# "*Subject to contract*" in English Law

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This article consider the label "*subject to contract*" in English law and two recent English court decisions which consider the effect of this label in different factual circumstances.

## "*Subject to contract*" in English Law

Parties who are negotiating a contract may use the label "*subject to contract*" to ensure that they do not enter into a binding agreement before they are ready to do so. This can be particularly important in English law when a binding agreement can be reached (with a few exceptions) without any particular formalities. However, the label is not unassailable and whether it has the required effect will always depend on the circumstances. The English Court of Appeal has explained the meaning of "*subject to contract*" as follows:

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> "What it means is that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) that each party reserves the right to withdraw until such time as a binding contract is made."[1]

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> "Whether in such a case the parties agree to enter into a binding contract waiving reliance on the subject to [written] contract term or understanding will again depend on all the circumstances of the case, although the case show that the court will not lightly hold."[2]

In construction contracts, issues may arise where a contract is being negotiated " subject to contact" but work begins before a formal contract is executed. On this, the English Supreme Court has stated:

> "… in a case where a contract is being negotiated *subject to contract* and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract on the

[1] *Generator Developments Ltd v Lidl UK GmbH* [2018] EWCA Civ 396 [79].

[2] *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14 [56].

> terms that were agreed *subject to contract*. That would be too simplistic and dogmatic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances."[3]

The circumstances were examined in the two cases considered below. As will be seen, in both cases the "*subject to contract*" protection was ultimately upheld.

## Joanne Properties Ltd v Moneything Capital Ltd [202] EWCA Civ 1541

The Court of Appeal had to decide whether the parties had entered into a binding settlement agreement in written communications passing between their respective solicitors.

The communications reflected negotiations regarding the allocation of proceeds from the sale of land. They were variously headed "*subject to contract*", "*without prejudice and subject to contract"* and *"without prejudice save as to costs"*.

Eventually, Moneything sent to Joanne a written document headed "*subject to contract*" setting out terms for the allocation of these proceeds. Some of these terms had not been previously discussed. Joanne did not reply. Moneything applied to the court for an order in those terms. Joanne replied that there had been no binding settlement because the negotiations had been "*subject to contract*".

The judge at first instance decided that there had been a binding settlement despite the words "*subject to contract*". One reason for this was the judge's view that, although there remained certain administrative matters to be agreed, they were not material for the purposes of the settlement.

The Court of Appeal did not agree. It found that there was no binding settlement. It noted in particular that "*parties could get rid of the qualification of "subject to contract" only if they both expressly agreed that it should be expunged or if such an agreement was necessarily to be implied"*.[4]

The Court of Appeal found that there was no express agreement that the "*subject to contract*" qualification should be expunged and no reason why such an agreement should be implied. It found that the label "*subject to contract*" had been used at various stages in the discussions by the parties" solicitors who must have known the meaning of these words.

The Court of Appeal also considered that the judge at first instance had undervalued the force of the "*subject to contract*" label; the judge had focused on whether the agreed terms were sufficiently complete to amount to an enforceable contract but this was the wrong question. The correct question was whether the parties intended to enter into a legally binding arrangement at all.

The Court of Appeal concluded "*As the cases show, where negotiations are carried out* "*subject to contract*", *the mere fact that the parties are of one mind is not enough. There must be a formal contract, or a clear factual basis for inferring that the parties must have intended to expunge the qualification. In this case there was neither.*"[5]

## Aqua Leisure International Limited v Benchmark Leisure Limited [2020] EWHC 3511 (TCC)

The English High Court had to decide (among other things) whether the parties had agreed to enter into a binding settlement agreement without the need for all terms to be reduced to writing.[6]

A dispute had arisen between the parties in respect of the construction of a waterpark and this dispute was the subject of an adjudicator's award. The sums awarded did not however represent the full amount due to Aqua and so the parties met to discuss settlement of the entirety of their dealings. The settlement discussed would essentially comprise Benchmark making a series of payments to Aqua, the

[3] *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14 [47].

