Menu à la contract

James Popperwell and Nikolas Ireland examine a recent case looking at contract formation

James Popperwell (pictured top) is a partner and Nikolas Ireland a solicitor at Macfarlanes LLP

The High Court's recent decision in *MacInnes v Gross* [2017] provides a cautionary tale for those who conduct business without formal written contracts. It also provides a reminder of the law relating to contract formation, whether an intention to create legal relations has been established and the importance of certainty of key terms.

At a glance

Where a contract is alleged in the absence of express and written agreement, the position can be precarious. Disputes can often arise as to whether the parties had the requisite intention to create legal relations and whether the fundamental terms were sufficiently certain for a contract to be formed.

The court will look objectively at whether the parties' communications lead to a conclusion that there is such intention. The judgment in *MacInnes* illustrates that where the subject matter is complex, the key terms are uncertain and the alleged agreement took place verbally in a non-formal setting, this can be difficult to establish.

Case facts

Bruce MacInnes was an investment banker employed by a bank who met businessman Hans Thomas Gross in 2008. Having not had contact since January 2009, MacInnes got in touch with Gross in January 2011 after hearing positive things about the group of companies (RunningBall) of which Gross was the principal figure. MacInnes was keen to develop the business relationship between RunningBall and the bank and sought to offer strategic advice with this in mind.

The parties corresponded on this basis and met on various occasions throughout February and March 2011, including a meeting in Zurich to discuss an offer for RunningBall from a company called Unibet and later for evening drinks in London. Throughout this period MacInnes, acting in his capacity as an employee, gave advice on potential funding options and also set up meetings between contacts and RunningBall to assist with the funding strategies.

On 23 March 2011 the parties had dinner (the Zuma dinner) and it was at this dinner that MacInnes alleged that a binding contract between him and Gross had been agreed, whereby:

- he would personally provide services in relation to various aspects of RunningBall but in particular to grow the business to maximise any return on sale;
- in exchange for those services, he would be paid 15% of the difference between the sale price of RunningBall and the lower of 100m Swiss francs or eight times the 2011 earnings before interest and tax (EBIT) of RunningBall; and
- in consequence of the agreement, he would hand in his notice to the bank and immediately become the CEO of HTG Ventures (which owned 95% of the shares in RunningBall).

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Immediately upon returning from the Zuma dinner, MacInnes sent Gross a two-page email giving general advice, for example, on the potential acquisition of a company by RunningBall and advising against the Unibet deal. In the final part of this email (which was the only

contemporaneous record of the discussion at the Zuma dinner relied upon), MacInnes discussed his own position and set out the alleged agreement. The relevant part of the email read:

> I am delighted that we are agreed on headline terms. I think the role of CEO of HTG Holding is an excellent formula to kick things off, and I appreciate the suggestion that I would be able to elect a strike price for options for 15 percent of RunningBall at the lower of SFr 100 million or eight times 2011 EBIT.
>
> On salary, I mention, my priority is to make sure that you are comfortable with any given level. At the same time, it would be helpful for this to cover the day-to-day running costs of my family (London school fees etc) which are quite significant. The tax rates here do not help, as we discussed.

Following the Zuma dinner, MacInnes gave in his notice but continued to work for the bank in relation to RunningBall until July 2011 when he became chairman of two companies within the RunningBall group. His involvement with RunningBall was sporadic going forward and, around September 2011, a company called Perform emerged as a potential buyer of RunningBall. In expectation of the potential progress of the deal, MacInnes emailed Gross on 7 December 2011 forwarding a copy of the email sent after the Zuma dinner.

The covering email also commented that 'it's really important to us both I think that we are completely aligned going into this process' and that 'it is crucial for me that you feel happy about it'. In Gross's response that same day, he stated 'next time we see each other let's make a proper contract'.

Following this email exchange, MacInnes was increasingly sidelined in the discussions which took place with Perform and which finally resulted in an offer of sale on 31 January 2012. By the time the sale went through in April 2012 MacInnes' involvement with RunningBall was entirely peripheral.

