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WHEN DO YOU HAVE A BINDING CONTRACT?

IT MAY BE MORE (OR LESS) OFTEN THAN YOU THINK

CONTRACT DISPUTES PRACTICAL GUIDES
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This is the first in our relaunched series of contract disputes practical guides, designed to provide clients with practical guidance on some key issues that feature in disputes relating to commercial contracts under English law.

Sometimes what appears to be an agreement is not in fact binding, for example because it is incomplete or its terms are uncertain, or perhaps because the necessary contractual intention is lacking.

Conversely, a binding agreement might be reached despite appearances to the contrary, for example where parties commence work before a formal agreement is signed.



In this guide, Chris Bushell, Maura McIntosh and Robert Moore consider the problems that can arise in relation to the formation and variation of contracts and some practical steps that can be taken to minimise the risks.

Top tips to make sure you enter into contracts only when you want to:

- **DO** remember a contract can be made by e-mail or discussions or by conduct
- **DO** mark all correspondence and drafts "subject to contract"
- If agreeing heads of terms **DO** make clear what (if anything) is binding
- **DON'T** start work until everyone has signed on the dotted line
- If you need to start work sooner **DO** try to agree key matters first
- **DO** make sure all obligations are clearly defined
- **DON'T** settle for an "agreement to agree"
- If you want to vary a contract, **DO** follow any specified formalities
- **DO** remember the need for "consideration", particularly if varying a contract

"An oral contract, or one implied by conduct, is just as binding as a formal written agreement – but a lot less clear"

1. No particular formalities needed

A contract will be formed when the parties have agreed on its essential terms, though of course that basic analysis may involve many potential complications (see our decision tree on page 14 for the key requirements for a binding agreement).

Under English law, there is no general requirement for particular formalities to be satisfied before a contract is formed. It is possible to make or accept an offer orally or by conduct, as well as in writing (though this general principle is subject to exceptions for certain types of contract, where formal requirements are imposed by statute, eg contracts for the sale of land).

The Commercial Court decision in *Novus Aviation Limited v Alubaf Arab International Bank BSC(c)* [2016] EWHC 1575 (Comm) illustrates the point (see our banking litigation ebulletin on the decision). The court found that a letter of commitment from the defendant bank was binding despite not having been countersigned by the claimant. Although the letter provided for a signature on behalf of the claimant to indicate that the terms were "accepted", it did not stipulate that the only way the claimant could signal its acceptance was by counter-signing the letter. Therefore acceptance could be communicated by conduct which (objectively analysed) showed an intention to accept the offer.

Even where a contract specifies that it will only become binding if accepted in a particular way, for example if it is signed by both parties, the court may conclude that any such requirement was waived either expressly or by implication (see section 4 below).

The position appears to be stricter regarding contractual stipulations as to how a contract may be varied, for example that any variation must be in writing and signed on behalf of both parties before it takes effect. Such clauses will generally be given effect (see section 7 below).

In deciding whether a contract has been concluded, the court will look at the parties' words and conduct overall and apply an objective test. For these purposes, the court can consider events that took place after the date the contract is said to have been concluded – in contrast to the rules on interpreting a concluded contract, where subsequent events cannot be taken into account.

In *Global Asset Capital, Inc v Aabar Block S.A.R.L* [2017] EWCA Civ 37 (considered here on our Litigation Notes blog), the Court of Appeal overturned the High Court's decision that a contract had arguably been concluded during a telephone call following a "subject to contract" offer letter, when that conclusion was inconsistent with the parties' subsequent communications.

The court reiterated the well-established principle that, when deciding whether a contract has been made during negotiations, the court will look at the whole course of those negotiations. Focusing on part of the communications in isolation could give the misleading impression that the parties had reached an agreement when in fact they had not.

The court will not consider subsequent events when interpreting a concluded contract, but that is a different point.

2. Formal agreement still to be executed

Parties may agree terms in discussions or correspondence with the intention that a formal document setting out the terms will be executed later. In these circumstances, it is often assumed that there is no binding agreement until that happens. That assumption may be misplaced. In fact the court will look at the parties' words and conduct to determine whether, judged objectively, they intended to be bound immediately or only when the formal document was executed.

