

Rural land contracts - where to start

Preliminary agreements binding or non-binding?

Many clients are unsure about how to commence negotiating purchase or sale transactions, and many opt into heads of agreement or offer to purchase agreements (**Preliminary Agreements**) as a tool for negotiating the commercial terms pre-contract stage with the parties' intention of entering into a formal binding contract later on.

However, the issue which arises from these Preliminary Agreements are almost always whether the Preliminary Agreements are binding or non-binding.

In particular, regard must be had to the conduct of the parties at the time the Preliminary Agreement was signed, the language used, eg "subject to contract", and the subject matter of the agreement. In particular, the leading decision of the High Court case in *Masters v Cameron* (1954) 91 CLR 353 discusses the issue with respect to the "subject to contract" clause.

The case considered whether an agreement for the sale of farm land was binding on the parties when the agreement was subject to the preparation of a formal contract of sale that contained terms and conditions set out in the agreement that was acceptable to the vendor's solicitors.

In finding that the agreement was not binding on the parties, the purchasers were entitled to obtain a refund of their deposit paid when, before a formal contract was prepared and signed, the purchasers pulled out of the agreement due to financing difficulties.

The High Court outlined three categories that may arise between parties who execute a preliminary agreement:

1. the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect;
2. the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document; and
3. the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

In particular, a preliminary agreement will bind the parties to it if it falls within the first and second points, whereas in the third point the parties are not contractually bound unless and until they actually bring the formal contract into existence.

In finding that the agreement for the sale of land fell into the third point, the High Court pointed out that the preliminary agreement was not binding on the parties until a formal contract is entered into, and given the use of the clause "subject to contract", the words served the purpose of the third point.

When the words "subject to contract" are given their natural meaning, on the face of it, it creates an overriding condition so that what has been agreed upon must be regarded as the intended basis for a future contract and not as constituting a contract.

In any event, the intention of the parties when the Preliminary Agreement was entered into must be considered, and the specifics of the drafting must serve the purpose between the parties.

Anderssen Lawyers are able to tailor different types of Preliminary Agreements to suit any particular transaction. Please contact us for a confidential discussion.



Denis Stephenson LL.B, B.Comm.

Special Counsel
Commercial and Property
Anderssen Lawyers

Phone: 07 3234 3107

Email: denis@anderssens.com.au

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