the HoA prescribed a date by which the deed of settlement and transaction documents were to be executed. Thirdly, cl 3 of the HoA did not use the terms 'subject to' or 'conditional upon' to expressly make the contemplated transactions conditional upon the execution of subsequent agreements. His Honour saw these characteristics, and the subsequent correspondence with the accountants, as consistent with the HoA having binding effect: at [32], [36].

In finding that the HoA nevertheless was unenforceable, his Honour took the view that cl 1(b) and 3(b) 'are too uncertain to be enforceable, because they provide no criteria by which the parties are to give effect to such advice, in whole, in part, or not at all, after they have had 'regard to' it': at [46]. His Honour also found difficulty with cl 3(c), because 'it also provides no criteria to determine the content of the transaction documents if a dispute arose between the parties, as it did': at [46].

As to whether the doctrine of severability might carve off any uncertain and enforceable clauses in order to leave a surviving enforceable rump of an agreement, Black J held that severance was not effective in this case since 'what would remain, if cl 2 and 3 were to be severed from the Heads of Agreement, would not be what the parties had agreed': at [48].

Conclusion

Mediations can be draining and heads of agreements reached at mediations often are written out quickly and in brief. Although it may not be feasible to set out all details necessary to give effect to the agreement reached, this decision emphasises the need to ensure a written agreement is sufficiently certain to be enforceable. **BN**