"The 'subject to contract' label isn't a complete magic bullet, but not using it may be asking for trouble"

The best way to avoid entering into binding commitments before you are ready is to ensure that all correspondence and draft documentation is clearly labelled "subject to contract". That gives a strong indication that the parties do not intend to create a binding contract (though it is not foolproof – see section 4 below).

Other wording may have the same effect, for example a clause stating that the agreement is subject to Board approval, or a counterparts clause which provides that no contract will come into existence until each party has executed and exchanged the counterparts. However, references to recording the terms in a formal agreement, or to an agreement "in principle", may not always be effective

The point can be illustrated by the following cases, all in the settlement context:

- In *Newbury v Sun Microsystems* [2013] EWHC 2180 (QB) (considered here) the High Court found there was a binding agreement where the defendant had made an offer to settle the proceedings by paying a stated sum, "such settlement to be recorded in a suitably worded agreement". It was significant that the offer specified a period for acceptance, and a period for payment if the offer was accepted. It was also relevant that the letter was not expressed to be "subject to contract"; those words would have been a clear indication that the terms were not intended to be binding, and their absence was a relevant factor indicating the contrary.
- In *Bieber v Teathers Limited* [2014] EWHC 4205 (Ch) (considered here) the High Court held that a binding settlement was agreed in an exchange of e-mails between the parties' solicitors despite their subsequent failure to agree formal terms. Again, it was significant that the e-mails were not labelled "subject to contract", and also that the offer was described as "a take it or leave it offer" and "a final gesture to reach settlement". Even a reference in the correspondence to the offer being "in principle" did not, in the context, mean that the offer was conditional. The context of the correspondence was also significant, in particular that the parties were under time pressure to reach agreement before a further tranche of counsel's fees became payable.

- In *Goodwood Investments Holdings Inc v ThyssenKrupp Industrial Solutions AG* [2018] EWHC 1056 (Comm) (considered here), in contrast to the cases outlined above, the Commercial Court concluded that there was no binding settlement, as the relevant offer was made subject to the conclusion of a formal settlement agreement and subject to Board approval. The judge noted that it is well established that words such as "subject to contract" indicate that parties do not intend to be bound until a formal contract is executed. The same applies to an agreement which is stated to be subject to the Board approval of one or both parties.

3. Heads of terms

Once parties have agreed the main terms for a transaction, they may decide to record those terms pending negotiation of the full agreement in a document known variously as a heads of terms, heads of agreement, term sheet, letter of intent, or memorandum of understanding.

In general, heads of terms are not intended to be binding, though they may include certain specified terms that are stated to be binding and as a result apply from the outset, such as confidentiality, exclusivity and governing law.

As noted above, the courts will determine the question of whether parties intended to be bound before execution of a full formal agreement based on an objective assessment of their words and conduct. It is therefore essential to make clear in any heads of terms or similar document whether it is intended to form a binding agreement at all, and if so to what extent, through use of the "subject to contract" label or a clear statement that the heads of terms are not intended to be legally binding except as specifically set out in the document – though no such formula can be guaranteed to prevent a binding agreement in all circumstances (see section 4 below).

It is also important to distinguish between a binding but conditional agreement and a non-binding agreement. So, for example, saying that terms are subject to shareholder or regulatory approval could potentially give rise to a conditional agreement (with a possible obligation on the relevant party to use reasonable endeavours to satisfy the condition) rather than no binding agreement at all.

"If agreeing 'heads of terms' or similar, have you made clear whether any of the terms are intended to be binding – and if so which?"

The case of *Diamond Build Limited v Clapham Park Homes Ltd* [2008] EWHC 1439 (TCC) illustrates the difficulties that can arise with letters of intent or similar documents. The parties had signed a letter of intent pending execution of a formal contract for construction works (which was to be executed as a deed, according to the requirements in the tender specification).

The letter of intent stated that if it was not possible to execute a formal contract in place of the letter, the employer would reimburse the contractor's reasonable costs capped at £250,000. The employer purported to terminate the letter of intent and rely on the cap. The contractor argued that the letter of intent had been superseded by a formal contract, although no such contract had been executed.

The court noted that a letter of intent can fall into one of several categories: it may not give rise to a contract at all; it may give rise to a simple contract which is applicable pending execution of a formal contract; or it may be a contract so far as it goes, but not subject to entering into a formal contract.

On the facts, the court concluded that the letter of intent did give rise to a contract which applied until the formal contract was executed. Therefore, the contractor's rights were limited to the letter of intent.

