

# Business sale and other contractual disputes

Dr Philip Bender, List A Barristers

# Agenda

- General comments
- Potential tax disputes
- Best endeavours clauses
- Misleading representations
- Dispute resolution clauses
- Options to litigate

# General comments

- Small business issues
  - Lack of written documentation
  - Borrowing agreements
- Detail and specificity eg
  - Dates
  - Steps to be undertaken
  - Conditions to be met
  - Avoidance of vague or unclear obligations

# General comments

- Conditions precedent to completion
  - Regulatory requirements (eg liquor licences)
  - Consent to assign lease
  - Eg no lease

# General comments

- Completion adjustments
  - Specific date/time for stocktake
  - Who completes?
  - Asset valuation process
  - Deadlock mechanism

# General comments

- Termination clause
  - Detailed default events
  - Clear process for termination

# General comments

- Non-refundable deposits
  - “something given in earnest, as a guarantee by the payer of the deposit that the contract will be performed”
  - *Fiorelli Properties Pty Ltd v Professional Fencemakers Pty Ltd* [2011] VSC 661
  - Versus Penalty eg substantial part of price
  - Unconscionable to retain

# What if you agree one thing & draft another?

- *Cherry v Steele-Park* [2017] NSWCA 295
- Property contract – purchaser was co.
  - If vendors validly terminated & resold for less
  - Could recover difference in price
- Variation 1 – extension of completion plus interest
- Variation 2 – extension of completion plus \$30k for variation
- Purchasers failed to complete – K terminated



# What if you agree one thing & draft another?

- Guarantee with directors of purchaser
- Pre-contractual emails
  - Parties agreed to guarantee \$30k only
  - Court agreed
- Vendors wanted difference in purchase price too under guarantee

# What if you agree one thing & draft another?

*Guaranteed Money means all amounts (including damages) that are payable, owing but not payable, or that otherwise remain unpaid by the Debtor to the Beneficiary on **any** account at **any** time under or in connection with the Agreement or **any transaction** contemplated by the Agreement, whether present or future, actual or contingent or incurred alone, jointly, severally or jointly and severally and without regard to the capacity in which the Debtor is liable including the obligation to pay the amounts specified in clauses 4 and 5 of the agreement (i.e. The \$30k).*

# What if you agree one thing & draft another?

- Could the emails be taken into account?
  - Ambiguity not a precondition to admissibility of extrinsic evidence
  - Consider surrounding circumstances first
  - Then ambiguity is a conclusion
  - Admissibility vs. Use
- Cannot use extrinsic evidence to contradict plain words of a contract

# What if you agree one thing & draft another?

- Court – emails potentially relevant to construction
  - Objective context in which contract drafted & executed
- Purchasers argued ambiguity – some eg
  - Referred to obligations under variation 2
  - “Agreement” defined to mean second variation (not original contract)
  - Guarantee entered into at about same time as second variation

# What if you agree one thing & draft another?

- Points in favour of wide construction - some eggs
  - Uses word “any” account / “any” time / “any” transaction
  - “including” damages
    - Extends to damages from non-completion
    - *Not* confined to \$30k amount
  - “Transaction” – could include conveyances
  - “All other obligations” –
    - Used in part of the variation
    - includes damages for non-completion

# What if you agree one thing & draft another?

- Language of guarantee clear
- Emails could not override that
- Despite intention to limit guarantee to \$30k

# Agreements to agree

- What are the parties intending to do?
  - Obligation to negotiate in good faith
- Eg *Verrochi v Messinis* [2016] VSC 490

# Tax issues – sale of assets

- Misconceptions about going concern
  - All things necessary for business to operate
  - Carried on to day of sale
  - Payment or consideration
  - GST registered or required
  - Written agreement
- Check the requirements!
- GST gross-up clause



# Tax issues – sale of assets

- GST on individual assets
  - Errors in treatment
  - Poor drafting
  - Examples
    - *Duoedge Pty Ltd v Leong*
    - *Cityrose Trading Pty Ltd v Booth & Anor*
    - *Empire Securities Pty Ltd v Miocevich*

# Tax issues – sale of shares

- Tax warranties & indemnities
  - Eg all filings / stampings / payments / no audits
  - Eg corporate reconstruction (stamp duty)
  - No latent tax liabilities
  - Unlodged returns / BASs
  - Amended assessments
  - Can the vendor fund it?