[4] Quoting from the Court of Appeal decision in Sherbrooke v Dipple (1981) 41 P & CR which itself quoted from *Tevenan v Norman Brett (Builders) Ltd* (1972) 223 EG 1945.

[5] Paragraph 34 of the judgment.

[6] This was an application by Benchmark for summary judgment in relation to Aqua's application to enforce the decision of the adjudicator. As well as the "*subject to contract*" point addressed in the present article, this case also raised interesting points about objections to the jurisdiction of adjudicators and waiver



parent company of Benchmark providing a guarantee to Aqua, and Aqua carrying out some warranty work.

After those discussions, Aqua sent Benchmark an email recording a "*payment resolution*" which was expressed to be "*without prejudice and subject to contract*". The email ended with the words "*please confirm your agreement to this settlement by return*". Benchmark replied with the single word "*agreed*" and Aqua replied "*meantime we will contact our lawyer to draft the settlement and guarantee wording … which [we] will forward to you as the binding agreement once signed by all the parties*".

Following this, Benchmark paid Aqua certain sums. Some of these payments were made on dates which complied with the "*payment resolution*" and other payments were made but not on compliant dates. Benchmark did not pay all of the sums set out in the "*payment resolution"*. Aqua started warranty work.

After some, but before all, of these payments had been made, Aqua sent Benchmark a "*deed of settlement and payment guarantee*" for Benchmark's "*review and completion*". In the deed of settlement, Aqua gave Benchmark credit for payments already made.

In the following five months, Aqua chased Benchmark for payment six times. Eventually, Benchmark replied to say that it would not provide a guarantee from its parent company. Benchmark had by that time not paid all of the adjudicator's decision or all of the sums set out in the "*payment resolution*".

The question the court had to decide was "*whether there is a reasonable prospect of establishing at trial that the parties agreed to enter into a binding contract (a new contract) without the need for all terms to be reduced to writing*."[7]

Aqua argued that the compromise agreement was expressly made in the context that it would not become binding until it was reduced to writing ("*subject to contract*"). As it was not reduced to writing, it was never binding.

Benchmark argued that the "*subject to contract*" proviso was waived because both parties "*obviously considered*" themselves bound by the "*payment resolution*" and conducted themselves in reliance on that common understanding and their conduct indicated a waiver of the "*subject to contract*" condition so that a new contract was entered into.

The judge found nothing that allowed him to conclude that a new contract had been made. He found that this was "*a paradigm example of why the court "will not lightly hold" that a condition that negotiations and agreements are "subject to contract" has been superseded"*; that the parties had agreed that there would be no binding contract until the terms were reduced to writing and signed off; the presence of an agreement that was acted on was not without more enough to indicate that the parties intended to be bound; and fundamentally "*everything that happened during the course of the parties" dealings with one another [including payments being made and work being performed] happened at a time when the ground rules applied [i.e., that the agreement was "subject to contract*"]."[8]

Accordingly, there was no agreement which barred the right to enforcement of the adjudicator's award.

## Conclusion

In English law, a contract can be made orally or in writing and with no formalities. If parties wish to avoid this, they should label correspondence and draft documents "*subject to contract*". This gives a good indication that they do not intend to create legal relations but it is not unassailable. Whether parties intend to be bound will depend on the facts and parties should accordingly take care that (unless this is what they want) their conduct does not amount to a waiver of the "*subject to contract*" label. A waiver may be express or implied through conduct. This can be a particularly difficult issue on building contracts where parties may start work before the formal contract is signed. The preferred solution should always be to agree first and start work later. In other jurisdictions, the protection that can be offered by the labels "*subject to contract*" (and also "*without prejudice*") cannot be taken for granted. Great care and local legal advice are always necessary when parties are considering relying on these labels.

**Please get in touch at joanne.clarke@howardkennedy.com with your thoughts or to discuss any concern**

[7] Paragraph 23 of the judgment.

[8] Paragraph 25 of the judgment.