4. Beginning work without formal agreement

Problems commonly occur where the parties agree terms "subject to contract" (whether in the form of heads of terms, a draft contract or merely an exchange of correspondence) and then begin to perform the obligations envisaged without ever concluding the anticipated formal agreement.

It may then be unclear whether they have, in fact, concluded a contract on the terms set out in the pre-contractual documentation, or whether they have concluded a contract on some more limited terms, or whether there is no binding contract at all.

Although use of the "subject to contract" label (or equivalent wording) will normally prevent the creation of a binding agreement, as it indicates a lack of intention to create legal relations, it can be overridden by other circumstances.

In particular, a court may find that the parties agreed to waive the "subject to contract" requirement, so that they would be bound despite the absence of a formal signed agreement. Such a waiver might be express or it might be inferred from the parties' communications and conduct. The question of whether the parties intended to be bound, and by what terms, will all depend on the facts.

The difficulties in applying these principles in practice are well illustrated by a Supreme Court decision from 2010. In *RTS Flexible Systems v Müller* [2010] UKSC 14 (see post) the High Court, Court of Appeal and Supreme Court all reached different conclusions on the contractual position where a contractor continued work following expiry of a short form contract (described as a Letter of Intent Contract) while the parties negotiated the final contract.

A draft contract was agreed (subject to some points of detail which, the Supreme Court held, were not regarded as essential) but was never executed. The draft contained a counterparts clause which provided that the contract would not become effective until the parties had executed and exchanged the counterparts. This was treated as equivalent to a "subject to contract" provision.

On these facts:

- The trial judge held that, after the expiry of the letter of intent, a new contract had been concluded between the parties on limited terms, not the terms of the draft contract.
- The Court of Appeal held that there was no binding contract at all following the expiry of the letter of intent.
- The Supreme Court held that the parties had agreed to waive the counterparts clause in the draft contract and there was a binding contract on those terms, not the more limited terms found to exist at first instance.

Another example is the Court of Appeal decision in *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443 (considered here). In that case the court found that a Deal Memorandum was binding in circumstances where it had not been signed by the claimant, despite an express provision that it was not to be binding until signed by both parties.

The court said that the provision stipulating that it would not be binding unless signed was clearly for the claimant's benefit. By not signing, the claimant was waiving the prescribed mode of acceptance.

In considering whether a contract had been created by conduct, the Commercial Court had been right to focus on whether there were clear and unequivocal acts on the claimant's part, which the defendant knew about, constituting acceptance by conduct of the offer made by the defendant. On the evidence, it was clear that there had been acceptance by conduct as the work envisaged by the Deal Memorandum had been carried out.

"If work has to start before full terms can be agreed, make sure you've got a clear interim agreement – and extend it as needed"

A further example is the Court of Appeal's decision in *Arcadis Consulting (UK) Ltd v AMEC (BCS) Ltd* [2018] EWCA Civ 2222 (considered here). In that case the court overturned a High Court decision which found that the defendant had undertaken preliminary work for a building project under an interim contract which did not incorporate any terms and conditions.

There was a dispute as to the terms on which the defendant carried out the works, in the absence of a formal written agreement which was still being negotiated at the relevant time, and in particular whether those terms incorporated a cap on the defendant's liability. The Court of Appeal found that terms and conditions had in fact been incorporated by reference, so that the defendant's liability was limited.

Although each case will turn on its facts, the decision suggests that the court may be reluctant to conclude that a party has assumed an unlimited liability for works carried out under an interim contract pending negotiation of a final agreement, when it never would have assumed such liability under that final agreement.

As the Supreme Court commented in *RTS Flexible*, the moral of the story is to agree first and to start work later. In many situations, however, that may be a counsel of perfection. So what can parties do to protect themselves if commercial considerations demand that they start work first and agree the terms later?

The answer is probably to agree as much as possible, even if the full terms cannot be agreed, and set out the agreed terms in a short form interim contract or binding heads of terms. This should include matters such as: what work is to be done at this initial stage; what payment will be due; how long the interim contract will last and whether/how it can be terminated earlier; and what happens if it expires or is terminated before a formal agreement is put in place.

Where agreement on the full terms cannot be concluded before the interim contract expires, and work needs to continue, the interim contract should be extended expressly.

Otherwise parties may find themselves arguing, potentially at great cost, over whether there is a contract at all and if so on what terms.

