The uncertain boundary between negotiations and agreement

John Dickinson, St John's Chambers – March 2015

1. The problem with oral Agreements:
   (1) Is there an agreement? The negotiations may not have reached the stage of concluding an agreement at all; as not all the terms have been agreed.
   (2) If there is an agreement there may an issue over what terms were agreed.

2. An oral agreement may specify that the terms are to be reduced to writing. In such a case where the parties have reached an agreement on all terms, it may be (1) an immediate binding oral agreement even if the parties intend that it will later be recorded in writing, or (2) it may be an agreement 'subject to contract', either because further terms are to be agreed or because the parties contemplate it will not be legally binding until a formal written contract has been duly executed[1].

3. When negotiations include a stipulation that an agreement is to be embodied in a formal written document, the effect of this stipulation depends on its purpose:
   (1) Either: The agreement is an oral binding agreement, with the written document intended to be a formal record of its terms[2];
   (2) Or: The agreement is regarded by the parties as being incomplete and not intended to be legally binding until the terms of the formal document are agreed and executed.[3]

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[1] Chitty on Contracts 31st Edition paragraph 2-117. *Benourad v Compass Group* [2010] EWHC 1182 (QB) Beatson J at paragraph 106; *RTS Flexible Systems Ltd v Molkerei Alois Muller* [2010] UKSC 14 paragraphs 45, 49. As summarised in *Maria and Gill v Lane Bednash* [2011] EWHC 839 (Ch) Arnold J at paragraph 19.

[2] *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd* [2008] EWHC 1301 (TCC) at paragraphs 55 and 56. An example for a land transaction (pre Section 2 of the Law of Property Miscellaneous Provisions) Act 1989 is *Stoner v Manchester City Council* [1974] 1 WLR 1403. *Raymond Bieber v Teathers Ltd* [2014] EWHC 4205 (Ch) HHJ Pelling QC – a binding settlement arose from an exchange of emails and a conversation between solicitors. The court held that the agreement was not conditional upon the agreement of the wording of a proposed consent order. Further it was held that, once a dispute arose over the terms agreed, a preparedness to negotiate the terms of the settlement agreement did not necessarily lead to the conclusion that the parties had not earlier entered into a binding agreement to settle the dispute.

[3] *Petromec Inc v Petroleo Brasileiro SA Petrobas* [2005] EWCA Civ 891 paragraphs 77 *"...the MOA was not legally binding at the time it was made. It contemplated the execution of a complex series of interlocking contractual agreements to be made in the future ... the MOA could never be more than an agreement to negotiate to bring about the contemplated transaction documents. At this stage, therefore, the MOA was too uncertain or incomplete to constitute a binding legal agreement*"; *Investec Bank (UK) td v Zulman* [2010] EWCA Civ 536 at paragraph 16; a failure to execute a formal document negatived contractual intention even though the words 'subject to contract' had not been used. *Benourad v Compass Group* [2010] EWHC 1182 (QB) at paragraph 106(a) and 110.

4. In relation to possibility (1) the immediate commencement of performance before the anticipated formal document is completed will support an inference or conclusion that the absence of the formal document does not render the agreement unworkable[4].

5. In relation to possibility (2) the pointers[5] towards an agreement not being legally binding until it is signed are:
   (1) Where solicitors are involved on both sides.
   (2) Where formal written agreements are to be produced.
   (3) Where arrangements are made for formal execution of the documents.
   The normal inference from these facts is that the parties are not bound unless and until they sign the formal agreement document[6].

6. In negotiations, whether oral or in correspondence, the use of the words 'subject to contract' make it crystal clear what the purpose of stipulating for a written document is. In a very exceptional case where a contract was expressly stated to be 'subject to contract' the presence of terms for a strict specified timetable for the formal approval of draft documents led the court to construe the words 'subject to contract' to mean that the parties had not yet settled all the details and these words did not prevent there being an intention to be legally bound[7]. Another exceptional case involved a sale of land by tender where following submission of the tender by the purchaser the vendor made a clerical error in adding the words 'subject to contract' on its acceptance document[8].

