English contract law and oral contracts

your word may still be your bond

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Verbal contracts have their place in English law

Whether it was American movie mogul Samuel Goldwyn or the Australian/Irish politician Bryan O'Loghlen who first said, 'A verbal contract isn't worth the paper it's written on', with all due respect, they did not have this quite right and recent case law confirms they actually had it quite wrong, at least under English law. A contract forms once the parties have, to all outward appearances, agreed the same terms on the same subject matter, normally through offer and acceptance *(Air Studios (Lyndhurst) Limited T/A Entertainment Group v Lombard North Central PLC [2012])*. However, many who negotiate commercial contracts often assume that there is a further requirement of formality and they are not bound unless and until the agreement is reduced to writing and signed by the parties. This is not true, oral contracts most certainly exist, and they are certainly enforceable with a few exceptions, and have been for a very great number of years.

No written agreement

The courts in England are not at all reluctant to find that binding contracts have been made despite the lack of a final writing and signature. Indeed, even in the narrow area where written and signed contracts are required (for example pursuant to the Statute of Frauds requirement that contracts for the sale of land must be in writing), the courts can find the requisite writing and signature in an exchange of emails.

Whether words and conduct were intended to create legal relations has to be judged objectively. Lord Clarke in *RTS Flexible Systems Ltd. v Molkerei Alois Muller GmbH [2010]* stated that "Even if certain terms of economic or other significance 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 precondition to a concluded and legally binding agreement.'

The sum of the whole

A summary of the principles of contract law were outlined by Lloyd LJ in *Pagnan SpA v Feed Products Ltd. [1987]*. These principles have been backed up in a wide series of case law since and are seen to apply to oral contracts as well. The principles conclude that the correspondence must be looked at as a whole and

that there may be an intention for a further condition to be fulfilled or term to be agreed, whether this renders the contract void until that point is to be viewed with regard to the intention of a reasonable man, versed in the business *(Bear Stearns Bank plc v Forum Global Equity Ltd. [2007])*.

The principle that parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled only forms an enforceable contract when the execution of the further contract is a condition or term of the bargain, if it is a mere expression of desire this will not suffice to form a contract. More recently, this principle was applied by the Court of Appeal in *Immingham Storage Company Ltd. v Clear Plc [2011]* where David Richards J outlined that the provision that a 'formal contract will then follow in due course' does not indicate that the claimant's acceptance of the signed quotation will be no more than an agreement subject to contract.

No agreement does not mean invalidation

If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty. It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left over. However, there is much debate over what is classified as 'essential' although it is accepted that the more important the term, the less likely it is that the parties will have left it for further decision.

The obvious practical lesson here is that, in negotiating contracts subject to English law, unless and until a party is ready in all respects to enter into a binding agreement, all written communications relating to negotiations and contractual terms should be consistently described as "subject to contract". One acts at their peril in disregarding this step as an antiquated or unnecessary formality. It is worth being wary of how you go about forming a contract as your oral dealings may not be interpreted in the way you may have suspected.

Perhaps the last word should go to Lord Mansfield as he cautioned in *Pray v Edie, [1786] T.R. 315*: 'As to the hardships upon foreigners, if they enter into contracts in England, . . . , they must submit themselves to be judged by the laws of this kingdom, and to our exposition of them.'