5. Terms incomplete or uncertain

Sometimes parties may intend to enter into a binding agreement, and believe they have done so, but a court may find that the parties' agreement is incomplete, or is too uncertain to be enforced.

As a result of this principle English law will not enforce a mere "agreement to agree". Such an obligation is too uncertain to form a binding contract: there is simply no way to determine what the parties are obliged to do. Formulations requiring the parties "reasonably" to agree, or to use best or reasonable endeavours to agree will generally fare no better.

In *Morris v Swanton Care & Community Ltd* [2018] EWCA Civ 2763 (considered here), the Court of Appeal found that a clause in a sale and purchase agreement that the seller would provide consultancy services to the target company for "such further period as shall reasonably be agreed" was void for uncertainty. For there to be any further period, there first had to be agreement between the parties. That was the "very paradigm of an agreement to agree" which could not be enforced.

The court went on to say that, even if the clause had provided for a further extension for a reasonable period, rather than requiring the parties reasonably to agree a further period, this would still have been unenforceable as the agreement did not provide any framework for determining what would be a reasonable period.

Similarly, in *Teekay Tankers Ltd v STX* [2017] EWHC 253 (Comm) (considered here), the High Court found that an option agreement for the purchase of oil tankers was void for uncertainty where it provided that the delivery date for the vessels would be "mutually agreed upon" when the relevant options were exercised.

The court found that it was impossible to imply a term by which the delivery dates were to be determined if the parties were not able to reach agreement. The delivery dates were an essential term of the contract, and so this was merely a non-binding "agreement to agree".

Although a mere "agreement to agree" will not be enforced, that is not to say that parties must agree every term of a proposed contract before they can be bound by it. In some cases the court may find that, judged objectively, the parties intended to enter into a binding contract even though some terms are left to be agreed.

Where that is the case, the contract will be enforceable so long as:

- they have agreed all the essential terms, so that the failure to agree the remaining terms is not fatal; or
- where an essential term remains to be agreed, the court can "fill in" the missing term by implication.

In *Wells v Devani* [2019] UKSC 4 (considered here), the Supreme Court held unanimously that a binding agreement was reached between a property seller and an estate agent, despite the parties not having specified the circumstances in which the agreed rate of commission would fall due. It overturned the decision of the Court of Appeal, which had found that the agreement was incomplete because of the failure to agree this essential term.

The Supreme Court found that the only sensible interpretation of the parties' words and conduct was that the commission would be payable on completion of a purchase by a buyer introduced by the agent, so it was not necessary to imply a term. If it had been necessary, however, the court would have had no hesitation in doing so. It disagreed with the Court of Appeal's view that the court could not imply a term where that would transform an incomplete bargain into a legally binding contract.

Where parties reach deadlock in negotiations, it may be tempting to include provisions which leave certain points to be agreed at a later date. And indeed that may be inevitable in some circumstances, for example in a long-term agreement where it is not possible to agree terms in advance to cover all eventualities and there may be a need for some flexibility.

"It may not be possible to anticipate every eventuality and cover it off in the agreement. But that doesn't mean you shouldn't try"

However, leaving matters to be agreed may be saving up trouble for the future and, in the worst case scenario, may involve expensive litigation to find out whether or not the terms are enforceable at all. Where possible, it is best to agree all important terms in advance. If matters are left to be agreed, the agreement should ideally set down clear criteria against which agreement is to be reached, or else some other machinery for resolving disputes in the event of a deadlock.

In *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] EWCA Civ 156 (considered here), the Court of Appeal held that a contract for the sale of goods which left matters, including certain charges and a shipping schedule, to be agreed was enforceable. The court was prepared to imply a term requiring the charges/schedule to be reasonable. Since the parties had agreed every other aspect of the contract including quality, specification and price, and had stipulated for the arbitration of disputes by a market tribunal, the court said it would be "almost perverse" to find that they did not intend to conclude a binding agreement, in particular where this formed an integral part of a wider overall transaction compromising an earlier dispute.

Similarly, in *Openwork Ltd v Forte* [2018] EWCA Civ 783 (considered here), the Court of Appeal held that a provision in a franchise contract that allowed for the clawback of commission in certain circumstances was sufficiently certain even though it did not specify exactly how the clawback was to be calculated. The court took as its starting point the principle that the court "should strive to give some meaning to contractual clauses agreed by the parties if it is at all possible to do so". It agreed with the judge that the parties' intention was reflected in a calculation on a straight-line basis over the relevant period.

