More than words—can a formal contract be construed from email exchanges?

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Commercial analysis: In JAS Financial Products LLP v Icap plc and another company, the court denied that a contract had been inferred from a proposal sent by email setting out the services to be provided and the price. David Bowden, freelance independent consultant comments on the decisions and talks to Russell Kelsall, partner at TLT LLP, about what lessons can be learned.

Original news

Jas Financial Products LLP v Icap plc and another company [2016] EWHC 591 (Comm), [2016] All ER (D) 163 (Mar)

The Commercial Court dismissed the claimant's claim regarding an alleged agreement between the parties by which the claimant was to provide services to the defendant. On the evidence, no legally binding contract had been made between the parties, either orally or in writing.

What issues did this case raise? Why is it significant?

David Bowden (DB): Icap wanted to have additional support for its middle office which had incurred significant losses. JAS Financial Products (JAS) provided specialist services to the financial services industry. ICAP and JAS held a meeting on Tuesday 13 May 2008—initially at Icap's office which then continued at a Corney & Barrow wine bar.

Prior to this meeting Mr Bray of JAS had sent a costed proposal for these support services to Mr Smith at Icap in an email dated 3 March 2008. The proposal was that JAS provide middle office services in tax, legal, accounting & operations risk for a fee of £50,000 a month for an initial two-year period.

This email was discussed point by point at the 13 May 2008 meeting but no changes were made (other than the two-year term would expire). The two representatives of both companies at that meeting shook hands on the deal. JAS started to provide services. Icap paid JAS's June 2008 invoice and also its July 2008 invoice (which Icap claimed was paid in error). Mr Bray said after the 13 May meeting that the two companies were 'done'. Mr Shah of JAS agreed to produce a note of the 13 May meeting but did not do so. Mr Shah did send an email on 16 May 2008 to Mr Smith of Icap which re-iterated the terms of the March 2008 proposal email.

The general counsel of Icap had neither been involved in nor drafted a contract. Icap said there was no contract concluded between Icap and JAS at the 13 May meeting and refused to pay JAS. The judge had to decide what had in fact been accomplished at the 13 May meeting.

Russell Kelsall (RK): This is not an unusual set of facts—many meetings are often undertaken following receipt of a proposal where the proposal is discussed at length. The parties may shake hands and consider a deal has been 'done' and maybe even say so. But that is not always enough to create a binding contract between the parties—as the court considered in this case.

What did the court decide?

DB: The judge decided that the outcome of the 13 May meeting was that JAS and Icap had agreed heads of terms. The face to face meeting where the proposal was discussed and where both sides shook on the deal did not give rise to a binding contract. Both companies had two representatives at the 13 May meeting. While the judge had witness statements from all four of them, in a slightly unusual move, the judge insisted that all four witnesses give all their evidence orally including their evidence in chief.

Of the four witnesses, the judge found neither the recollection of Mr Miell of Icap nor of Mr Shah of JAS on the 13 May meeting to be 'reliable'. The evidence of Mr Smith of Icap was found to be 'more reliable' but 'his memory was affected by the severe lapse of time'. The judge found that Mr Smith would not have allowed the word 'done' to go unchallenged. Mr Smith's evidence was that this transaction would next need to go to Icap's general counsel.

How helpful is the judgment in clarifying the law in this area? Are there any grey areas remaining?

DB: Although this was a four-day trial the eight-page reserved judgment references only two authorities with each of these being from the Supreme Court or House of Lords.

In the first, *Carmichael v National Power Plc* [1999] UKHL 47, [1999] 4 All ER 897, Lord Hoffmann stated that '[t]he terms of the contract must be objectively construed', paraphrasing the Court of Appeal decision by Ward LJ (*Carmichael v National Power Plc* [1998] ICR 1167 at para [1185]) that '[w]hat they thought they had achieved is of no consequence'. Likewise, Chadwick LJ (at para [1194]) said '[t]he question was not what the parties thought their obligations were […]'.

