

# Memo

To: JRR  
 From: AVW  
 Date: 23 March 2012  
 File No: 7141000  
 Re: Formation of an enforceable contract – Lighthouse Beach Resort sale agreement with B Benari

## 1. INTRODUCTION

- 1.1 You have asked me to determine whether Sean Butler had an enforceable contract for the sale of the Lighthouse Beach Resort to B Benari for \$14 million via various emails dated January – February 2011.

## 2. SUMMARY

- 2.1 **Elements of enforceable contract:** In my opinion, the email of 26 February 2011 (attachment 1), meets the requirements for an enforceable contract, being:
- (a) Agreement (offer and acceptance occurred);
  - (b) Consideration (agreed price of \$14 million); and
  - (c) An intention to create legal relations (ie intend that the agreement will give rise to legal rights and obligations).
- 2.2 **Absence of formal contract not fatal:** In my opinion, the fact that Sean and Brian proposed to have the terms restated in a formal contract was a formality only.<sup>1</sup> It was not a condition. Therefore, it still meets the requirements of an enforceable contract.
- 2.3 **Property Law Act:** The email is in writing which satisfies the requirement in section 34(1)(a) of the Property Law Act 1969 (WA), - a contract for the sale or other disposition of land or an interest in land, will only be enforceable if it is in writing.
- 2.4 **Alternative causes of action:** Sean Bulter also has the following alternative causes of action based on "pre-contractual liability" available:

CAUSE OF ACTION	REMEDY
The doctrine of promissory estoppels	Prevents Mr Benari asserting his strict legal rights in a way which contradicts the promise to buy the Lighthouse for \$14million
In tort, for fraud or negligence	Damages from Mr Benari
Under statute, for example, in respect of misleading or deceptive conduct	Damages from Mr Benari
In restitution, for example, where the concept	Compensation from Mr Benari

<sup>1</sup> *Godecke v Kirwan* (1973) 129 CLR 629 (sale agreed but conditional on vendor's solicitors settling subsidiary terms of formal contract).

of unjust enrichment is satisfied	
In equity, on the basis, for example, that there was a breach of a fiduciary obligation	Mr Benari under an obligation to account for profits made

### 3. FORMATION OF AN ENFORCEABLE CONTRACT

3.1 The three principal requirements for the formation of an enforceable contract are:

- (a) Agreement;
- (b) Consideration; and
- (c) An intention to create legal relations.

### 4. AGREEMENT

4.1 There are two types of agreements – (1) express agreement; (2) implied agreement.

4.2 An express agreement is where offer and acceptance has occurred.

4.3 Whereas an implied agreement is inferred from parties conduct.

4.4 **Offer:** An offer does not of itself create or give rise to legal obligations.<sup>2</sup>

4.5 Therefore, an offer may be withdrawn or revoked by the offeror at any time before it has been accepted.<sup>3</sup>

4.6 **Acceptance:** Acceptance must be unequivocal that is, the language used must be such as would convey to a reasonable person in the position of the offeror a clear and definite decision by the offeree to be bound by the terms of the offer leaving nothing further to be negotiated.<sup>4</sup>

4.7 **Email:** Legislation has recently been enacted dealing with certain aspects of electronic transactions, including email.

4.8 Acceptance by email is effective at the time it enters the offeror's mail server.

### 5. CONSIDERATION

5.1 Consideration can be defined:

- 1. In terms of benefit or detriment; or
- 2. In terms of a bargain – ie price.

5.2 **Definition in terms of benefit and detriment:** Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, is sufficient consideration to support a promise.<sup>5</sup>

5.3 **Definition in terms of bargain** An act or forbearance of the one party, or the promise thereof is the price ('consideration') for which the promise is bought.<sup>6</sup> This type of consideration is

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<sup>2</sup> *Spiro v Glencrown Properties Ltd* [1991] Ch 537 at 542.

<sup>3</sup> *Metropolitan Milk Supply (Greater Brisbane) Ltd v Paulsen* [1933] St R Qd 53.

<sup>4</sup> *Appleby v Johnson* (1874) LR 9 CP 158.

<sup>5</sup> *Longridge v Dorville* (1821) 5 B & Ald 117 at 122; per Holroyd J.

A valuable consideration, may consist either some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

applied to most contracts today. 'Price' requires the parties' agreement on the particular act or forbearance as the consideration.

