Nil by mouth: the problem with oral agreements

Charlie Newington-Bridges, St John's Chambers and
Iwan Doull, Berry Smith LLP

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This guide provides an overview of the principles relating to oral agreements. It is not legal advice and should not be relied upon as such. Businesses and individuals should seek bespoke legal advice in respect of their particular positions.

Introduction

1. Having acted for Claimants and Defendants in a number of alleged oral agreement trials in the High Court over the last 3-4 years, it is apparent that there are a series of features to these types of cases now that may be different to historic oral agreement cases. One of the principal reasons for this difference is the numerous modes of communication available to all today. It has become inherently less likely that there will be little or nothing of an agreement captured or referenced in written form electronically. A further point of difference with historic cases is the extent of disclosure. It is no revelation to commercial litigators that disclosure exercises have become extensive and expensive, even with or perhaps because of the advent of CPR PD 51U. However, managing that exercise in the context of oral agreements and the procedural rules will be important.

2. For the claimant's advisers, it may be that a confident, credible client and an optimistically described set of circumstances in early conferences suggest that the case has higher prospects of success than may later materialise[1]. In defending oral agreement claims, advisers may be wary that critical evidence contained in electronic communications such as WhatsApp or Facebook is not before those advising and only appears during the disclosure exercise.

3. Oral agreement cases of course turn to a significant extent on the facts established at trial. Nonetheless, the principles that apply to oral agreements require careful analysis and application. This note attempts to set out the key legal principles that apply to oral agreement cases including the relevant procedural rules, as well as the practical difficulties that arise in such cases and how those can be overcome. Overall, it attempts to examine how oral agreement cases have changed and what solicitors can do to minimise the risks of litigation arising from those changes for their clients.

Oral Agreements – the Legal Principles

4. The following is a non-comprehensive, but it is hoped useful guide to the legal principles that apply to oral agreements. It focuses on the legal principles that a court will apply in determining whether or not an oral agreement has actually been reached by the parties.

[1] This may be true of many types of cases, although it seems particularly true of oral agreement claims.

Agreement

5. One of the first and most important questions in an oral agreement case is often whether or not an agreement has been reached by the parties. The relevant principles in relation to whether or not an oral agreement has been concluded are as follows:

5.1. Whether or not the parties have reached a binding agreement and, if so, on what terms depends on an objective consideration of what was communicated between them, by words and conduct, over the whole course of their negotiations: Pagnan Spa v Feed Producers Ltd[2]. See also RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH[3] and Maple Leaf Macro Volatility Master Fund and another v Rouvroy and another[4].

5.2. Generally, the parties' subjective state of mind and any subjective reservations that are not communicated are irrelevant, because subjective reservations do not prevent the formation of a binding contract. However, subjective belief may be relevant to demonstrate whether objectively a particular term has been agreed where consensus depends on oral exchanges or conduct: see Bieber v Teathers Ltd[5] and Carmichael v National Power Plc[6].

[2] [1987] 2 Lloyd's Rep 601 at [619], CA.
[3] [2010] 1 WLR 753 at [45]
[4] [2009] EWHC 257 (Comm)
[5] [2014] EWHC 4205 (Ch) at [14(ii)]
[6] [1999] 1 WLR 2041

5.3. If, on an objective appraisal of the parties' words and conduct, the parties intended to conclude a legally binding agreement, the fact that certain terms of economic or other significance have not been agreed does not prevent it being a binding agreement. The only requirement is that the parties have agreed on all the terms necessary for there to be an enforceable contract: Pagnan SpA v Feed Products Ltd[7] and Bieber v Teathers[8].

5.4. Although the formation of contract is conventionally analysed in terms of whether a contractual offer was accepted, the law does not require rigorous compliance with an analysis along these lines. Nor does it require that any particular communication or act must, in itself, manifest that the party intends to contract. The court will, if appropriate, assess a person's conduct over a period and decide whether its cumulative effect is that he has evinced an intention to make the contract: Maple Leaf[9].

5.5. The fact that the parties to an agreement recognised that their agreement would need further matters to be agreed later does not prevent a contract having been formed. As Lloyd LJ said in the Pagnan case (cit sup) at p619:

"there is no legal obstacle to the parties agreeing to be bound while deferring important matters to be agreed later".

5.6. Where an agreement is oral or partly in writing and partly oral, it is permissible to have regard to the parties' subsequent conduct for the purposes of

[7] Ibid at [619] (proposition 6) cited with approval in RTS (above) at [49];
[8] Ibid at [14(iii)].
[9] Ibid at [242]

determining whether or not the terms were agreed or which terms were included: *Bieber v Teathers*[10].

5.7. There is recent High Court authority that refers to email, texts and other electronic messages as being admissible as evidence as to whether a contract was formed and, if it was, what the terms of that contract were: Edgeworth Capital (Luxembourg) S.A.R.L. v Aabar Investments[11].