"If your contract leaves matters to be agreed, don't assume you can get round it by refusing to agree – that may not be the case"

6. Promises on both sides

Unless it is by deed, an agreement will not be enforceable unless each party has provided "consideration" which means some sort of payment or value. Commercial agreements normally involve obligations being taken on by each party, and so questions of a lack of consideration rarely come up. However, problems may arise, for example, where a contract is being varied for the benefit of one or other party, who may not be taking on any additional obligations in return.

The law is not concerned with whether the amount of consideration offered is adequate by reference to the consideration received in return. Therefore, if there is any doubt, parties should ensure that a token consideration is paid (eg £1) or that the agreement is in the form of a deed so that no consideration is necessary.

7. Varying a contract

Where parties have entered into a contract, they can later agree to vary its terms. Most of the requirements for entering into a binding contract in the first place will also apply to a variation, such as whether the varied terms are sufficiently certain to be enforced (see section 5) and the need for consideration (see section 6).

As with entering into the original contract, there is no general requirement for particular formalities to be satisfied before a variation can take effect. So for example, assuming the contract is silent on the point, it is possible to vary a contract orally as well as in writing.

The contract may, however, contain a clause restricting the manner in which it can be varied – typically by stipulating that a variation will not be effective unless it is in writing and signed on behalf of both parties. This is sometimes known as a no oral modification (NOM) clause.

Until recently, there was concern that a NOM clause may not always be effective to prevent a subsequent oral variation of a contract. The Court of Appeal had taken the view that the oral variation could amount to an agreement to dispense with the NOM clause itself, and so would not prevent the variation taking effect.

The Supreme Court authority outlined on the right has, however, restored an element of certainty as to the effect of these clauses. Following that decision, NOM clauses will generally be given effect so as to prevent contracting parties being bound by a subsequent variation unless the specified formalities are complied with.

The law of estoppel may, however, come into play to prevent a party seeking to take unfair advantage of an opponent by inducing it to act on the contract as varied.

In *Rock Advertising Ltd v MWB Business Exchange Centre Ltd* [2018] UKSC 24 (considered here), the Supreme Court found that a NOM clause was effective to prevent amendments subsequently being effected orally.

The dispute arose in the context of a licence for office space. When the occupant (Rock) fell into arrears on the licence fee, the owner (MWB) terminated the agreement. Rock argued that the licence agreement had been varied orally to revise the payment schedule.

The Court of Appeal found that the oral amendment was effective despite the NOM clause. The Supreme Court unanimously overturned that decision.

The majority judgment, given by Lord Sumption, was based on the broad proposition that the law should and does give effect to contractual provisions requiring specified formalities to be observed for a variation, such as NOM clauses. Lord Briggs reached his conclusion on narrower grounds. In his view, a NOM clause would bind the parties unless waived expressly or by necessary implication – in the same way that a "subject to contract" can be removed.

The Supreme Court recognised the risk of injustice where a party acts on the contract as varied and then finds that it is not binding, but said the law of estoppel would provide a safeguard in appropriate cases. The court did not seek to define the circumstances in which such an estoppel would arise. However, it would require at the very least some words or conduct which unequivocally represented that the variation would be valid despite being agreed informally; the informal promise itself would not be sufficient for that purpose.

As noted above, a contractual variation will be binding on the parties only if it is supported by consideration.

There is a long established rule that the performance of a pre-existing obligation is not good consideration. A closely associated rule is that part payment of an existing debt is not good consideration for a promise to accept less than the full amount. This is referred to as the rule in *Foakes v Beer* after a 19th century case.

The rule about pre-existing obligations has been softened to some extent by case law which has held that an expectation of commercial benefit arising from the performance of the pre-existing obligation may amount to good consideration, even in the absence of some new obligation (see *Williams v Roffey* on the right).

