

DON'T FORGET TO COMPLETE THE CONTRACT ...

- ▶ Two recent cases have highlighted that the courts are willing to find that a binding contract exists even when its terms have not been finalised (or formalised) in writing.
- ▶ In *Wells v Devani* [2019] UKSC 4, the Supreme Court attached significant importance to the parties' actions (within the factual context) in finding the existence of a binding contract.
- ▶ The Technology and Construction Court adopted a similar approach in *Anchor 2020 Ltd v Midas Construction Ltd* [2019] EWHC 435 concluding that, notwithstanding an unsigned contract, there was a clear intention to create legal relations and thus a binding contract.

What's it about?

The courts have given two separate but timely reminders of their willingness to find that a binding contract exists, even where terms have not been finalised (or formalised) in writing, but where it is apparent this is what the parties bargained for.

Wells v Devani centred around whether commission should be payable to an estate agent where an oral contract (but no written contract) existed – and whether failure to comply with the Estate Agents Act 1979 meant that the estate agent should be deprived of his commission.

The Supreme Court held that based on the facts of the case and the actions and conduct of the parties, a legally binding contract did exist. It was further held that the failure to comply with statute should not deprive the estate agent of his whole commission.

In *Anchor 2020 Ltd v Midas Construction Ltd*, the failure of the employer to sign a building contract (it had just been signed by Midas) was not fatal to the existence of the contract – with the court finding that a binding contract existed in the form of the partially signed contract.

In coming to its decision, the court applied the approach from *RTS v Molkerei* – in that in determining whether there is a binding contract the court must consider objectively whether the parties intended to create legal relations and had agreed all of the essential terms for legal relations to arise.

Why does it matter?

The courts have shown a clear preference to find that a binding contract does exist (in the absence of finalised terms) where conduct and actions indicate that this is the case.

Put simply, there is a risk that a binding contract may have been created without the parties realising or without the "formalisation" of its terms.

There are certain things to look out for. Parties to a contract (whether physically in existence or not) should be aware that:

- ▶ context and conduct are important in determining whether a binding contract exists. For example:
 - ▶ where parties intend to be bound and have acted on their agreement then the courts are reluctant to find that any such agreement is too uncertain to be enforced;
 - ▶ if on the facts it would be naturally understood that something would happen, the implication is that it will happen (and that this forms part of the binding contract);
- ▶ the courts are willing to imply terms into a contract to render it sufficiently certain or complete to constitute a binding contract (where without implication of such terms it would otherwise be incomplete and enforceable);

- ▶ an unsigned written agreement which is intended to be signed by both parties can form the contract between the parties, despite the lack of execution;
- ▶ even the words "subject to contract" do not necessarily prevent a contract from being found to exist, where the parties' actions are otherwise consistent with the operation of its terms.

Now what?

The benefit of being certain as to the terms you have contracted on cannot be understated.

Contracting best practice has to be (and has always been) to ensure that your contract conditions are agreed and signed in a timely fashion, and before any significant work is carried out or services undertaken.

There are times when commercial or programme pressure mean that "kicking the can down the road" on the contract negotiation / finalisation is very appealing. This should be resisted wherever possible.

In (exceptional) circumstances where the agreement of contractual terms have fallen behind the progress of the works or services, the parties need to ensure that (i) their actions and conduct are consistent with the commercial deal they have struck and (ii) they do not commit to do something (or not do something) which they wouldn't want to form part of a binding contract. And of course, in these circumstances don't forget to complete the contract...

Who to Contact

JOE WILKINSON

Partner

+44(0) 113 209 2332

+44(0) 7775 586366



MARK BROOMFIELD

Legal Director

+44(0) 113 209 7635

+44 (0)7738 602886



10-31247305-1

addleshawgoddard.com

Aberdeen, Doha, Dubai, Edinburgh, Glasgow, Hamburg, Hong Kong,
Leeds, London, Manchester, Muscat, Singapore and Tokyo*

*a formal alliance with Hashidate Law Office