Certainty

6. One of the key ways in which purported oral agreements are attacked by defendants is that the alleged agreement lacks the required certainty to form a binding agreement. The relevant principles in relation to contractual certainty in the context of oral agreements are as follows:

6.1. The courts are reluctant to conclude that what the parties intended to be a commercial agreement is too uncertain to be of contractual effect, the more where a party has acted upon it: see Sykes v Fine Fare[12] and Trentham v Archital Luxfer[13].

6.2. Where there is a clear intent to create legal relations and the transaction or transactions are clearly of a commercial character, English law is perfectly ready to recognise the contractual relations that the parties' actions so clearly intend

[10] Ibid at [55]. See also Chitty at 13-136
[11] [2018] EWHC 1627 (Comm)
[12] [1967] 1 Lloyd's Rep 53 at p 57 per Lord Denning MR
[13] [1993] 1 Lloyd's Rep 25 at p 27, 63 BLR 44, [1992] BLM (December) 5 per Steyn LJ

and will not frustrate them on account of some difficulty of analysis. The law recognises the need to adopt a practical approach and to give legal effect to inherently contractual situations: The Zephyr[14].

6.3. If there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract. In ascertaining whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides, and one which has been executed on one side or the other. If it is executed on one side, that is, if the one does his part without having come to an agreement as to the price or the terms, then the law will say that there is necessarily implied, from the conduct of the parties, a contract that, in default of agreement, a reasonable sum is to be paid: Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD[15] and British Bank for Foreign Trade v Novinex[16].

6.4. In a commercial agreement, the further the parties have gone on with their contract the more ready are the Courts to imply any reasonable term so as to give effect to their intentions. When much has been done, the Courts will do their best not to destroy the bargain. But when an agreement has been acted upon and the parties have been put to great expense in implementing it, the

[14] [1984] 1 All ER 35, [1984] 1 WLR 100, [1984] 1 Lloyd's Rep 58 at [72]
[15] [2001] EWCA Civ 406
[16] [1949] 1 KB 623

courts ought to imply all reasonable terms so as to avoid any uncertainties: F & G Sykes (Wessex) Ltd v Fine Fare Ltd[17].

6.5. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential: G Percy Trentham v Archital Luxfer Ltd and others[18].

Blue v Ashley[19]

7. This was a high profile and factually unusual alleged oral agreement case involving Mike Ashley, the founder of Sports Direct ('SD') and Jeffrey Blue, a former investment banker. In essence, Mr Blue had been employed by SD as a consultant to advise on investment banking related matters. In a meeting held at a pub close to SD's offices in London, it was alleged by Mr Blue that he entered into an agreement with Mr Ashley, whereby Mr Ashley would pay Mr Blue £15 million if the share price of Sports Direct doubled from £4 to £8. It was a feature of the case that the parties were drunk, at least by the end of the evening because in Mr Ashley's words the pints kept 'coming like machine guns.'

[17] [1967] 1 Lloyd's Rep 53
[18] [1993] 1 Lloyd's Rep 25
[19] [2017] EWHC 1928 (Comm)

8. Leggatt J in his judgment noted that factors which may tend to show that an agreement was not intended to be legally binding include the fact that it was made in a social context, the fact that it was expressed in vague language and the fact that the promissory statement was made in anger or jest[20].

9. Leggatt J found against Mr Blue holding that no oral agreement had been entered into by the parties. Some of the more notable findings included that Mr Blue did not make any written record of the conversation in the pub. Nor in the following days and weeks (or months) did he raise the topic of an incentive payment and what Mr Ashley had said in the pub again with Mr Ashley.

10. As alluded to above, Leggatt J observed that it is rare in modern commercial litigation to encounter a claim, particularly a claim for millions of pounds, based on an agreement which is not only said to have been made purely by word of mouth but of which there is no contemporaneous documentary record of any kind. In the twenty-first century the prevalence of emails, text messages and other forms of electronic communication is such that most agreements or discussions which are of legal significance, even if not embodied in writing, leave some form of electronic footprint. In Blue, however, such a footprint was entirely absent.

Consideration

11. The relevant principles in relation to consideration that may apply in case such as these are:

[20] Chitty on Contracts (32nd Edn, 2015), vol 1, paras 2-177, 2-194 and 2-195.

11.1 The doctrine of consideration is based on the idea of reciprocity: that "something of value in the eye of the law" must be given for a promise in order to make it enforceable as a contract. It follows that an informal gratuitous promise does not amount to a contract. A person or body to whom a promise of a gift is made from purely charitable or sentimental motives gives nothing for the promise; and the claims of such a promisee are regarded as less compelling than those of a person who has provided (or promised) some return for the promise: Chitty on Contracts at 4-002.

11.2 The traditional definition of consideration concentrates on the requirement that "something of value" must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value), or some benefit to the promisor (in that he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus, payment by a buyer is consideration for the seller's promise to deliver and can be described either as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer's promise to pay and can be described either as a detriment to the seller or as a benefit to the buyer: Chitty at 4-004.