- 5.4 Here, the price of \$14 million is the consideration for which the promise to sell is bought.<sup>7</sup>

## 6. INTENTION TO CREATE LEGAL RELATIONS

- 6.1 The parties must intend that the agreement will give rise to legal rights and obligations.<sup>8</sup>
- 6.2 The test of whether the parties had an intention to create legal relations is objective by reference to the facts.<sup>9</sup> The facts can show that the intention was express or implied.<sup>10</sup>
- 6.3 A binding contract cannot be found where the parties to negotiations do not intend to be bound until further (and in that sense essential) terms of the bargain are agreed.<sup>11</sup>

## 7. PROPERTY LAW ACT 1969 (WA)

- 7.1 At common law there is no general rule that contracts must be in writing. A contract can be oral written, partly written and partly oral or implied by conduct.
- 7.2 However, in the case of a contract for the sale or other disposition of land or an interest in land, it will only be enforceable if it is in writing - section 34(1)(a) of the Property Law Act 1969 (WA).

## 8. EXISTENCE OF AN AGREEMENT SUBJECT TO EXECUTION OF A FORMAL CONTRACT

- 8.1 If the parties have:
- reached finality in negotiating the terms of their bargain;
  - intend to be immediately bound by the agreement;
  - intend that neither party may withdraw; and
  - they propose to have the terms restated in a formal contract,
- then execution of the formal document is a matter of formality only – there is an enforceable contract in existence.<sup>12</sup>
- 8.2 If the parties have:
- reached finality in negotiating the terms of their bargain;
  - intend to be immediately bound; and
  - but they have made performance of one or more of the terms conditional upon the execution of a formal document.
- then the obligation to perform the contract is postponed until the execution of the formal document.<sup>13</sup>
- 8.3 If the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract, then there is no contract unless and until the formal contract is executed.<sup>14</sup> This is standard practice in relation to conveyancing transactions.<sup>15</sup>

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<sup>6</sup> *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847 at 855.

<sup>7</sup> *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847 at 855.

<sup>8</sup> *Ratto v Trifid Pty Ltd* [1987] WAR 237 at 241.

<sup>9</sup> *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at 105.

<sup>10</sup> *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 336.

<sup>11</sup> *Australian Broadcasting Corp v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540.

<sup>12</sup> *Branca v Cobarro* [1947] 1 KB 854 at 858.

<sup>13</sup> *Godecke v Kirwan* (1973) 129 CLR 629 (sale agreed but conditional on vendor's solicitors settling subsidiary terms of formal contract).

<sup>14</sup> *Masters v Cameron* (1954) 91 CLR 353; 28 ALJ 438 (no contract where agreement by which vendor agreed to sell property on certain terms provided that it was subject to preparation of formal contract acceptable to vendor's solicitors but document was never signed).



## 9. PRE-CONTRACTUAL LIABILITY – ALTERNATIVE CAUSES OF ACTION

- 9.1 If you have an agreement, but do not meet the requirements of an “enforceable contract”, the following alternative causes of action are available.
- (a) The doctrine of promissory estoppel;
  - (b) Liability in tort, for fraud or negligence;
  - (c) Liability under statute, for example, in respect of misleading or deceptive conduct - damages;
  - (d) In restitution, for example, where the concept of unjust enrichment is satisfied - restitution for benefits conferred under a contract which fails to materialise;
  - (e) In equity, on the basis, for example, that there was a breach of a fiduciary obligation – obligation to account for profit made.<sup>16</sup>
- 9.2 These alternative causes of action are based on “pre-contractual liability”.
- 9.3 **The doctrine of promissory estoppels:** Where there is a pre-existing legal relationship between the person who made the representation, promise or assurance and the person to whom it was made, estoppel may apply and prevent the representor or promisor asserting his or her strict legal rights in a way which contradicts the representation, promise or assurance, and the legal rights may be suspended while the estoppel operates.
- 9.4 **Liability in tort, for fraud or negligence:** Damages as a result of fraud or negligence.
- 9.5 **Under statute, for example, in respect of misleading or deceptive conduct:** Liability in damages for contravention of prohibition on misleading or deceptive conduct.
- 9.6 **In restitution, for example, where the concept of unjust enrichment is satisfied:** Restitution for benefits conferred under a contract which fails to materialise.
- 9.7 Where work is done in response to a request which is found to have no contractual effect, a claim for restitution based on unjust enrichment will be available if there has been reliance on (and substantial compliance with) the request, in the expectation that the work would be remunerated, provided objective evidence is present that it was not the intention of the defendant that the work be done gratuitously.
- 9.8 Alternatively, a claim for compensation or restitution may be available if the person who made the request decides not to enter into the contract, not because of bona fide disagreement concerning its terms or the nature or quality of the work done, but for reasons which pertain only to his or her own position and do not relate at all to that of the other party. Similarly, if the plaintiff made payments for performance under the contemplated contract, the money so paid will be recoverable if there is a total failure of consideration.
- 9.9 In these situations, the finding that there is no contract means that the defendant may have no claim for damages in contract for defects in the work done. However, where the benefit takes the form of work preparatory to contract formation, and although the main contract is never formed, the court may imply a collateral contract dealing with the work, breach of which will give rise to a liability to pay contract damages.
- 9.10 **In equity, on the basis, for example, that there was a breach of a fiduciary obligation:** Obligation to account for profit made as a result of the breach of the fiduciary duty.