Lord Hoffman added that:

'This austere rule would be orthodox doctrine in a case in which the terms of the contract had been reduced to writing. But I do not think that it applies to a case like the present.'

'In the case of a contract which is based partly upon oral exchanges and conduct, a party may have a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief.'

He elaborated on this further to state that:

'The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done. But when both parties are agreed about what they understood their mutual obligations (or lack of them) to be, it is a strong thing to exclude their evidence from consideration. Evidence of subsequent conduct, which would be inadmissible to construe a purely written contract (see *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796, [1970] AC 583) may be relevant on similar grounds, namely that it shows what the parties thought they had agreed. It may of course also be admissible for the same purposes as it would be if the contract had been in writing, namely to support an argument that the terms have been varied or enlarged or to found an estoppel.'

In the second, *RTS Flexible Systems Limited v Molkerei Alois Müller Gmbh & Company KG (UK Production)* [2010] UKSC 14, [2010] All ER (D) 95 (Mar), Lord Clarke ruled at para [45]:

'The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.'

Whether the judge applied either the *Carmichael* or *Müller* tests he came to the same result that no binding contract had been formed. The subjective state of mind of a party (or potential party) to a contract is irrelevant. Only one thing is relevant which is whether viewed objectively it has been communicated clearly that a legally binding agreement has been concluded. The areas that courts, judges and arbitrators will continue to have to resolve is exactly what has been communicated and agreed—where there is any doubt then it is unlikely that a binding contract has been formed.

What does all this mean for lawyers and their clients? What should they do next?

DB: Three things stand out from this case and they are each routine or mundane things that lawyers will encounter regularly. The first is that no note was made of what was said or agreed at the critical meeting. The prudent course would have been to have written something up shortly after the return to the office and to then circulate and agree.

The second points towards a certain business naïvety by the supplier. It cannot have plausibly thought that a discussion of a proposal in a wine bar followed by handshake would be all that it would take to get a contract. It must have been expecting to see a contract to sign moreover the case in a business professing expertise in financial services where it was

providing legal risk management. While it submitted invoices and got two of these paid, this is not a satisfactory way to build up a business portfolio.

The third relates to the lapse of time. By the time the case came to trial the judge was trying to piece together what had happened nearly eight years ago. Inevitably, memories will have faded and the focus in such a case inevitably shifts to contemporaneous documents. However, here there were few documents that assisted and those that were produced were capable of being interpreted by either party to assist their case.

RK: There can be no doubt that the decision is a sensible one. Many meetings take place where heads of terms are effectively agreed. These then form the basis of a written contract. To come to any other conclusion would have been unduly burdensome it would have led to parties having to say—at the start of each meeting—that the discussions taking place are strictly subject to contract and no binding contract will be reached until a separate written document is signed by both of them.

However, it is more important than ever that everyone has the same understanding of the status of meetings. It would have been sensible for an agenda to have been circulated making it clear that the parties would discuss the proposed terms with the aim of coming to some heads of terms. This would have avoided any uncertainty over the status of the agreement reached in the bar.

How does this fit in with other developments in this area? Do you have any predictions for future developments?

RK: There is no doubt that the law needs to be flexible enough to recognise contracts, but firm when contracts have not been formed. It is therefore difficult to see the law developing any clear, hard and fast rules which apply to all situations. For example, the High Court recently decided in *Bieber v Teathers Limited (in liquidation)* [2014] EWHC 4205 (Ch), [2014] All ER (D) 168 (Dec) that email correspondence did create a binding contract, even when it was not the intention of both parties to do so. In that case, the parties exchanged emails over a settlement of a dispute. There was no express or implied reference to the discussions being subject to the contract (which was seen as fairly fatal).

Given the flexibility of the common law, businesses should therefore proceed with caution when discussing prospective deals. It should always be made clear that any negotiations are expressly subject to contract. If this is not clear, there will always be a risk the parties have entered into binding settlement terms before they intended to do so.

Interviewed by David Bowden.

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