



## Précis Paper

### **Can an unexecuted contract be binding, and if so, how?**

#### **Introduction**

In this edition of BenchTV, Gregory Sirtes SC and Amelia Avery-Williams (Barrister) discuss the case of Nurisvan Investment Ltd & Anor v Anyoption Holdings [2017] VSCA 141. The facts of the case and the decisions of the County Court and Court of Appeal were as follows: Nurisvan was the sole shareholder of a company Fibo Australia Ltd which was authorised to carry on a financial services business. Nurisvan, Fibo and Anyoption negotiated with a view to Anyoption's purchase from Nurisvan of its shares in Fibo. Fibo and Anyoption executed a 'Binding Heads of Agreement'. Nurisvan was named as party but did not execute the agreement. Agreement provided for parties' entry into a 'Share Purchase Agreement'. Nurisvan advised Anyoption it did not consider itself bound by any agreement with Anyoption and was not obliged to comply with the Heads of Agreement. Anyoption sought specific performance of the Heads of Agreement, or the draft Share Transfer Agreement. The primary judge ordered specific performance of Share Sale Agreement on terms contained in the Heads of Agreement. The Court of Appeal however found that the Heads of Agreement was not a contract between the parties to enter a Share Sale Agreement, but an agreement between them to negotiate in good faith concerning Share Sale Agreement's conclusion. The Court of Appel allowed Nurisvan's appeal.

## **Key areas of presenters' discussion**

1. Discussion of the case's beginnings in the County Court in which proceedings were brought for the enforcement of the Binding Heads of Agreement. The Binding Heads of Agreement is described in detail in respect of its form (a deed) and content (concerning sale of shares in Fibo)
2. Discussion of the reasons why Nurisvan and Anyoption, which were both companies owned and registered in Cyprus, came to enliven the Australian Courts' jurisdiction. The reasons were that the dispute concerned an agreement formulated in Australia concerning the purchase of shares in an Australian company. Lawyers had been engaged in Australia and the agreement provided that it was governed by Victorian law.
3. Presenters discussed in detail the relief that had been sought at first instance, namely specific performance of the Heads of Agreement or of the draft share sale agreement. Special note was made of the interesting nature of the trial judge's order that not only could Anyoption obtain specific performance of the Heads of Agreement but that the order should be that the parties execute a sale of shares agreement. It was noted that this order 'caught the eye' of the Court of Appeal and that one of the issues faced by the Court of Appeal was the style of that order. Issues were identified which constituted difficulties with the form of the trial judge's specific performance order. One issue concerned the terms of the order in that they would require Court's ongoing supervision. The Heads of Agreement did not deal with certain key and important factors, such as how adjustments were to be dealt with on the shares' conveyance, for example, vendor's warranties, or whether conditions precedent had been satisfied. Another issue concerned whether damages would have been an adequate remedy rather than an order for specific performance. The presenters returned to the issue of whether damages would be an adequate remedy later in the presentation.
4. The three issues on appeal were discussed: these were whether the Binding Heads of Agreement was binding even though Nurisvan had not executed

it, whether it was possible for the share sale agreement to be executed where it had unfinalised aspects, whether the Binding Heads of Agreement was no more than an agreement to agree and whether damages was an adequate remedy.

5. Another key area of discussion concerned the approach, both by the trial judge and Court of Appeal to post-contractual conduct in determining whether Nurisvan was a party to the Heads of Agreement, even though it had not signed it. The Court of Appeal found that the trial judge had been correct to look at progress of negotiations over a long period (10 months) to determine whether Nurisvan was bound to the Heads of Agreement even though it had not executed it. It was noted that before the decision in the Court of Appeal there was no settled view concerning the extent to which regard could be had to post contractual conduct to determine parties to the contract in circumstances where there was a formal written document.
6. The Court of Appeal's decision to set aside the order for specific performances was discussed. The Court of Appeal, while it found Nurisvan was bound by the Binding Heads of Agreement, also concluded that the Binding Heads of Agreement was an agreement intending to set a framework for negotiation. Therefore the obligations imposed on Nurisvan and Anyoption were to negotiate in good faith.
7. Important features to take away from case, Three things that practitioners could take away from the Court of Appeal's decision were: 1. That an unexecuted contract can still be binding if the parties have confirmed it or indicated through conduct their intent to be bound. 2. That the Court can have regard to conduct post-dating a contract's formation to determine whether contract exists and who parties are. 3. Where there is a heads of agreement careful consideration is required of the terms of that document to ascertain whether it is immediately binding, or whether it is no more than an agreement to agree.

## **Presenters' Biographies:**

Mr Sirtes was called to the Bar in 1992 and was appointed Senior Counsel in 2008. He is also a Lieutenant Commander and Legal Officer in the Royal Australian Navy Reserve. His practice is primarily in property, probate, professional negligence, contracts and building and construction.

Amelia was called to the Bar in 2014. Prior to coming to the Bar, Amelia was an employed solicitor with King & Wood Mallesons in their dispute resolution group and earlier the Associate to the Honourable Justice Perram in the Federal Court of Australia. Amelia's practice includes equity, commercial and administrative law matters.

### **Bibliography:**

Benchmark link:  
[https://benchmarkinc.com.au/benchmark/banking/benchmark\\_20-06-2017\\_banking.pdf](https://benchmarkinc.com.au/benchmark/banking/benchmark_20-06-2017_banking.pdf)

Nurisvan Investment Ltd & Anor v Anyoption Holdings [2017] VSCA 141

Masters v Cameron [1954] HCA 72