"*Experienced solicitors, must be taken to know what the label means*" – English Court of Appeal emphasises the consequence of holding negotiations "subject to contract"

The judgment in the recent decision of the English Court of Appeal in *Joanne Properties Ltd -v- Moneything Capital Ltd and another*[1] ("**Joanne**") reaffirmed the position that once negotiations between the parties are commenced "subject to contract", this condition applies to those negotiations up until either a formal agreement is reached between the parties, or it is agreed that the condition should be removed.

The facts

The case resulted from a compromise of the respondent's (Moneything) action to enforce the security which it held over the claimant's (JPL) property. In compromising the initial action, the parties agreed that the property in question would be sold with the surplus proceeds "ring-fenced" and the distribution of the funds to be agreed between the parties. Initial correspondence between the parties' solicitors in respect of the "ring-fenced" £140,000 was marked as "subject to contract". Over the course of negotiations, the respondent's solicitors made an offer by email in respect of the sum with "mechanics and terms to be agreed", to which the claimant's solicitor replied "Agreed". Both the purported offer and acceptance read "without prejudice and subject to contract" in their subject line.

Subsequently, and before any such proposal was made or agreed, the claimant changed solicitors and took the position that there had been no agreement between the parties as the negotiations had been conducted "subject to contract". Despite the claimant's position, the respondent ultimately sought a Consent Order on the basis of the purported agreement.

Allowing the claimant's appeal of the High Court's decision that an agreement had been concluded between the parties, the Court of Appeal determined that the first-instance judge had undervalued the force of the "subject to contract" label on the legal effect of the negotiations.

In its judgment, the Court cited Lord Denning MR decision in *Sherbrooke v Dipple*[2]:

"But there is this overwhelming point: Everything in the opening letter was "subject to contract." All the subsequent negotiations were subject to that overriding initial condition."

The Court went on to cite the judgment in *Generator Developments Ltd v Lidl UK GmbH*[3], that the label "subject to contract" means:

"that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) that each party reserves the right to withdraw until such time as a binding contract is made."

The Court held that there was undoubtedly no express agreement between the parties that the subject to contract condition should be removed, nor was there any reason that such an agreement should be implied.

Irish Courts – subject to equity

The Irish Courts' approach in respect of negotiations conducted "subject to contact" has been consistent with that of the English Courts, as seen in the Supreme Court decisions in *Mulhall v. Haren and Boyle v. Lee*[4]. It should be noted however that that Irish Courts have, in specific circumstances, allowed equity to intervene where a party seeks to unconscionably rely on the "subject to contract" label, particularly where the Court has found that there was a clear intention to contract between the parties or where there has been some part performance of the obligations under that contract.

In *Prunty v. Crowley*[5], the Court refused to allow a developer renege on his offer, marked "subject to contract", to complete a transaction for the acquisition of lands entered into with his business partner if the landowner discontinued proceedings for specific performance of the deal.

Similarly, in JLT Financial Services Ltd v. Gannon[6], two landowners proposed to enter into transactions whereby Landowner A would acquire a neighbouring site from Landowner B and Landowner B would be granted a lease over other lands owned by Landowner A. Having concluded the lease to Landowner B, Landowner A sought to terminate negotiations, which remained marked "subject to contract", in respect of the acquisition of Landowner B's property. The Supreme Court upheld the decision of the decision of Laffoy J. in the High Court that Landowner B had performed their contractual obligation and that it would be "unconscionable and a breach of good faith" to allow the Landowner A to avoid, what the Court deemed, their contractual liability.

Key take-aways

The decision in Joanne serves as useful reminder of the fundamental principles of what has become "ordinary legal parlance". The significance of diligent drafting of correspondence is that contracts which are intended to be subject to agreement between the parties remain as such until such a time as the parties intend to enter into a formal agreement. While the Courts have shown a reluctance to allow parties to unconscionably rely on the label, it remains the case that:

"There must be a formal contract, or a clear factual basis for inferring that the parties must have intended to expunge the qualification"[7]

1 [2020] EWCA Civ 1541
2 (1981) 41 P & CR 173
3 [2018] EWCA Civ 396 [2018] 2 P & CR
4 [1992] 1 IR 555
5 [2016] IEHC 293 (High Court, O'Malley J, 30 May 2016)
6 [2017] IESC 70
7 Joanne Properties Ltd -v- Moneything Capital and another [2020] EWCA Civ 1541

Key Contacts

David Fitzgibbon
Partner
E: david.fitzgibbon@matheson.com
T: 01 232 3708

Thomas Burke
Solicitor
E: thomas.burke@matheson.com
T: 01 232 3782