# Tax issues – sale of shares

- Income tax consolidated group
  - Exposure to group liabilities on exit
  - Clear exit
  - Tax sharing agreement
- Break up of indirect tax group
  - Indirect tax sharing agreement

# Best endeavours clauses

- Absolute obligations = certainty
- Best / reasonable endeavours
  - Substantially similar
  - cf “best reasonable endeavours” (*Forster v Hall* [2012] NSWCA 122)

# Best endeavours clauses

- Best / reasonable endeavours
  - Do all things reasonable in circumstances to achieve contractual objective (*Hospital Products*)
  - Do all reasonably can to achieve objective but not beyond the bounds of reason (*Hospital Products*)
  - Implying an obligation that party will not hinder or prevent fulfilment of objective (*Hospital Products*)

# Best endeavours clauses

- Best / reasonable endeavours
  - Standard measured by what is reasonable in circumstances having regard to nature, capacity, qualifications and responsibilities of party in light of particular contract (*Transfield Pty Ltd v Arlo*)
  - Do all reasonably expected having regard to circumstances of party's business operation (*Transfield Pty Ltd v Arlo*)

# Best endeavours clauses

- *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7
  - (a) If in accordance with Clause 9 ('Nominations') the Buyer's nomination for a Day exceeds the MDQ, the Sellers *must use reasonable endeavours* to make available for delivery up to an additional 30TJ/Day of Gas in excess of MDQ ('Supplemental Maximum Daily Quantity' or 'SMDQ').
  - (b) In determining whether they *are able to supply SMDQ on a Day*, the Sellers may take into account all relevant commercial, economic and operational matters

# Best endeavours clauses

- *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7
- Not an absolute or unconditional obligation
- Nature & extent of obligation conditioned by what is reasonable in circumstances
  - Can include circumstances affecting an obligor's business
- Can contain internal standard of reasonableness



# Best endeavours clauses

- Lessons – precision / definition
  - Set standard to determine best/reasonable endeavours
  - Precise criteria for a single standard
  - Measureable standards (eg industry)
  - Specific steps to undertake / timetabling
  - Limitations on the obligation
  - Specific /quantified obligations on expenditure

# Best endeavours clauses

- Lessons – precision / definition
  - When compliance not required
  - Changes in market conditions
  - Changes in party situation

# Best endeavours clauses

- *Centennial Coal Company Ltd v Xstrata Coal Pty Ltd* [2009] NSWSC 788; (2009) 76 NSWLR 129 (appeal)
  - Reasonable endeavours keep being made
  - Unless would have such remote prospects of success are simply likely to be wasted
  - Until all reasonable endeavours are exhausted
  - Future changes may allow new endeavours
- Time limits / sunset clauses

# Best endeavours clauses

- *Ugrinovski v Naumovski & Ors* [2016] VSC 555
  - (24) The parties are to use all reasonable endeavours to:
    - (a) ensure that all necessary steps are done so that the above orders are effected in the most tax effective way on or before the Settlement Date; and
    - (b) ensure that the value of the shares, units, interests and assets of the Group are maintained between the date of this agreement and Settlement Date;
    - (c) ensure that the set-offs and payments referred to in paragraph 23 above do not result in a liability between the Ugrinovski interests and the Naumovski interests following settlement.

