

'Heads of terms' and 'subject to contract': 8 key principles on when  
pre-contractual negotiations are legally binding

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# Commonly-used documents/phrases

**'Heads of Terms'**

**'Letters of Intent'**

**'Heads of Agreement'**

**'Intention to Proceed'**

**'Subject to Contract'**

## ***RTS Limited v Molkerei*[2010] UKSC 14**

## ***Pretoria Energy Company v Blankney Estate Limited* [2022]EWHC 1467 (Ch):**

- Deputy Judge Joanne Wicks KC in June 2022
- Currently subject to an appeal
- Due to be heard in the Court of Appeal later this year
- Does not develop or provide any new law in this area, but provides a summary of the legal principles at [25]-[30]

# 8 Key Principles

- (1) Whether there is a binding contract depends not on the subjective state of mind of the parties but a consideration of what was communicated between them by words or conduct...
- (2) The second and related principle is that, whilst the issues of contractual certainty and intention are distinct – one issue may inform the other
- (3) It is necessary to look at the whole course of dealing between the parties
- (4) It is for the parties to choose which terms they regard as essential for the formation of a contract
- (5) The onus of demonstrating there is not the necessary intention lies on the party who asserts it
- (6) The Courts are reluctant to find an agreement is too vague to be enforced and the court may imply terms to fill the gaps
- (7) Business people often record important agreements in a crude and summary fashion
- (8) It is neither essential nor always conclusive to expressly negative contractual intention

**(1) Whether there is a binding contract depends not on the subjective state of mind of the parties but a consideration of what was communicated between them by words or conduct.....**

***"Whether there is a binding contract between the parties and, if so, upon what terms depends on what they have agreed. It depends not on 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 of 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" (RTS Ltd v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14 at para [45])"***

## **(2) Issues of contractual certainty and intention are distinct, and one issue may inform the other**

*"In my judgment, the judge seriously undervalued the force of the "subject to contract" label on the legal effect of the negotiations. He also failed to separate the two distinct questions (a) whether the parties intended to enter into a legally binding arrangement at all and (b) whether the agreed terms were sufficiently complete to amount to an enforceable contract. Almost all the points that he mentioned went to that second question rather than to the first." (Lewison LJ in Joanne Properties at [33])*

One issue may inform the other - the more vague and uncertain an agreement is, the less likely it is that the parties intended it to be legally binding: *MacInnes v Gross* [2017] EWHC 46 at [77]

### **(3) It is necessary to look at the whole course of dealing between the parties**

- To determine whether a contract has been formed is necessary to look at the whole course of dealing between the parties.
- Events which occur after the making of an alleged contract are irrelevant to the question of contractual interpretation, however, events or conduct which occur after the making of an alleged contract are relevant to the question of whether a contract has been formed.
- *Pretoria v Blankney* at [27]; *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37 at [28]-[39]; *Hussey v Horne-Payne* (1878) 4 App Cas 311

#### **(4) It is for the parties to choose which terms they regard as essential for the formation of a contract**

- It is for the parties to choose which terms they regard as essential for the formation of legally binding relations, even if there are further terms to be agreed *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548 at para [32])
- *“On the question of an enforceable contract or not, it is for the parties to decide at what stage they wish to be contractually bound. To use the vivid phrase of Lord Bingham (as Bingham J) the parties are “masters of their contractual fate” (Pagnan Spa v Feed Products Limited [1987] 2 Lloyd's Rep 601 at 611.) They can agree to be bound contractually, even if there are further terms to be agreed between them (RTS Flexible Systems case (supra) at [48]). The question is whether the agreement is unworkable or fails for uncertainty.”*



## **(5) The onus on demonstrating there is not the necessary intention lies on the party who asserts it, and it is a heavy one**

- In a commercial context, the onus of demonstrating there was not the necessary intention to create legal relations lies on the party who is asserting it, and it is a heavy one
- This was set out in Edwards v Skyways [1964] 1 All ER 494, [1964] 1 WLR 349 at 355 per Megaw J:

*“In the present case, the subject-matter of the agreement is business relations, not social or domestic matters. There was a meeting of minds — an intention to agree. There was, admittedly, consideration for the company's promise. I accept the propositions of counsel for the plaintiff that in a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one.”*

## **(6) The courts are reluctant to find an agreement is too vague to be enforced and the court may imply terms to fill the gaps**

- Where parties intend to be contractually bound, courts are reluctant to find an agreement is too vague to be enforced: *Wells v Devani* [2019] UKSC 4 at [18].

*"It may be the case that the words and conduct relied upon are so vague and lacking in specificity that the court is unable to identify the terms on which the parties have reached agreement or to attribute to the parties any contractual intention. But the courts are reluctant to find an agreement is too vague or uncertain to be enforced where it is found that the parties had the intention of being contractually bound and have acted on their agreement."*

- Furthermore, the court may imply terms to fill apparent gaps particularly in commercial dealings: *Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406 at para [69]

## **(7) Business people often record the most important agreements in a crude and summary fashion**

*"Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat ['words are to be understood such that the subject matter may be more effective than wasted']" (Hillas & Co Ltd v Arcos Ltd [1932] All ER Rep 494 at para [503])*

## **(8) (i) It is not essential to always expressly negative contractual intention, (ii) nor is it always conclusive**

- It is not always essential to expressly negative contractual intention

*"...[...].the more complicated the subject matter the more likely the parties are to want to enshrine their contract in some written document to be prepared by their solicitors. This enables them to review all the terms before being committed to any of them. The commonest way of achieving this ability is to stipulate that the negotiations are 'subject to contract'. In such a case there is no binding contract until the formal written contract has been duly executed, see The Chinnock v Marchioness of Ely 4 De GJ&S 638 . But it is not essential that there should have been an express stipulation that the negotiations are to be 'subject to contract'." Whitehead Mann Limited v Cheverny Consulting Limited [2006] EWCA Civ 1303 [42]*



**(8) (i) It is not essential to always expressly negative contractual intention, (ii) nor is it always conclusive**

- Perhaps the most helpful authority on the use of the phrase 'subject to contract' is *Joanne Properties Limited v Moneything Capital Limited* [2020] EWCA Civ 1541:

*"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."* [34]

**(8) (i) It is not essential to always expressly negative contractual intention, (ii) nor is it always conclusive**

- *Tiverton Estates Ltd v Wearwell* [1975] Ch 146
- *Secretary of State for Transport v Christos* [2003] EWCA Civ 1073
- *Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG* [2018] EWHC 1056 (Comm)
- *Jirehouse Capital v Beller* [2009] EWHC 2538 (Ch)
- *Green Deal Marketing Southern Ltd v Economy Energy Trading Ltd* [2019] EWHC 507, [2019] 2 All ER (Comm) 191
- *Mahmood v The Big Bus Company* [2021] EWHC 3395

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