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4 *Tryggingarfelagion Foroyar P/F CPT Empresas Maritimas SA (The Athena)* [2011] EWHC 589 (Admlty) at paragraph 45.

5 *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2006] EWCA Civ 1303 at paragraph 45; Similar reasoning was fatal to a claim for a constructive trust *Crosso No 4 Unlimited v Jolan Ltd*, [2011] EWCA Civ 1619 paragraph 108.

6 The presence of such factors is not conclusive, see *Rowena Williams v Gregory Jones* (QBD David Blunt QC 25.2.2014 Lawtel 7.3.2014.

7 *Alpenstow Ltd v Regalian Properties* [1985] 1 WLR 721, 730; [1985] 2 All ER 545, 553g '*In my judgment this is a case where there is a very strong and exceptional context which must induce the court not to give the words 'subject to contract' their clear prima facie meaning, and I so hold. The fact that the agreements were professionally drawn is ultimately seen to be in favour of this view. You cannot credit the draftsman with an adherence to the conventional meaning of 'subject to contract' without accusing him of lax and superfluous drafting. I think that he has shown himself to be worth more than that. Why write so much so well to so small effect?'*

8 *Michael Richards Properties Ltd v St Saviour's* [1975] 3 All ER 416, 424. As the tender had set out all the terms the words 'subject to contract' were held to be meaningless and were expunged. Goff J stated *'I hope this judgment will not ring warning bells in solicitors' offices. I am not casting any doubt on the meaning, effect and protection of the words 'subject to contract' in the cases in which in normal conveyancing practice and everyday life they are used'*.

7. The absence of the use of the phrase 'subject to contract' in negotiations does not necessarily mean that the parties intend to be bound once an oral agreement is reached[9].

8. If an agreement is subject to contract can that change? The parties can agree that the agreement is no longer subject to contract, either expressly or by implication[10]. The parties may agree to remove the effect of the words 'subject to contract'[11]. Both parties need to agree to waive the requirement[12]. The fact of starting performance will not always or even usually give rise to an implication that the 'subject to contract' requirement has been waived[13]. However where all the essential or important terms are agreed and substantial services have been rendered a court is more likely to find there is a contract without the necessity for a formal written agreement.

9. In *Taylor v Burton*[14] parties in a right of way dispute negotiated for the execution of a deed so as to dispose of an appeal by consent. The negotiations for the deed had been 'subject to contract'. Both counsel submitted an order with an attached draft deed. The Court of Appeal made an order and proposed suggested that the deed be executed by the parties before the order was finalised and sealed. The defendant declined to execute the deed. An issue arose as to whether the 'subject to contact' stipulation had been waived. The Court of Appeal held that the submission of the draft order had not demonstrated the parties' agreement to expunge the 'subject to contract' qualification.

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9 *Investec Bank (UK) td v Zulman* [2010] EWCA Civ 536 at paragraph 17.

10 *RTS Flexible Systems Ltd v Molkerei Alois Muller* [2010] UKSC 14 paragraphs 60: Discussions were 'subject to contract' and the contract was not signed. The court held that the question was, objectively speaking, whether the parties intentions took a new turn at some stage such that they intended to be bound by the 'final draft contract' without the need for its formal execution. As substantial works had been carried out the court could infer that a contract has been concluded.

11 *Cohen v Nessdale* [1981] 3 All ER 118, 127 – 128. On the facts in the case the 'subject to contract' requirement had not been removed expressly or by implication.

12 *Haq v Island Homes Housing Association* [2011] EWCA Civ 805 paragraph 72 – both parties need to waive the requirement, a unilateral waiver will not suffice.

13 *RTS Flexible Systems Ltd v Molkerei Alois Muller* [2010] UKSC 14 paragraphs 47.

14 [2015] EWCA Civ 142, paragraphs 35 and 38 - 39.

10. The parties or a party may be estopped from asserting the agreement is 'subject to contract'[15]. This is a form of proprietary estoppel interest. A party seeking to rely on negotiations, which had remained expressly subject to contract, in order to found an estoppel has to demonstrate that: (a) the other party had created or encouraged an expectation or belief that it would not withdraw from the agreement in principle; and (b) it had relied on that belief or expectation.[16]

11. Where an agreement for the joint acquisition of property lacks contractual force, as no formal documents have been executed, there may be scope to argue for a constructive trust[17]. The decision in *Cobbe v Yeoman's Row Management* [18] has severely restricted the scope for such an argument in commercial transactions.