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<sup>15</sup> *Masters v Cameron* (1954) 91 CLR 353; 28 ALJ 438.

<sup>16</sup> *Ravinder Rohini Pty Ltd v Krizaic* (1991) 105 ALR 593 at 604 per Wilcox J, Fed C of A fiduciary relationship arose even if redevelopment agreement was not enforceable as a contract.

Attachment 1

## Anna White

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**From:** Sean Butler [sbutler@iinet.net.au]  
**Sent:** Wednesday, 21 March 2012 3:48 PM  
**To:** Anna White  
**Subject:** Agreement in principle

*Note*

**From:** Brian Benari [mailto:bbenari@challenger.com.au]  
**Sent:** Saturday, 26 February 2011 2:05 PM  
**To:** 'sbutler@iinet.net.au'  
**Subject:** Re: Agreement in principle

Yes. We could get O and A drafted for lhouse by CBRE now. It will be for acquisition of units by xxx from Cargill trust.  
BB

**From:** Sean Butler [mailto:sbutler@iinet.net.au]  
**Sent:** Saturday, February 26, 2011 04:28 PM  
**To:** Brian Benari  
**Subject:** Agreement in principle

Brian,  
Can you confirm you agree in principle to the agreement below.  
I need formal offer and acceptances for nab next week so need to keep things going  
Regards  
Sean

**From:** Sean Butler [mailto:sbutler@iinet.net.au]  
**Sent:** Friday, 4 February 2011 2:49 PM  
**To:** Brian Benari  
**Subject:** Agreement in principle

Hi Brian,

It was good to discuss things yesterday.

Agreement proposed

Brian Takes LBR as is incl two houses for \$14m

Sean agrees to Deed of Restraint proposed in the current offer.

Sean takes National as is for \$5.5m

### Other Items:

Loans to be repaid to adjust according to capital contributions of each party (will finalise LBUT accounts).

It's up to each party to do whatever they decide with their respective properties after settlement.

Both parties mutually agreed to the proposal above.

Sean to handover LBR as proposed in other purchase offer.

Brian to retain all plans and intellectual property for the Lighthouse and vice versa for Sean and the National.

Let me know if that's in principal.

Regards

Sean

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## Sean Butler

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**From:** Brian Benari <bbenari@challenger.com.au>  
**Sent:** Friday, 8 April 2011 2:43 PM  
**To:** Sean Butler  
**Subject:** RE: Light House Beach Hotel

**Sensitivity:** Confidential

Sean

I think what Laurie is saying is he does not know your personal tax position. Remember, trusts pass income through themselves to beneficiaries. That is, the sale of property by the LBUT or indeed the sale of units in LBH, generates a profit which goes into the Cargill Trust and then goes to whoever it distributes profits to. That is, the ultimate beneficiary pays the tax. I don't believe Laurie has any line of sight as to the position of the Cargill trust nor its beneficiaries as he has never done their tax returns.

Can I suggest that we have a phone link up between your tax guy / Laurie (and if appropriate the two of us) and they walk through the workings. Its complex and needs good communication.

With respect to 7 weeks, we agreed the pricing and terms at the beginning of this process. 14 mio for the LBH and any structure should leave you in the same position as the BR offer and 5.5m for the National – nothing has changed. Any settlement is dependent on finance and in-line with this, absent a formal contract, I have had the Lighthouse valued (and hope to receive the val ASAP) and am seeking to finalise the purchase on the basis of our discussions. We have an obligation to Bankwest to settle this matter.

Finally, Bankwest called me yesterday advising that 58,000 is owing on interest. I note that all payments inc the full payment for the National has been made by me approx. 20 March. Can you shed some light on the quantum outstanding.

