

# When mediation gets HOT: Abberley v Abberley

By Laura Cole and Kieran Sharman

In December 2011, the Abberley brothers met to mediate the division of £1,275,000 worth of agricultural assets between them. Unfortunately, the process ended in tears and a trip to the High Court.

After a long day of mediation, continuing late into the evening, the parties reached a deal. The mediator typed up the agreement but – before it could be printed – it disappeared from the screen and couldn't be retrieved. So, the mediator wrote out the agreed heads of terms ("HOT") and that document was signed by the mediator and the solicitors for the Abberley brothers.

When the matter reached the High Court, the questions for the Judge (His Honour Judge Jarman QC.) were:

- Whether the HOT formed a binding contract; and
- If they did, were they enforceable under section 2 Law of Property (Miscellaneous Provisions) Act 1989 ("section 2")?

## Common understanding

At the trial, after hearing the witness evidence, Judge Jarman was satisfied that all the parties knew what land was being referred to in the HOT, and there was enough certainty to create legally binding relations.

Judge Jarman took a practical approach to overcoming supposed uncertainties presented by the defendant.

The Judge found that the HOT contained enough detail to establish the general mechanics which had been agreed at the mediation, including the identity of the intended tenant for the farm

business tenancy ("FBT") and the commencement date of the FBT.

**Lesson 1: the court will assess the parties' words and conduct to determine their intentions.**

**Lesson 2: given the skeletal nature of the HOT, the court will not shy from purposive construction.**

## Binding contract

Judge Jarman was persuaded that, although the HOT anticipated further documentation (e.g. transfers), they did not contemplate a further formal agreement. Although a formal agreement might sensibly be expected to follow, to document the HOT, Judge Jarman stressed that this did not mean the HOT were not intended to be binding.

**Lesson 3: "The mere fact that a more formal document is envisaged does not, of itself, preclude the existence of a binding agreement." (para 39 of the Judgment)**

**Lesson 4: clearly mark any HOT not intended to bind the parties as SUBJECT TO CONTRACT.**

## Enforceability

Section 2 requires a contract for the disposition of an interest in land to: (i) be in writing (tick – the HOT were written down); and (ii) incorporate all the terms which the parties have agreed in one document.

Judge Jarman noted that, whilst there was consensus in retrospect that certain items should have been included in the HOT (such as cross indemnities and the rent review mechanism) there was not a consensus at the mediation about the detail of how those provisions should be drafted.

Therefore, all the terms agreed at the mediation were incorporated in the HOT and those not agreed simply fell outside the scope of section 2.

**Lesson 5: precisely record all terms that are agreed upon in the HOT.**



## ABOUT THE AUTHORS



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