Entering Into a Binding Contract – Recent Lessons From the English Courts

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A binding contract is concluded when there is an offer, acceptance and consideration, as well as an intention to create legal relations and certainty of the terms of the contract. However, it can be difficult to determine when a binding contract is concluded, particularly where there are urgent negotiations between the parties in order to commence work quickly. Difficulties can also arise when negotiations take place over a protracted period or when using multiple channels of communications, including newer methods such as WhatsApp messaging. If a party starts to perform its obligations under a contract before the contract is concluded, that party may not be entitled to rely on the terms that have been agreed or be entitled to be paid. Two recent judgments from the English courts both found that the parties had failed to conclude binding contracts.

SMIT Salvage v Luster Maritime[1]

This case concerned the March 2021 grounding of the container ship, the Ever Given, in the Suez Canal, which had a significant impact on sailings between Europe and Asia and attracted widespread media coverage. Refloating the Ever Given was vital, and this element of urgency was a key factor in the case.

Luster, owners of the Ever Given, sought assistance from SMIT, a maritime salvage company. Emails were exchanged between the parties, with a consensus on remuneration terms for SMIT's services reached. Luster argued that at this point a contract was concluded, with other contractual terms to be agreed at a later stage (noting that they never were). SMIT maintained that a binding contract did not exist.

At first instance, the High Court found that the exchange of emails between the parties had resulted in an agreement on remuneration, but that a binding contract between the parties had not been constituted.

On appeal, Lord Justice Males, who gave the lead judgment, emphasised that the burden was on Luster to demonstrate that the parties' exchanges evidenced unequivocally an intention to be bound – and it was considered that they fell considerably short of doing so. Rather, the exchanges indicated an absence of intention to be legally bound until all outstanding matters were agreed. Although neither party used the universally acknowledged terms of "subject to contract" or "subject details", this was not necessary nor relevant and would not mean that a contract had been concluded. As a result, SMIT were able to make a claim for salvage under both the terms of the International Convention of Salvage 1989 and at common law.

It was accepted by the court that a salvor may occasionally be prepared to proceed on a pre-contract speculative basis, however it was argued that SMIT's ultimatums made clear that it was not prepared to do so here. Once the remuneration terms were agreed, the urgency in the parties' negotiations did not have the same intensity. However, this alone was not enough to override the

fact that the agreement reached on remuneration left basic issues unresolved. Furthermore, the skeletal nature of what was agreed was highly relevant to the question of whether the parties intended for there to be a binding contract.

Southeaster Maritime v Trafigura Maritime Logistics[2]

In this case, Southeaster, the owners of a vessel, the Aquafreedom, were negotiating a four-year charterparty with Trafigura. Each party was represented by a broker (albeit from the same broking company) and the negotiations took place by way of email, WhatsApp messages and by telephone over a period of 12 days. Offers and counteroffers were made, but the parties disagreed on whether a binding charterparty was concluded.

Southeaster applied for summary judgment contending that there was no binding charterparty. The court found that Trafigura had no realistic prospect of showing that a binding charterparty was concluded between the parties and, as a result, Southeaster's application succeeded.

In reaching its conclusion, it was necessary for the court to consider that, in the context of charterparty negotiations, the making of an agreement on "subjects" will indicate that there is a pre-condition which remains outstanding and that a binding contract will only come into existence when the "subject" is lifted. This is not a condition subsequent but a condition precedent, the presence of which is enough to prevent a contract from coming into existence. "Subjects" have the same legal standing as when a contract is marked "subject to contract".

The court also looked at whether the WhatsApp messages, particularly between the brokers, should be disregarded or given less weight than email communications. Some of the WhatsApp messages between the brokers, who knew each other, were informal (and for example included a Thumbs Up emoji), but it was also used to convey relevant contractual information. As there was nothing suggesting that Southeaster's position could not be conveyed by WhatsApp or that WhatsApp was an unofficial channel of communication, the court found that there was no reason to disregard these messages. Instead, the court considered that the messages were generally businesslike and contained information that previously might have been conveyed during telephone discussions, which came with the advantage that there is an exact record of what was said.

Comment

These cases illustrate two situations where the court found there was no binding contract between the parties and, as a result, a party was unable to rely on the terms that it thought had been agreed.

There are ways that a party can seek to avoid such a situation:

1. Where the parties have reached agreement on all the material terms of a contract, this should be recorded, ideally in a written document signed by all the parties.
2. Use of headings in correspondence or draft agreements can help to show whether there is an intention to be bound by any agreement recorded in writing. However, failure to use terminology such as "subject to contract" or "subject details" does not mean that there was an intention to be bound by an agreement alleged to be recorded in correspondence.
3. An agreement to enter into a more comprehensive agreement does not evidence an intention not to be bound. However, careful consideration should be given when including an obligation to negotiate any further terms, as such provisions are normally unenforceable on the basis that they amount to an agreement to agree.

4. Where the terms have been agreed, but certain actions or documents are still required, the parties should set these out and refer to them as conditions precedent.
5. Work under the contract should only be performed after the conclusion of a binding contract. While in *SMIT*, the salvors were able to make a claim for salvage, this is not commonly available and a party risks not being paid if it proceeds with the work before the contract has been concluded.
6. Ensure that everyone involved in the negotiations is aware of the status of a contract, particularly where a party has different teams working on the matter.

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[1] *SMIT Salvage BV & Ors v Luster Maritime SA & Anor* [2024] EWCA Civ 260

[2] *Southeaster Maritime Ltd v Trafigura Maritime Logistics Pte Ltd mv* "Aquafreedom" [2024] EWHC 255 (Comm)