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KEY CONTRACT CASES LEARNINGS FROM 2017

March 2018

Case	Background & Key Principles	Drafting Tip
MACINNES V GROSS [2017] EWHC 46 AND BLUE V ASHLEY [2017] EWHA 1928	These two cases concerned whether there was an intention to form a legally binding contract based solely on an oral agreement. For a contract to be legally binding, there must be an offer, acceptance, consideration (money or money's worth), certainty of terms and the intention to form a legally binding agreement. Therefore, a contract cannot be made without these requirements. Both the cases concerned an oral agreement made in an informal setting, with the claimant alleging that a legally binding oral agreement had been made. The contract in Blue v Ashley was alleged to have been made over drinks in a pub, while in MacInnes the contract was said to have been formed over dinner at a restaurant in Mayfair. In Blue v Ashley, the purpose of the event was to introduce Mr Ashley to prospective corporate brokers for Sports Direct and for Mr Ashley and Mr Blue to meet other industry traders to build a commercial relationship. Mr Blue contended that Mr Ashley agreed to pay him £15 million if the share price for Sports Direct reached £8 per share. Once the share price reached £8 per share, a year and half later, Mr Blue alleged that he was now entitled to the £15 million. Mr Ashley failed to pay. In MacInnes v Gross, Mr MacInnes argued that during the meeting he agreed that he would leave his job and help Mr Gross grow his business, in exchange Mr MacInnes would receive 15% of any difference achieved between the target and actual sale price of Mr Gross's business. The same evening Mr MacInnes emailed Mr Gross and referred to having 'agreed on headline terms'. A written contract was never agreed, and after the business was sold, Mr MacInnes demanded £15 million in payment. The High Court held in both occasions that there was no contract. The	When negotiating a contract, take care to ensure all discussions are accurately documented and detailed to avoid any form of uncertainty. In the absence of a written agreement, the burden of proof is substantial for the party seeking to assert a contractual relationship. Avoid using informal settings to agree on important terms of a contract such as headline terms as two different parties at the same meeting may leave with very different perspectives as to the nature of the discussions. Simply making a contemporaneous note recording the discussions may not be adequate evidence of a finalised contract. Summary of legal concepts involved in forming a legally binding contract: **Offer**: An offer is a promise by one party to enter into a contract on certain terms. It must be: – specific; – complete; – capable of acceptance; and – made with the intention to be bound by acceptance. **Acceptance:** A binding contract is formed when an offer is made and accepted. The time and place where the offer is accepted determines the point in

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fact that negotiations took place over an informal setting and lack of written confirmation did not automatically preclude the contract being legally binding, as a contract can be made anywhere. However, factors such as the setting, purpose of the meeting, commercial reasoning and nature and tone of the conversation is scrutinised to determine the parties' intention to create legal relations.

Principle: In determining intentions to create legal relations, the governing criteria is ultimately reviewed from the perspective of the 'reasonable expectations of honest and sensible business men'. The court will not imply a party's intention to create a legally binding contract lightly.

time a contract becomes legally binding.

Consideration: contract law is based on the principal of reciprocal obligations on the parties to a contract. What this means is that parties must receive valuable consideration, i.e. money or money's worth. The amount of consideration is not important, but it must have some value even if it is does not seem adequate. For example, when a party agrees to amend a contract where there is no advantage for them, consideration can be included by for example, the payment of £1. However, consideration is not needed if it is made as a deed.

Intention to create legal relations: A contract cannot be made without a mutual intention to create a legally binding agreement, this is generally presumed in all commercial situations. There has been a rise in cases concerning whether a serious offer has been made and whether or not the offer expressed a willingness to be legally bound. There may be circumstances when a person uses the language of an offer but does not express a genuine willingness to be bound, such as in the case of Blue v Ashley and MacInnes v Gross. A legal agreement formed in a social context tends not to suggest an intention to create legal relations.

Certainty of terms: for a binding contract to form, key terms must be agreed upon, such as price or delivery date. The agreement must also not be otherwise uncertain or vague.