12. An alternative legal route is through establishing a waiver (in the sense of an election) of the requirement for signatures to a formal document[19].

13. The Contract may remain 'subject to contract', so that this main agreement remains without contractual force but a separate preliminary contract may arise

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[15] *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2006] EWCA Civ 1303 at paragraph 46. *Benourad v Compass Group* [2010] EWHC 1182 (QB) at paragraph 106(b).

[16] AG of Hong Kong v Humphreys Estate [1987] AC 114, 124. See also the comments of Lord Scott in *Cobbe v Yeoman's Rowe* [2008] UKHL 55, paragraph 25 – in a subject to contract case proprietary estoppel 'cannot ordinarily arise'. *Haq v Island Homes Housing Association* [2011] EWCA Civ 805 paragraph 60. On the facts the Haq claim failed as nothing had happened to make it unconscionable for the landlord to rely on its strict legal rights and refuse to grant the lease agreed in principle, despite having allowed the tenant a licence to occupy the land to carry out substantial building works on the land.

[17] *Banner Homes Group v Luff Developments* [2000] Ch 372.

[18] [2008] UKHL 55, paragraphs 86 and 91: '*both parties knew that the that there was no legally binding contract, and that either was therefore free to discontinue the negotiations without legal liability that is, liability in equity as well as at law …Mr Cobbe was therefore running a risk, but he stood to make a handsome profit if the deal went ahead, and the market stayed favourable. … the fact is that he ran a commercial risk, with his eyes open, and the outcome has proved unfortunate for him.*' Facts showing an agreement was subject to contract were held to be fatal to a claim for a constructive trust in the case of *Crosso No 4 Unlimited v Jolan Ltd*, [2011] EWCA Civ 1619 paragraph 108.

[19] *The Botnica* [2006] EWHC 1360 (Comm) at paragraph 90 – waiver or a kind of election: '*OSA had a "right" to refuse to sign the contract terms. If OSA abandoned that right in such a way as to indicate to DSND that it no longer insisted on signing the terms before a valid contract was created, then it was, in my view, exercising a kind of election'*. *RTS Flexible Systems Ltd v Molkerei Alois Muller* [2010] UKSC 14 paragraphs 55-56, 86. The court applied the standard of the reasonable, honest businessman and inferred that the parties had intended that the work should be carried out for the agreed price on the agreed terms and thereby waived the necessity for a formal written agreement, the need for which had been 'overtaken by events'.

– typically from services being rendered there being an implied agreement that a reasonable price will be paid.[20]

14. If the agreement remains subject to contract, (and even if some essential terms remain to be agreed) and there is performance without signing a document, for example by one party rendering services or delivering goods to the other party then a non-contractual restitutionary obligation may arise[21]. Such a Quantum Meruit claim was held to arise where no contract had been concluded but work was done in the belief that there was a contract or the expectation that the negotiations between the parties would result in a contract. There was a common law restitutionary remedy to claim a reasonable sum. This remedy is to deprive the party of the unjust enrichment of benefitting from the services without a contractual liability to pay for them[22]. This will equate to a reasonable sum for the services, not the value unlocked by the use of the services[23].

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[20] *Benourad v Compass Group* [2010] EWHC 1182 (QB) at paragraph 106(f).

[21] *Benourad v Compass Group* [2010] EWHC 1182 (QB) at paragraph 106 (g) to (l). Though in that case there was insufficient evidence on which to value the claim – paragraphs 1323, 134-135.

[22] *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189 at paragraph 48. *Cobbe v Yeoman's Row Management* [2008] UKHL 55 [2008] 1 WLR 1752 paragraph 40 to 45; *Benourad v Compass Group* [2010] EWHC 1182 (QB) at paragraph 106(g) to (l).

[23] *Cobbe v Yeoman's Row Management* [2008] UKHL 55 [2008] 1 WLR 1752 paragraph 41.