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The legal analysis

Lord Clarke said in the Supreme Court case of *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] that

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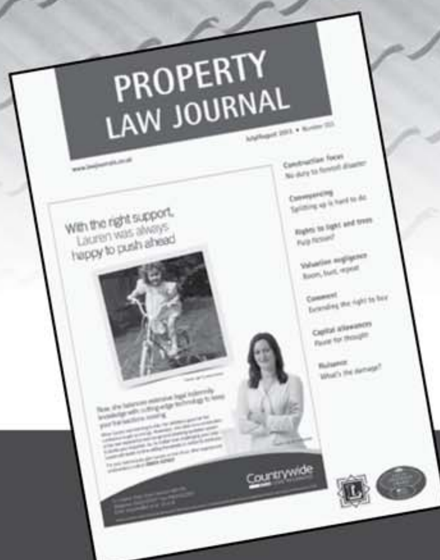

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when considering whether or not there is a binding contract between parties, their subjective state of mind is irrelevant but what must be considered is:

> … 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 the terms which they regarded or the law requires as essential for the formation of legally binding relations.

The subjective expectations and reservations of the parties are to be ignored and instead, the governing criteria are the reasonable expectations of honest and sensible businessmen, as was specified in the case of *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] which Lord Clarke cited in his judgment.

The court found it striking that in the email of 23 March 2011 the highest that MacInnes put it was that there was an agreement 'on headline terms' but no more.

Lord Clarke's comments therefore specify two of the critical elements to contract formation without which there can be no legally binding agreement:

- the intention to create legal relations; and
- agreement upon the fundamental terms of the contract.

In the present case, Coulson J applied the objective test outlined in *RTS* and, upon analysis of the correspondence and conduct between MacInnes and Gross, found that the evidence consistently pointed away from the claimant's case and towards that advanced by Gross. Coulson J dismissed MacInnes' claim and stated that he was 'firmly of the view that no binding contract was made between the parties on 23 March 2011', this being the Zuma dinner. The reasons given fell into two main categories, namely, there being no intention to create legal relations and the absence of agreement, complexity and uncertainty.

Practical points

- Where an oral agreement has been reached between parties, it is always the best course of action to document the agreement in express terms and with clear and certain language to reduce the risk of the existence of the contract being subsequently questioned. This is especially true where the subject matter is complex.
- Where business is being conducted in an informal setting or where parties are not dealing in their first language, the court will scrutinise the communications more closely on the basis that it is less likely that there will be an intention to create legal relations in such situations. Accordingly, extra care should be taken in these situations to ensure that all aspects of the agreement are fully agreed as being legally binding and are properly understood.
- If an agreement contains a trigger event (such as an event resulting in the payment of a commission) then this must be expressly agreed. The best way to do this to ensure complete clarity is to record it in writing.
- In the event of a dispute, the court will carefully examine the substance, language and tone of contemporaneous evidence when considering whether a legally binding oral contract was formed. Where there is a lack of information, uncertain language or a tone which would lead the reasonable businessman to objectively conclude that nothing concrete had been agreed, the court will likely conclude that no binding contract has been formed. This may have serious ramifications for parties who had sought to rely on such discussions.

No intention to create legal relations

Of paramount importance to Coulson J's finding was the language in the emails of 23 March 2011 and 7 December 2011. He found that the tentative nature of the words used by MacInnes in referring to and describing the alleged agreement signified that the formulation process was ongoing as opposed to being a concluded agreement.

The court found it striking that in the email of 23 March 2011 the highest that MacInnes put it was that there was an agreement 'on headline terms' but no more. The objective reading of the language was that, while the parties had outlined the basis for an agreement, it was now in Gross's power to conclude the discussions. Of course, this would not have been possible if matters had already been concluded as alleged by MacInnes. By way of example of this lack of concluded agreement, the court referred to part of MacInnes' email of 7 December 2011 which said that it was important 'that we are completely aligned going into this process' and used this to demonstrate that MacInnes knew that the parties had not yet aligned with each other in any legally binding way.

The response from Gross which stated that they now needed to 'make a proper contract' followed on logically from this narrative and was taken by the court to mean that there was no proper and binding agreement in existence.

Coulson J commented that while an informal and relaxed setting does not prevent a contract coming into existence:

> … it does mean that the Court should closely scrutinise the contention that, despite the setting, there was an intention to create legal relations.

