



## LEGAL BRIEFING

### *Raymond Bieber and others v Teathers Ltd (in liquidation)*

[2014] EWHC 4205 (Ch), His Honour Judge Pelling QC

#### *The Facts*

During 2001-2002 Teathers Ltd ('the Defendant') promoted a collective investment scheme in a TV production partnership that aimed to provide tax and income benefits to investors. When the investments failed a group of disappointed investors ('the Claimants') commenced proceedings claiming an aggregate sum in excess of £20m.

The trial was fixed to commence on 21 July 2014. Following an unsuccessful mediation on 21 May 2014, a series of commercial exchanges commenced between the parties' solicitors. In a letter dated 27 May 2014, the Defendant's solicitors offered a monetary settlement "subject to the agreement of final terms" but this was rejected by the Claimants.

In a letter dated 20 June 2014, the Claimants' solicitor made a full and final settlement offer payable within 28 days. The Defendant's solicitors responded on 23 June with a counter-offer also expressed to be in full and final settlement and payable within 28 days.

Between 24 and 26 June 2014 there were further exchanges all of which focused on the sum to be paid to the Claimants without indicating any additional settlement terms. The Defendant made a final offer on 26 June 2014 and after some deliberation, on 29 June 2014 the Claimants' solicitor emailed the Defendant's solicitor stating that the Claimants would accept the offer and that a draft consent order would follow. The Defendant's solicitor responded by email stating "Noted, with thanks".

The Claimants' solicitor submitted a draft Tomlin order but the Defendant's solicitors responded with a detailed draft settlement agreement that amongst other things sought an indemnity from the Claimants to cover third party claims against the Defendant.

The Claimants subsequently sought a declaration that a binding agreement had been reached on 29 June 2014. The Defendant disputed this arguing that the parties had reached agreement on the understanding that comprehensive settlement terms would still have to be agreed.

#### *The Issues*

First, did the exchange of emails between the parties' solicitors on 29 June 2014 amount to a binding settlement?

Second, if there was a binding agreement, was this agreement in substance still subject to contract?

#### *The Decision*

On the first issue the Judge reviewed the relevant principles established by the authorities namely that:

(i) whether or not an agreement has been reached will be determined by objectively considering the whole course of the parties' negotiations;

(ii) once the parties have to all outward appearances agreed on the same terms concerning the same subject matter then a contract will have been formed even if it is understood that a formal agreement will be subsequently entered into that records and/or adds to the terms agreed; and

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(iii) whether or not the parties intended to be bound immediately or only when a formal agreement has been executed depends upon an objective appraisal of their words and conduct.

Following a detailed review of the exchanges during May and June 2014, the Judge concluded that there was no evidence to support the Defendant's contention that the parties had ever had in mind a two stage negotiation i.e. that the initial agreement on money would be subject to subsequent agreement on detailed terms. The Judge noted for example that the Defendant had not at any stage sought to reserve its position, either generally, nor specifically in relation to the indemnity against third party claims that the Defendant demanded post 29 June 2014.

On the second issue the Judge said that during May and June there was no indication from either party that issues of substance remained to be agreed after the exchange of emails on 29 June. Looked at objectively the exchanges preceding 29 June made it clear that the parties intended to reach a final and binding agreement. Whilst the Claimants' solicitor had proposed a consent order this would be required only for the purposes of carrying the 29 June agreement into effect (and for lodging with the Court). There was no suggestion that the 29 June agreement was conditional upon finalising the terms of the consent order. Hence the 29 June emails could not be said to be "subject to contract" exchanges.

#### *Commentary*

If a settlement offer is intended to be conditional upon the conclusion of written terms, this must be made clear at the time the offer is made, ordinarily by stating that terms remain to be agreed and making the offer "subject to contract". As in this case, omission of the words "subject to contract" will not automatically doom any argument that the offer is conditional. What matters is the overall context of the settlement exchanges, when viewed objectively.

Ted Lowery  
February 2015

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