Is There a Contract?

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As a party to contractual negotiations, it is important to ensure that the parties have entered into a binding contract. Failure to do so, can result in the parties not being bound by the terms that have been negotiated and may mean that a party is not entitled to be paid if they have gone on to perform the contract. In certain instances, parties may enter into a signed agreement, such as "heads of terms", to record a preliminary agreement, with the intention to enter into a detailed contract in due course, but such a document may not address all the relevant terms adequately.

These are issues that the English courts have considered this year in three different cases and are reviewed in this alert. From these cases we have identified some helpful practical tips that negotiating parties could use during their contract negotiations.

Smit Salvage BV & Others v Luster Maritime SA & Another[1]

The grounding of the Ever Given (the "**Vessel**") in the Suez Canal in March 2021 impacted many vessels sailing between Asia and Europe and attracted significant media attention. It was essential to refloat the Vessel as soon as possible and this urgency is likely to have been one of the reasons that gave rise to this case.

The defendants, co-owners of the Vessel, (the "**Owners**"), sought assistance from the claimant, SMIT. The parties exchanged emails and reached a consensus as to the remuneration for SMIT's services. While the parties continued to negotiate the terms of the draft contract, by the time the Vessel was refloated, the parties had not reached agreement and no written contract was ever signed. SMIT made a claim for salvage under the terms of the International Convention of Salvage 1989 (the "**Convention**") and/or at common law. The Owners rejected this, saying that the parties had concluded a contract upon agreement of the remuneration terms, and therefore it was not open to SMIT to claim salvage. The High Court found that the exchange of emails between the parties had resulted in an agreement on remuneration, but not a binding contract between the parties. As a result, SMIT was entitled to make a potentially more valuable claim under the Convention or at common law; although this was not confirmed in the judgment.

Fenchurch Advisory Partners LLP v AA Ltd[2]

The English court also determined that an agreement regarding fees, again recorded in an email exchange, did not constitute a binding contract for the provision of consultancy services to the AA. The claimant, Fenchurch, was assisting the defendant, the AA, on the potential sale of its insurance division. An engagement letter had been extensively negotiated between the parties but did not include the agreed fees, while other terms remained subject to negotiation, and the letter had not been signed. Despite this, Fenchurch assisted the AA in projects in the expectation that the AA would become a client. As Fenchurch was not paid, it commenced proceedings against the AA.

Fenchurch's case was that the email correspondence constituted a binding agreement, entitling them to payment of the agreed fee. In contrast, the AA argued that the parties intended to enter a

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binding contract only when the engagement letter was signed. The Court acknowledged that the parties had intended to enter into a binding contract and had reached an agreement as to fees. However, the exchange of emails signified that there would not be a legal relationship between the parties until the engagement letter was finalized. Fenchurch did however succeed with its restitutionary claim for the services that it had performed.

Pretoria Energy Company (Chittering) Ltd v Blankney Estates Ltd[3]

In this case, the parties had signed "Heads of Terms", but not concluded any subsequent agreement. The appellant, Pretoria, operated anaerobic digestion plants, and wanted to build and operate such a plant on the site owned by the respondent, Blankney. The "Heads of Terms" recognised the site, stated a lease term of 25 years, which was to be outside the Landlord and Tenant Act 1954 (the "**1954 Act**"), and determined a lease value of £150,000 per annum.

The parties disagreed about whether the terms concerning the grant of a lease in the Heads of Terms were sufficient to constitute a binding contract. Pretoria asserted that the document imposed a contractual obligation on Blankney to grant a 25-year lease of the site, which Blankney had failed to do, resulting in Pretoria seeking damages for loss of profit of £56m and £416,000 in reliance losses.

The Court of Appeal upheld the decision of the trial judge who had found that the parties had not entered into a binding agreement for a lease. The parties had expressly stated that a formal contract would be drawn up, which in the case of a lease would need to address numerous provisions which were not present in the Heads of Terms, and they had not dealt with the necessary formalities required when granting a lease outside the 1954 Act. The parties had also agreed a period of exclusivity for negotiations. As a result, the Heads of Terms did not amount to a binding contract for a lease.

Practical considerations

These cases demonstrate that until parties have signed a formal agreement recording the full terms of the contract, it may be difficult to rely on any agreement that the parties may have reached. It is therefore important that if the parties wish to be bound, that they make it clear that the negotiations have reached the point where a binding contract exists. This can be achieved in various ways and we set out some suggestions here:

1. Where the parties have reached agreement on all the material terms of a contract, this should be recorded, ideally in a contract signed by all the parties, although there is no rule of English law that requires that a contract must be in writing and signed in order for it to be legally binding.
2. Use of headings in correspondence or draft agreements can help to show whether it is the intention of the parties to be bound by any agreement recorded in the correspondence.However, there is no rule of English law that the failure to use "*subject to contract*" or "*subject to details*" language means that there was an intention to be bound by an agreement recorded in correspondence.In both *Smit* and *Pretoria*, the parties did not use such language but were found to have not entered into an agreement.
3. Ensure that work is only performed after the conclusion of a binding contract, not just payment terms.
4. Ensure that everyone involved in the negotiations is aware of the status of a contract, particularly where there are different teams within one company.In *Fenchurch*, there was a

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commercial team and a legal team involved in negotiating the contract and this gave rise to uncertainty as to the status of the contract.
5. Where a contract is subject to specific formalities, such as a lease, ensure that these are properly addressed.
6. There is no rule of English law that provides that an agreement to enter into a more comprehensive agreement evidences an intention not to be bound.However careful consideration should be given when including an obligation to negotiate any further terms, as these are normally found to be unenforceable by the courts.

Postscript: *Permission to appeal was granted on paper in respect of the Admiralty Court's decision from June 2023 and a hearing before the Court of Appeal is scheduled to take place in February 2024.*

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[1] [2023] EWHC 697 (Admlty)

[2] [2023] EWHC 108 (Comm)

[3] [2023] EWCA Civ 482