# Misleading representations

- Representations on past and future financials
- Consumer Law remedies
- Independent verification
- Discount price
- No reliance clauses
- Amounts in escrow
- Earn outs

# Misleading representations

- *Jewelsnloo Pty Ltd v Sengos* [2016] NSWCA 309
  - Representations about turnover
  - Consumer law – s 236
  - Loss suffered “because of” conduct
  - Was there reliance on representation?
- Discounted price
- No reliance clause

# Dispute resolution clauses

- Defined process to follow before litigation
  - Settlement negotiations
  - Mediation
  - Arbitration
- Certainty to avoid being unenforceable
- Seek stay if litigation commenced

# Dispute resolution clauses

- *WTE Co-Generation & Anor v RCR Energy Pty Ltd & Anor* [2013] VSC 314
- Written notice of dispute then initial meeting  
*In the event the parties have not resolved the dispute then within a further seven days, senior executives representing each of the parties must meet to attempt to resolve the dispute or to agree on methods of doing so.*



# Dispute resolution clauses

- Unenforceable for uncertainty
  - Failure to outline which method to adopt & specifics
  - Agreement to agree

*“as a minimum, what is necessary for a valid and enforceable dispute resolution clause, is to set out the process or model to be employed, and in a manner which does not leave this to further agreement.”*

# Dispute resolution clauses

- No stay if clause unenforceable
- Courts favour a commercially sensible construction
- General clauses enforced if sensible meaning
- Courts slow to declare void

# Dispute resolution clauses

- Agreements to agree – unenforceable
- Agreement to negotiate not incomplete
  - If requires parties to behave in particular way may be uncertain
- Obligation to undertake discussions “in an honest and genuine attempt to reach an identified result” is not incomplete

# Dispute resolution clauses

- Negotiation clauses still acceptable
  - *United Group Rail Services Ltd v Rail Corporation of New South Wales* (2009) 74 NSWLR 618

*Representatives to “meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference”*

- *Little Legs Play Centre Pty Ltd v Speranza* [2015] VCAT 1158

*Parties “to enter into negotiations... and... do all things reasonable to settle this matter”*

# Dispute resolution clauses

- Expert determination
  - Valid means of resolution: eg *Mineral Resources Ltd v Pilbara Minerals Ltd* [2016] WASC 338
  - Heavy onus to override contractual mechanism: *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563
  - Even where a dispute involves questions of fact and law, an expert may determine it: *The Heart Research Institute v Psiron Ltd* [2002] NSWSC 646

# Dispute resolution clauses

- Expert determination – invalid
  - Agreed procedures inadequate to determine
  - Dispute does not involve application of expert's special knowledge or dispute is outside that area
  - Contract terminated or discharged
- Need express power to survive end
- Eg *FPM Constructions Pty Limited & Anor v The Council of the City of Blue Mountains* [2005] NSWCA 340

# Dispute resolution clauses

- Mediation clauses
- Can fail for certainty
- Courts will not impose mechanism for mediation
- Eg *Skill Tiling v Trio Construct* [2014] VMC 4

*If the meeting is not resolve the dispute, then within a further 28 days the parties must mediate the dispute. If the mediation has not resulted in a resolution of the dispute within a further 28 days than the parties are free to pursue their rights at law.*

# Dispute resolution clauses

- *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSW 996
  - Must make completion a condition precedent to litigation
  - Process must be certain
  - Selection of mediator & third party mechanism
  - Payment of mediator
  - Detailed process for conduct of mediation



# Options for litigation

- VCAT – Civil claims list
- Advantages
  - Good for smaller value disputes
  - Informality in making applications
  - Low costs
  - Compulsory conference procedure
  - Informality and flexibility with evidence

# Options for litigation

- VCAT – Civil claims list
- Disadvantages
  - Presumption against costs (s 109)
  - Less strict with procedural enforcement
  - Limited mechanisms to ensure compliance
  - Informality can detract from smooth case
  - No power to enforce final orders
  - Reputational – austlii publication

# Options for litigation

- Smaller claims – Magistrates' Court
  - Costs advantages
  - ADR – private mediation / registrars / DSCV (<\$40k)
  - Formality
  - Compliance with orders
  - Less business disputes
  - Power to enforce own orders
- Other issues
  - *Civil Procedure Act* / costs scales
  - Complexity of disputes



## Presenter contact details

---

Dr Philip Bender

Owen Dixon Chambers West

[pbender@vicbar.com.au](mailto:pbender@vicbar.com.au)

03 9225 6941

*Dr Philip Bender is a barrister practising in taxation, commercial and property law.*