Introduction

The case of *Masters v Cameron* [1954] 91 CLR 353 was a High Court of Australia decision which examined pre-contract conduct of parties and the form of agreement resulting, in order to determine if the ‘agreement’ constituted a binding legal agreement. In this context, pre-contract terms reached often indicate that a formal contract was intended to consolidate the initial agreed terms. Heads of Agreement (HOA) can often be a recital of initial or principal terms agreed. However, in many instances a HOA does not represent a final binding contract because it can often state that the terms must transition into a formally prepared agreement.

This newsletter discusses the recent decision of the NSW Supreme Court handed down on 7 September 2016 of *Coyte and Anor v Norman and Anor; Centre Capital (Newcastle) Pty Ltd and Anor* [2016] NSWSC 1242 (*Coyte’s case*).

The unfortunate circumstances of Coyte’s case are that:

1. Two parties had entered into a HOA which was very loosely worded as the foundation for a joint venture;
2. When the joint venture was terminated, the parties vigorously litigated their claims and counterclaims against the other; and
3. When 11 days of trial were over, no one walked away as a winner.

In hindsight, Coyte’s case could have been avoided if the parties formalised their HOA documentation into a formal joint venture document.
The background of Coyte's case

Both Mr Coyte and Mr Norman were financial planners and decided that they would act harmoniously in a joint venture with their nominee companies. Whilst other parties feature in the decision, Mr Coyte and Mr Norman were the main protagonists. In 2005, Mr Coyte and Mr Norman entered into a HOA under which Centre Capital (Newcastle) Pty Ltd (CCN) would operate the Centre Capital Mutual Unit Trust (JV Trust). Mr Coyte and Mr Norman became directors of CCN. On 1 July 2007, the parties decided to enter into another HOA to supersede the 2005 HOA.

The 2007 HOA stated that each of Mr Coyte and Mr Norman would retain their own clients and recognised that the joint venture could be terminated. It was agreed that if one party wished to 'sell his clients’, the other was to have first rights of refusal.

In June 2011, Mr Coyte gave Mr Norman a notice of termination of the joint venture, effective 30 June 2011.

In the 6 months after 30 June 2011, there was a period of hiatus to determine the entitlement of income received by the JV Trust and agreement was reached on ‘ownership’ of clients by each party.

An unexplained aspect was that fact that the JV Trust was a unit trust initially established where 75% of the units were held by the Norman interests and 25% of the units were held by the Coyte interests. Conversely, expenses were split 50/50.

The winding up of the JV Trust became acrimonious, resulting in initial claims by the Coyte interests and counterclaims from the Norman interests.

The court concluded that the fundamentals of the 2007 joint venture variation was that there was to be a 50/50 split of expenses and that each was entitled to income generated from their own clients. The unit holding ratio was considered as 'not agreed' and the presiding judge considered, on Masters principles, that Mr Coyte never accepted the unit holding ratio.

There were numerous allegations based on breaches of directors’ duties arising out of ss 180 to 184 of the Corporations Act 2001 (Cth). The decision contains vain attempts to align conduct of Mr Coyte and Mr Norman with what occurred in Australian Securities and Investments Commission (ASIC) v Rich [2009] 75 ACSR, and ASIC v Maxwell [2006] NSWSC 1052 – all to no avail.

Conclusions

The meaningless outcome for either party would have been overshadowed by the cost of proceedings, particularly the costs of 11 days of trial. The presiding judge determined that a decision on costs was to await a separate hearing.

Coyte’s case might never have involved litigation if the parties had used their HOA as guidance towards preparation of a well drafted (and legally binding) joint venture agreement before they went into business together.

Author

Tony Stumm
Consultant
P: (07) 3000 8402
E: tstumm@carternewell.com