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29 September 2021

# When Does A Contract Become Binding?

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The starting point to determine whether a contract is binding is to establish whether there is a common consensus between the parties to create a binding contractual relationship.

However, the expression of an intent to create a legally binding relationship is not always found in the form of a formal written contract or agreement, which may only become binding once each party has signed on the dotted line.

Courts have frequently been required to determine whether a preliminary agreement is binding, for example in the form of a letter of intent, heads of agreement or even email correspondence (**Pre-Contract Documents**).

These types of Pre-Contract Documents commonly contemplate entry into a formal contract after a further period of negotiation.

There are primarily four scenarios involving Pre-Contract Documents:

1. The parties have reached agreement with finality regarding the subject matter of the bargain and intend to be immediately bound to the performance of those terms, and at the same time propose to have the terms restated in a fuller or more precise way, but that the effect of the agreement does not change;
2. The parties have agreed on all of the terms of their bargain and do not intend any departure on addition to the agreed terms, but they have made performance of one or more of the terms conditional upon the execution of formal documentation (for example, the payment of a deposit from one party to another);

3. The parties do not intend to make a concluded bargain unless they each execute a formal contract document; and
4. The parties intend to be bound immediately and exclusively by the terms which are agreed while expecting to make a further contract to replace the first which will include additional terms by consent.

Whether or not a contract has been formed depends on the objective intention of the parties in the circumstances, or "*what each party by words and conduct would have led a reasonable person in the position of the other party to believe*". It is a common misconception that an agreement is not binding until there is a signed contract unless, of course, that is expressed in the documentation.

## Nurisvan Investments Limited v Anyoption Holdings Limited [2017] VSCA 141 *(the Nurisvan Decision)*

This Victorian Court of Appeal case provides an example of where a business deal can become problematic. It involves Pre-Contract Documents which were not drafted appropriately to bind the parties to their intended outcome.

Brief facts

1. FIBO Australia Pty Limited (**FIBO**) was the wholly-owned subsidiary of Nurisvan.
2. FIBO held an Australian Financial Services License (**AFSL**).
3. Anyoption was interested in acquiring an AFSL.

In 2014, Anyoption and Nurisvan began negotiations with the view that Nurisvan would purchase shares in FIBO.

On 24 December 2014, the parties entered a heads of agreement (**HOA**) which only allowed for unilateral execution by FIBO and Anyoption, not Nurisvan, and which featured the following recitals:

*a) the Vendor wishes to sell to the Purchaser and the Purchaser wishes to buy from the Vendor the Shares;*

*b) FIBO holds a valid AFSL;*

*c) the parties wish to manifest their intention for the Vendor to sell and the Purchaser to purchase all of the shares in this Deed;*

*d) the parties agree that this Deed is binding on the parties;*

*(collectively, the "**Recitals**").*

Clause 5 of the HOA dealt with the "Terms of the Share Purchase Agreement" and provided:

*5.0 The Parties acknowledge and agree that the following conditions, among others, will be included in the Share Purchase Agreement:*

*5.1 The Purchaser will acquire the Shares from the Vendor free from any encumbrance.*

*5.2 The Purchaser will pay the Purchase Price to the Vendor as consideration for the acquisition of the Shares and Assets which will be paid as follows…*

*5.3 Completion of the Share Purchase Agreement is conditional, amongst other matters, on….*

*5.4 The Vendor will provide reasonable warranties as agreed by the Purchaser concerning FIBO, the shares and the AFSL (including but not limited to warranties to title and compliance with the terms of the license and the law).*

By a letter in late 2015, Nurisvan attempted to terminate the HOA.

Anyoption sought a Court order for specific performance requiring Nurisvan to perform the terms of the HOA.

The primary considerations were whether the HOA was legally binding on the parties having regard to the fact that Nurisvan was not a signatory and if so, whether the HOA had sufficient essential terms to be binding on the parties.

The primary judge ordered that the parties were to perform the HOA and execute a Share Sale Agreement, on the basis that clause 5 was still operative on whatever other terms were reasonably necessary to give business efficacy to the Share Sale Agreement.

Nurisvan appealed and the Court of Appeal held that the HOA was not legally binding for the following reasons:

1. Recital A expressed a wish that the Vendor sell and was not expressed in a form of agreement at the time the document was formed;
2. Recital C was expressed in terms of a wish by the parties to manifest their intention, not to manifest their agreement;
3. Clauses 5.1 and 5.2 were expressed in terms of an event in the future;
4. Clause 5.3 identified a condition precedent to completion, by using the words "conditional, amongst other matters".
5. A comparison between the HOA and the ninth draft of the Share Sale Agreement showed matters which were unresolved between the parties.

## *MX v FSS Trustee Corporation as Trustee of the First State Superannuation Scheme [2020] NSWSC 961 (the MX Decision)*

The *Nuvisan Decision* was recently considered by the New South Wales Supreme Court in the *MX Decision* in which Robb J endorsed the approach of the Victorian Court of Appeal in the *Nurisvan Decision*.

This case considered whether email correspondence between the parties' solicitors regarding an offer to settle the matter was intended, upon acceptance, to immediately bind the parties prior to a formal settlement deed being entered into.

The Court considered:

1. the precision and meaning of the terms expressed (objectively);
2. whether there was sufficient certainty of the terms of acceptance; and
3. the subsequent conduct of the parties, specifically the use of the words by the solicitor indicating that an "in principle" agreement had been reached.

His Honour therefore found that, in these circumstances, there was insufficient certainty to create an intention be bound by the terms expressed in the email.

## KEY TAKE-AWAYS

As can be seen from the above, whether you intend to immediately bind a party to a deal or whether you only wish for matters to be binding once a contract is entered into depends on the precise wording of the agreement.

## CONTACT US

If you need assistance with structuring Pre-Contractual Documents or binding contractual documents, please contact **Emilee Clark**, Associate, on **(02) 8239 6500** or **emilee.clark@kreisson.com.au**.