This is an interesting point and would seem to suggest that although the informal nature of the Zuma dinner was not a deciding factor, it was more difficult for MacInnes to prove his case given the non-business circumstances. Similarly, the court placed relevance on the fact Gross's

first language was not English and commented that this 'must inevitably sound a note of caution' when deciding whether the discussions led to a binding agreement.

While the points concerning informality and Gross's first language are not conclusive in themselves, they are nonetheless issues which the court used to formulate the context of the discussions and therefore assisted in the finding that there was no intention to create legal relations at the Zuma dinner.

Absence of agreement, complexity and uncertainty

The court highlighted the lack of agreement and uncertainty on the critical issue of MacInnes' remuneration and salary in the email of 23 March 2011 as a reason that the parties could not possibly have had the requisite intention to create legal relations at the Zuma dinner and could not have met the objective test set out in *RTS* at this time. Additionally, this point ties in with the general criticism of MacInnes' case that the alleged agreement was too vague, complex and uncertain to have any contractual force.

Despite the repeated submissions by MacInnes that the alleged agreement was simple and that the remuneration calculation was straightforward, the court was at a loss as to why, if this was the case, MacInnes did not record this 'simple' agreement in his email of 23 March 2011. The court described the email as a 'wholly unconvincing document' which failed to refer to numerous fundamental elements of the remuneration and did not even refer to the sale of RunningBall or explain the variable commission agreement which was asserted. The failure of MacInnes to record the basis of the alleged contract in the email of 23 March 2011 demonstrated an absence of agreement (which by virtue of its variable commission payment was relatively complex) and was in itself, the court said, sufficient on its own to decide the case against MacInnes.

This part of the decision reflected the comments in *Whitehead Mann Ltd v Cheverny Consulting Ltd* [2006] where it was said that:

> ... the more complicated the subject matter, the more likely the parties are to want to enshrine their contract in a written document, thereby enabling them to review all the terms before being committed to any of them.

In light of the complexities in the present case and the potential of a multimillion-pound commission, it would seem unlikely that the parties would have sought to conclude the contract over the Zuma dinner.

Coulson J stated in his judgment that, as a general principle, uncertainty as to the meaning of what had been said between the parties was reason enough for a court to conclude that there is no binding agreement between parties. The complete lack of certainty in what had been agreed between the parties was compounded by the case put forward by MacInnes that his remuneration would be triggered on the sale of RunningBall. The trigger event was not referred to in the email of 23 March 2011 and there was no detail in the alleged agreement as to the date of the trigger or the method of calculation. The court stated that:

> ... anyone with any experience of commercial contracts... knows that the contract needs to be clear as to precisely what events trigger the payment of commission, and what events do not. That is why they are reduced to writing.

Coulson J specifically referred in his judgment to the legal principle that a trigger event must be expressly identified for the formation of a legally binding contract. The case of *Wells v Devani* [2016] provides recent Court of Appeal authority for the notion that a commission-based contract cannot be formed without express agreement as to the triggering event of payment of the commission. In such circumstances, the court cannot imply a term into an incomplete contract in order to complete it and there will therefore be no enforceable contract.

This provides a further basis upon which the failure to meet the objective test in *RTS* can be demonstrated. The express identification of a trigger event is required by law for a commission payment and therefore by failing to agree this point, the parties could not have entered into a binding contract at the Zuma dinner.

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Conclusion

The intention to create legal relations and the requirement for agreement upon essential terms are two of the fundamental requirements which underpin the objective test outlined by Lord Clarke in *RTS* when considering whether a legally binding contract has been formed.

Proving the requisite intention without detailed and clear contemporaneous evidence is difficult and will be further hindered where the alleged contract is complex or contains elements such as trigger events which are required by law to be expressly identified.

While parties do, of course, have freedom of contract and are able to enter into binding oral agreements in any situation, be it over dinner or at the boardroom table, it is wise to approach such agreements with caution and ensure that at the very least the fundamental terms are recorded in writing and that all parties have the intention to create a legally binding contract. ■

G Percy Trentham Ltd v Archital Luxfer Ltd
[1993] 1 Lloyd's Rep 25

MacInnes v Gross
[2017] EWHC 46 (QB)

RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG
[2010] UKSC 14

Wells v Devani
[2016] EWCA Civ 1106

Whitehead Mann Ltd v Cheverny Consulting Ltd
[2006] EWCA Civ 1303