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Subject to contract

A simple phrase is crucial to avoid being unintentionally bound by an agreement in settlement negotiations, explains **Sophia Purkis**

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Settlement negotiations may often be challenging and conducted under pressure. In *Bieber v Teathers (in liquidation)* [2014] EWHC 4205, the court issued a stark reminder to make sure that offers are made expressly 'subject to contract' to avoid the risk of being unintentionally bound by an agreement. The court held in *Bieber* that a binding settlement of the claims had been reached by an exchange of emails between the parties' solicitors shortly before trial, notwithstanding that they were subsequently unable to agree a formal settlement agreement.

Email exchange

The claims involved a large number of investors in a series of film and television production partnerships, designed to be tax efficient, which had been formed by the defendant. The claimants' claims were said to be in the region of £20m. The defendant was in insolvent liquidation and had insurance cover of about £10m.

The parties had tried to resolve the litigation. Shortly before trial, the claimants' solicitor emailed the defendant's solicitor a proposed settlement figure, stating: 'If the offer is in principle acceptable we will produce a Tomlin Order, which will record and break down the amounts payable to each claimant.'

The offer was declined, and a counter-offer made. The claimants declined this and proposed alternative terms, including that the sum proposed should be paid within 28 days and would be in full and final settlement of the claims, counterclaims, and costs. Following telephone discussions between the parties' solicitors, the defendant's solicitor proposed an alternative figure as a 'take it or leave it offer' and, in a subsequent email, referred to their incurring the next tranche of brief fees the next working day. Further emails were exchanged, and, on Sunday night, the claimants' solicitors accepted the defendant's settlement figure, saying they would send a draft consent order in the morning.

On Monday the claimants' solicitor sent the defendant's solicitor a draft consent order for signature. The defendant responded by sending the claimants a draft long-form agreement containing various terms, including an indemnity in respect of contribution claims. Despite negotiations continuing for a further two weeks, the indemnity proved a stumbling block. The claimants sought a declaration that the parties had reached a binding settlement of the proceedings by the email exchange in which the claimants agreed to accept a payment of the proposed settlement sum by the defendant.

In a detailed judgment, the court considered the principles applicable when deciding if a binding agreement has been reached. These include:

- Whether the parties had concluded an agreement should be determined objectively by considering the whole course of the parties' negotiations. Once the parties have, to all outward appearances agreed terms, a contract will have formed, even if it is understood that a formal agreement will be entered later;
- Generally, the subjective state of a party's mind and his subjective reservations are irrelevant, and evidence of their existence inadmissible, if they were not communicated contemporaneously to the other party;
- The only requirement is that the parties, having contractual intent, should have agreed all the terms necessary for there to be a binding agreement;
- If the parties wish to ensure that a contract otherwise capable of being made orally is only made in a formal document, they may ensure it is so by expressly stipulating that negotiations are undertaken 'subject to contract';
- Parties do not have to state expressly that negotiations are 'subject to contract' if they mutually understand that to be the position. However, whether there was such a mutual understanding is a question of fact in each case; and,
- Even if the parties initially agree to negotiate 'subject to contract', it is open to them subsequently to agree, expressly or impliedly, to remove the qualification or waive that stipulation.

Binding settlement

On these principles, the court held that a binding settlement had been reached. It dismissed the defendant's submissions that the parties had intended a two-stage process, first agreeing a figure and then negotiating other terms before reaching a binding agreement. In so doing, the judge said that the words 'in principle' were insufficient to acknowledge the proposed two-stage process: there had been no mention of what other terms were to be agreed, and the terms of the email exchange were contrary to the idea that the negotiations were 'subject to contract'. Further, the fact that parties were willing to discuss the terms of a formal settlement agreement did not necessarily mean they had not already entered into a binding agreement to settle their claims.

The expression 'subject to contract' is commonly used in commercial contract negotiations. To avoid uncertainty, and the risk of being bound unintentionally by a settlement, litigators should remember to state expressly that negotiations are being conducted 'subject to contract'. SJ

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