"A variation is unlikely to be effective unless it complies with any formalities required by the contract"

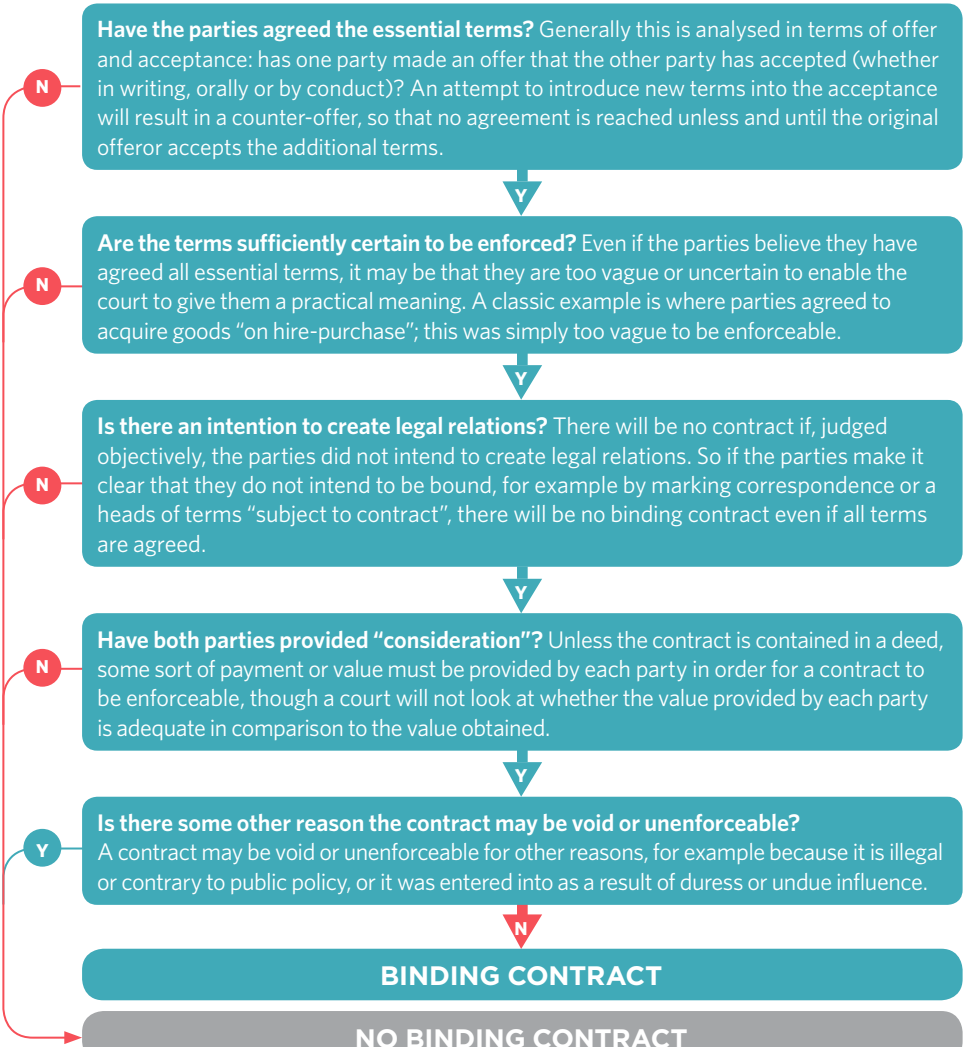
However, as Lord Sumption noted in *Rock v MWB* (considered above), the case law in this area is difficult to reconcile. He also suggested that the rule in *Foakes v Beer* is probably ripe for reconsideration by the Supreme Court.

As a practical matter, parties seeking to vary a contract should consider whether both parties are providing consideration in the form of new obligations. If one party is merely promising to perform its existing obligations, eg to pay part of what's owed, the variation may not be binding. If in doubt, consider recording the variation in a deed.

In *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, the claimant entered into a subcontract with the defendant main contractor to carry out carpentry work in a block of flats. The claimant got into financial difficulty because the agreed price was too low. The defendant agreed to pay an additional sum for each flat completed, hoping thereby to allow the claimant to complete the work and avoid the defendants triggering a time penalty clause in the main contract.

The defendants then failed to pay the additional sums and the claimant sued for payment. The Court of Appeal upheld the agreement to pay the additional sums, finding that a commercial advantage resulting from the promise to pay (here avoiding the time penalty) was capable of constituting consideration for it, so long as the promise to pay was not secured by economic duress or fraud.

Decision tree: Do you have a binding contract?



But remember the parties may have rights against each other arising in other ways, for example in tort (eg a claim for negligence) or in restitution (eg a claim for a "quantum meruit" for work completed).

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