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Court of Appeal confirms relevance of communications subsequent to an alleged contract

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Overview

Contract negotiations necessarily involve much toing and froing between the parties, but at what point does the contract become final? When can you stop taking further exchanges into account and what is the effect of "subject to contract" wording? In *Global Asset Capital, Inc v Aabar*[1], the Court of Appeal held that the judge at first instance had erred in finding it was arguable that a contract had been concluded during a telephone call subsequent to an offer letter stated to be "subject to contract". In so doing, the Court reaffirmed the principle in *Hussey v Horne-Payne*[2] that, when deciding whether a contract has been formed during negotiations, the Court will consider the whole course of those negotiations to avoid a misleading impression that the parties had reached agreement, when in fact they had not.

The negotiations

On 23 April 2015, the respondents ("**Global**") sent to the appellants ("**Aabar**") an offer letter marked "*WITHOUT PREJUDICE – SUBJECT TO CONTRACT*" containing an offer to buy a package of Aabar's rights and other debt interests (the "**Aabar rights**"). Global alleged that, during a subsequent telephone call on 6 May 2015, Aabar had agreed to sell the Aabar rights to Global, subject to two conditions (the "**Alleged Contract**"). The conditions were that (i) Global re-send the 23 April 2015 offer letter to Aabar in "*open and binding form*" and (ii) Aabar receive "*satisfactory evidence of [Global's] ability to fund the transaction*".

On 9 May 2015, Global emailed Aabar attaching two letters. The first letter contained the key commercial terms of the 23 April 2015 offer letter but also included various supplemental and different terms (the "**9 May Offer**"). Notably, Global's email asked Aabar to confirm its acceptance of the 9 May Offer. The second letter purported to evidence Global's ability to fund the transaction. On 10 May 2015, Aabar responded by stating that the 9 May Offer had not been accepted and that there were no ongoing negotiations between the parties.

Claim and appeal

Global commenced proceedings seeking (i) a declaration that the Alleged Contract was valid; (ii) enforcement of the Alleged Contract; and (iii) specific performance. Shortly afterwards, Aabar applied unsuccessfully for summary judgment and/or strike out of Global's claims. In dismissing Aabar's applications,[3] the judge held that the parties' communications immediately following the telephone call on 6 May 2015 should not be taken into account in considering whether the Alleged Contract had been made on 6 May 2015.

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1 *Global Asset Capital, Inc & Anor v Aabar Block S.A.R.L. & Ors* [2017] EWCA Civ 37.

2 *Hussey v Horne-Payne* (1878) 4 App Cas 311.

3 [2016] EWHC 298 (Comm).

Aabar appealed, contending that the first instance judge had been wrong to conclude (i) that he should not take account of the parties' communications immediately following the 6 May 2015 telephone call; and (ii) that Global had real prospects of establishing its case that the Alleged Contract was concluded on 6 May 2015.

1 – Should communications subsequent to the 6 May 2015 telephone call be taken into account?

Finding in Aabar's favour, the Court of Appeal held that the first instance judge had misapplied two principles when considering this issue:

- First, the general principle that one cannot "*interpret the meaning of words used in a contract by reference to what happened later*". While this principle is correct in the context of interpreting a contract, it is not relevant to the question of whether a contract has been formed.
- Second, the principle in *Perry v Suffields Ltd*[4] that "*once it is shown that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at*". The Court of Appeal confirmed that this principle applies only once it has been established that a contract has been concluded. Again, it does not apply to the prior question of whether a contract has been formed.

In finding for Aabar on this issue, the Court of Appeal reaffirmed the well-established principle in *Hussey v Horne-Payne* that, when deciding whether a contract has been made during negotiations, the Court will consider the whole course of those negotiations to avoid a misleading impression that a contract has been formed when in fact it has not. In so doing, the Court of Appeal rejected Global's contention that the principle in *Hussey* did not apply to oral contracts.

2 – Was the Alleged Contract formed on 6 May 2015?

In seeking to establish that the Alleged Contract had been formed, a key difficulty for Global was the fact that its 23 April 2015 offer letter to Aabar was stated to be "*SUBJECT TO CONTRACT*". It is well established that dealing on a "subject to contract" basis negates contractual intention[5] unless the parties have agreed unequivocally to waive the "subject to contract" status of their dealings.[6] The Court of Appeal found no evidence of unequivocal waiver by the parties, and thus concluded that the 23 April 2015 offer was not capable of an acceptance that would result in the formation of a contract. Further, in light of the first issue having been decided in Aabar's favour, having regard to communications subsequent to 6 May 2015 made it even clearer that the Alleged Contract had not been concluded. In particular, the 9 May 2015 email from Global to Aabar asking Aabar to confirm its acceptance of the 9 May Offer was plainly inconsistent with the Alleged Contract having been concluded on 6 May 2015.

Practical considerations

Negotiating parties should be mindful that a contract can be concluded in writing, orally, or by conduct. When negotiating with counterparties, communications should be expressed to be "subject to contract" to ensure a contract is not prematurely concluded. That said, including "subject to contract" language is not necessarily conclusive: rather, such language is a strong indication that terms are not intended to be binding. The Court may find that parties have agreed to waive the "subject to contract" status of their dealings, though the present case illustrates that the Court will generally be slow to do so.

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4 [1916] 2 Ch. 187.

5 *See*, for example, *London & Regional Investments Limited v TBI Plc & Anr* [2002] EWCA Civ 355.

6 *RTS Flexible Systems Ltd v Molkerei Alois Müller Gmbh & Co KG (UK Production)* [2010] UKSC 14.