Oral Agreements - Practical Difficulties

Witness Statements

12. The new PD 57 presents particular problems in relation to witness statements for oral agreement cases. The fundamental question is how does a solicitor go about

reconciling a version of events that is supposedly in the witnesses' own words, which may be partly supported and partly undermined? If that involves clarification, can a potentially complex iterative drafting process to get to the final draft really be consistent with the declaration in the statement that the solicitor must now give? To what extent is explanatory evidence required that would not otherwise be necessary if the agreement was in written form? When should solicitors stop trying to clarify oral evidence to perhaps identify (no doubt innocently) contractual certainty or other unclear aspects of the agreement? These are not questions that are susceptible to generalised answers, but they may well be questions that solicitors will want to have in mind before and during the witness statement drafting process.

Procedural Rules

13. One perhaps basic aspect of oral agreement cases that is surprisingly often overlooked is the pleading requirements relating to oral agreements set out in the practice direction to CPR 16. As a reminder, CPR 16 PD 7.4 provides[21]:

> "7.4 Where a claim is based upon an oral agreement, the particulars of claim should set out the contractual words used and state by whom, to whom, when and where they were spoken.

14. It is therefore a requirement of the CPR that those pleading an oral agreement in particulars of claim set out what the contractual words used were. Pausing there, it is often the case that this will be based on the memory of the individual claiming that an oral agreement was entered into and the occasion when that alleged

[21] CPR 16 PD 7.5 relates to conduct brought about by conduct and provides that: "Where a claim is based upon an agreement by conduct, the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done".

contract was entered may have been some years prior. It may therefore be appropriate to plead 'or words to that effect' after the pleading the words used. However, it of course may well lay the claimant open to the defence that there is a lack of certainty if he cannot recall precisely what the words used were.

15. It is a further requirement that it is pleaded who spoke the words and to whom they were spoken. One would imagine that generally this would be less problematic as it is often the case that the alleged contractual words are spoken by one individual to another either face to face, over the phone or over Teams/ Zoom etc.

16. Similarly , pleading when and where should be reasonably clear. However, claimants and their representatives should be alive to the potential challenge that the claimant could not have been in the place that he/she says they were at the time of the alleged oral agreement. An early check on the credibility of the claimant's account may involve a check of the diary of the claimant to confirm that the claimant was, for example, in the country at the time the alleged agreement was made or not in a meeting elsewhere and incapable of being in the place where the agreement supposedly was reached.

Disclosure

17. A key question is whether communications such as those via Whatsapp or Facebook are to be treated as a more informal form of communication, akin to a social setting described in Ashley, than perhaps more formal emails, especially when the content and tone is viewed in totality?

18. WhatsApp and Facebook communications rarely explicitly spell out an agreement, rather they offer tantalising supporting hints that can lead to false expectations when viewed in the wider context of disclosure. It can involve or require detailed analysis of the timings of messages to identify inconsistencies with the oral explanation, both at the time of the alleged agreement, and by later contradictory messages or actions. All too often this type of analysis only occurs just before trial in preparation, rather than earlier in the litigation. This may well be because when analysis is done for the purposes of advice on merits, all the WhatsApp and Facebook communications may not have been provided. This is particularly the case where the WhatsApp messages for example run to thousands of messages occupying hundreds of pages of disclosure.

19. Furthermore, initial disclosure which appears supportive can be undermined by later more general disclosure from other sources, that directly contradict what's alleged or the general gist of the agreement. A question that arises is how relevant can communication with third parties be without unnecessarily widening the scope of the duty of disclosure and the relevance of their evidence?

Regular Review of Merits

20. As suggested above, the shifting nature of oral agreements claims may warrant a review of merits at several stages during the course of the litigation. All too often counsel is engaged to advise on merits at the outset, but a further consideration of merits is not made during the litigation. The merits of the claim may have changed

considerably from a pre-issuance advice to mid-way through a claim where disclosure has been provided by both parties following searches of electronic data. It may add to costs having several advices, but equally, it may save significant costs if a claim is re-assessed as less meritorious than previously thought later in its life and an exit involving settlement or even discontinuance is sought.

Conclusion

21. Oral agreement claims are fundamentally difficult claims because they involve uncertainty on many fronts. There is the fundamental uncertainty of one person's word against another and the difficulty in predicting which witness is likely to be believed. There is the perhaps new uncertainty that electronic data brings. A court may take the view that it is inherently unlikely that an agreement was reached without any trace or reference being made to it in any form of electronic communication. However, it is not all plain sailing for defendants either. They will not know with certainty how credible a witness the claimant or the key witness for the claimant is going to be. They too will not know what disclosure is going throw up. From both perspectives, regular appraisal of merits and a cold-eyed assessment of prospects would be advisable.

Iwan Dou
idoull@berrysmith.com
Berry Smith LLP

Charlie Newington-Bridges
charlie.newington-bridges@stjohnschambers.co.uk
St John's Chambers