Regards

BB

Brian Benari  
Tel: 02 9994 7025

**From:** Sean Butler [mailto:sbutler@iinet.net.au]  
**Sent:** Friday, 8 April 2011 3:04 PM  
**To:** Brian Benari  
**Cc:** Robert Byatt at Bankwest  
**Subject:** Light House Beach Hotel  
**Importance:** High  
**Sensitivity:** Confidential

Hi BB,

Laurie does act for me in regards to the lighthouse and always has so I am a bit surprised he is reluctant to advise giving a definite answer.

I will get advice from my accountant as advised however he has had no previous understanding of the Lighthouse Beach Unit Trust so it may take a while for him to go over the issues here.



As it took over seven weeks to get your offer prepared I hope you will understand I will need some time to go through it as well.

In simple terms your offer needs to give me the same net position as the one from Burgess Rawson. I Am sure you would agree that this is only fair.

Regards,

Sean

**From:** Laurie Lapsley [mailto:laurie@cspartners.com.au]

**Sent:** Friday, 8 April 2011 11:31 AM

**To:** sbutler@inet.net.au; Brian Benari

**Subject:** FW: Light House Beach Hotel

**Importance:** High

**Sensitivity:** Confidential

Dear Sean and Brian,

Sean has asked me to comment on the proposal made to him by Brian and to comment on the tax implications of Brian's offer versus the cash offer received through Burgess Rawson. As I do not act for Sean and am not intimately familiar with his circumstances, I cannot give unequivocal advice as to the taxation implications of sale. Sean has advised that he has received advice from his tax advisor that he will be entitled to claim the small business active assets CGT concessions (SBAACs) in regard to the capital gain amounts arising from the sale or transfer of his interests in the Lighthouse. How and when these concessions can be applied for Sean, is for him to determine with his advisors. On the basis that Sean will be entitled to the SBAACs, I nonetheless provide below my understanding of the taxation implications of the transfer of Sean's interests in this enterprise.

There are, or were two options being considered:

1. The sale of the Hotel by the LHBUT (Option 1) or
2. the sale by Sean of his units in the LHBUT (Option 2).

In undertaking my analysis of these options, I have used the 30 June 2010 balance sheet of the trust, and the tax position as at that time. As these documents haven't yet been forwarded to you, I attach for your reference copies of the 2010 Financial Statements and Tax return of the trust. I have assumed that the SBAACs will be applicable as advised by Sean, and have analysed the projected tax consequences arising from the sale of the business undertaking for the agreed value of \$14m. I have ignored the trading results of the entity for the financial year to date and any movements in the trust's liabilities. Accordingly, these calculations are not absolute but are designed to give a basis for comparison of options 1 and 2. The workings detailing my conclusions can be found in the attached workbook.

In Option 1, the assessable capital gain that Sean would be required to disclose in the 2011 return of the Cargill Trust would be \$1,235,130. Option 2 would require the Cargill Trust to disclose an assessable capital gain of \$1,669,324. The difference between the two (\$434,194) can be explained as 50% of the carried forward revenue tax losses available in the trust (\$1,737,110) reduced by the 50% general CG discount for assets held for more than 12 months. In both instances, the cash amount returned to the Cargill Trust would be the same. It should be noted that the tax losses accrued to the trust would be lost under option 2.

On the assumption that SBAACs apply, a further discount of the CG is available but it would be necessary to use the "retirement exemption" and contribute a significant sum to superannuation to eliminate entirely all tax liability arising from the transactions. Note that the CGT retirement exemption is subject to a \$600,000 lifetime limit and hence, unless there is more than one "concession stakeholder" associated with the Cargill Trust on who's behalf a retirement exemption contribution could be made, some of the gain would become assessable. Also, CGT Small business concession amounts distributed from a unit trust will reduce the cost base of the unitholder's unit holdings under CGT Event E4 and, where the cost base is exhausted, the excess becomes an assessable capital gain. In the case of Option 1 this may mean that the distributed CGT concession amount becomes assessable as a capital gain on the Cargill Trust's units in LHBUT. Whilst it is possible that this assessable amount might also be subject to the SBAACs if the trust were to be wound up in the year in which the transaction was performed, unless this is done, Option 2 would give rise to a lower assessable CG.

In summary, assuming the SBAACs are available, Sean's ultimate tax liability will depend upon what choices Sean makes in dealing with the concessions, but could be as low as nil for either of the options being considered.

Once again I urge Sean to get his advice regarding the application of the SBAAC to his particular circumstances confirmed.

Kind regards

*Laurie Lapsley*

Partner



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