



Letter of Advice Scenario

Entries Due 16th August 2013

Eva, a successful clothing designer, had been wanting for some time to set up a business in central Melbourne. In December 2010, she began negotiations to purchase an existing women's fashion business located on Flinders Lane from its owner and operator, Lewis. Lewis was anxious to finalise the deal before he went on a holiday, so he and Eva decided to dispense with lawyers. They met at a nearby rooftop bar later that week and nipped out the terms over a jug of sangria.

Since Lewis was retaining ownership of the premises, Lewis agreed to give Eva a lease for three years with a right of renewal for a further three years on the same terms and conditions, except rent. "Obviously with property prices going through the roof, I need to be able to review the rent at least every three years," he said.

"That goes without saying," replied Eva, "but what form should the rent review clause take?"

"I have a copy of the standard form used for commercial leases", replied Lewis, "so why don't we just choose the appropriate clauses from that?"

"That sounds like a good idea," said Eva. "But what about the contents of the shop? I really like some of the antique furniture you have been using to display your things. Would you be prepared to part with any of that?"

"You can have all of it, as long as it is independently valued," said Lewis, "because I bought it years ago and have no idea what it is worth now."

"Fair enough," Eva replied. "Let's put pen to paper then."

Clause 1 of the resulting contract of sale provided that "the seller agrees to sell and the purchaser agrees to buy the business including goodwill (if any) together with the furniture set out in the attached schedule for \$100,000 plus stock in trade to be valued by a registered valuer to be appointed by the seller."

The attached schedule simply stated: "All furniture in shop."

Clause 2 provided that "Upon settlement of the sale of the business, the parties will enter into a lease in relation to the Flinders Lane shop for a three year period at a rent of \$700 per week and upon appropriate conditions from the annexed form of contract of lease for commercial premises." However, the contract of lease was not annexed.

Clause 3 of the contract also provided for payment of a 10% deposit with the balance of the purchase price plus the value of the furniture and stock in trade to be paid on 31 January 2011 or such other time as the parties might agree.

Both Lewis and Eva then signed the agreement and Eva wrote out a cheque for \$10,000 which Lewis banked.

The next day Eva saw an advertisement in mX newspaper for an auction of vintage clothes in Richmond. The advertisement stated: "Where the highest bid does not reach the reserve price, the highest bidder will have an option to purchase the item in question for the reserve price for one hour after the conclusion of the auction." Eva put in the highest bid for a vintage Chanel dress, but it failed to match the reserve price. After the auction, she approached the auctioneer and enquired as to the reserve price. "It is \$1000" she was told.

"That's a bit steep. I'm not sure I want it at that price," she said. But no sooner had she uttered these words then one of her business rivals, Jacob, who had overheard the conversation, jumped in and said that he would take it for \$1000.

"It's a deal!" said the auctioneer. "Hang on a second," protested Eva, hating to be outsmarted. "Don't I have an option for one hour? I've changed my mind. I'll take the dress."

"Oops, too slow!" said the auctioneer, handing the dress to Jacob. "This gentleman has beat you to it." A couple of weeks later, Eva read in the "Weekend Australian" that the dress had been worn by a famous British actress and was in fact worth \$10,000.

To add insult to injury, when Eva contacted Lewis in late January 2011 to see how much the antiques and stock in trade were going to cost, he told her that he still hadn't arranged for a valuation.

"Actually, I was about to contact you myself," he said. "The terms of the sale leave too many things up in the air. In fact, the whole thing is riddled with holes. So I'm afraid that the deal is off."

"Not as far as I am concerned," Eva retorted and hung up. She overheard at a dinner party later that week that Lewis had in fact accepted a higher offer from Jacob for the business.

Eva now seeks your written legal advice on her rights and remedies in relation to both the purchase of the business and the dress. Your advice should include the following matters:

Whether Eva has a binding contract with Lewis and if so upon what terms; and

Whether Eva has an action for breach of contract against the auctioneer.

If you require any additional information, please state what that information is and why it is necessary.