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TEEKAY TANKERS LTD V STX OFFSHORE AND SHIPBUILDING CO LTD [2017] EWHC 253 (COMM)	This case concerned whether the court would imply essential terms into a contract to give effect to the parties' intention to enter into a legally binding agreement. The parties entered into shipbuilding contracts for the construction of four tankers, to be completed by the STX Offshore and Shipbuilding Co (the "**defendant**"). An option agreement was also agreed, which provided for Teekay Tankers (the "**claimant**") to have the option to order more ships. A dispute arose as to the completion and termination of the contract and option agreement. The option agreement provided for the delivery date of the ships to be 'mutually agreed' and that the defendant would use their 'best endeavours' to deliver the ships within a certain time period. The court considered the following three issues: (1) whether the clause was enforceable or void for uncertainty; (2) if it was unenforceable, whether a term could be implied to aid certainty; and (3) the impact of the phrase 'best endeavours'. The court held that despite clear intentions to create a legally binding contract, it was void for uncertainty as implying a date for delivery would be inconsistent with the express wording of the mutual agreement clause. Although the Claimant tried to overcome the uncertainty by arguing that the best endeavours clause would kick in, the effect was that there was merely an agreement to agree on an essential term. **Principle:** The court will not imply terms into a contract that would be inconsistent with the express terms of the parties' agreement, even if the insertion of the term is based on reasonableness.	Care should be taken when drafting a contract and using vague terms like 'mutually agreed' or agreeing to use 'best endeavours' as they are inherently uncertain and may not have the desired effect intended. As mentioned above in the practice point, a contract can only be formed if essential terms are not missing, i.e. ensure all key terms are agreed. There is a difference between relying on best endeavours to achieve a certain result verses agreeing to use best endeavours to reach agreement on an essential term. For example, agreeing key terms at a later date can have the effect of amounting to no more than an agreement to agree.

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ABBOT V RCI EUROPE [2016] EWHC 2602 (CH)	This case considered the circumstances in which broadly worded terms will be unfair in a contract as to create a significant imbalance in the parties' rights and obligations. The case involved a scheme for exchanging weeks at timeshare properties. The Claimants were members of the scheme and the defendant was the operator, RCI. The scheme contained a very wide discretion as to how weeks in properties were traded. In summary, the Claimants alleged that RCI had misinterpreted the nature of its exchange programme, renting out members' timeshare usage rights to people outside the scheme pool, effectively reducing the opportunity for members to make exchanges. The terms of the clause (the **"permitted user clause"**) stated that once a member deposited their timeshare rights into the exchange pool, they relinquished all rights to use them and agreed that RCI could use them without restriction. The Claimants argued that the permitted user clause breached the unfair contract terms act as it caused a significant imbalance in the parties' rights and obligations. The Claimant also relied on the use of implied terms, breach of fiduciary duty and misinterpretations. The High Court dismissed all claims. The judge found that the clause did not create a significant imbalance in the relationship between the parties as both statutory and common law had the effect of preventing a wide contractual discretion from being unfair. The judge considered the following in relation to implied terms: (1) there is a statutorily implied obligation that RCI provide its services with reasonable care and skill; and (2) under common law RCI could not use its discretion as to the operation of the exchange system arbitrarily, capriciously or	Terms allowing for business discretion should only be included, and exercised, with caution. To avoid uncertainty, include for example, the minimum or maximum range of discretion that is expected. Practice Note: this reasoning may be at odds with the Competition and Markets Authority **("CMA")** guidance as they suggest terms that reserve a wide discretion to the trader may be unfair. However, it is a reminder that the CMA's views are only guidance and ultimately it is for the courts to interpret and apply the laws.

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	unreasonably. **Principle:** A term allowing for business discretion will only be found to create a significant imbalance if the alleged unfair term places the consumer in a legal position less favourable than that provided by national law. Moreover, an obligation to act in good faith may be inferred in an implied obligation to exercise reasonable discretion.	
GLOBAL ASSET CAPITAL, INC V AABAR BLOCK S.A.R.L. [1]	This case concerned whether a contract had come into existence during an exchange of communications. During negotiations of contracts, a common tactic employed to prevent a contract from being formed to early is to mark the correspondence as 'subject to contract'. Global Asset Capital **("Global")** an American private equity fund, tried to purchase a package of rights and debt interests from Aabar Block **("Aabar").** The respondent's, Global, sent to the appellants, Aabar an offer letter labelled 'without prejudice - subject to contract' **(**the **"Offer Letter")** setting out proposed contractual terms. Global argued that during a subsequent telephone call the contract was concluded, subject to two conditions. The first required Global to re-send the Offer Letter in an 'open and binding form' and that Global provide satisfactory evidence of their ability to fund the purchase. Three days after the telephone call, Global emailed Aabar two letters described as 'binding and committed letters of finance'. The first letter confirmed key commercial terms set out in the Offer Letter but also included a few changes. The second letter was a letter of finance confirming Global's ability to pay. Global contended that a contract had been formed during the telephone	All communication and travelling drafts while being negotiated should be clearly labeled 'subject to contract' to ensure all written contractual terms will come into effect at the intended time in one contractual document. Be aware that 'subject to contract' is not definitive in determining whether a contract is intended to be binding or not. The court will consider the parties conduct as a whole, for example, a party may have unknowingly waived the 'subject to contract' intention by performing any of their obligations under contract. Be aware that the court will take into account key terms that have been accepted or not yet agreed in any offer letter or alleged contract such as providing deadlines for acceptance of an offer or exclusivity periods in which negotiations with third parties have taken place.

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call as the two conditions required had been met. Aabar disagreed, stating that no contact had been accepted. Global therefore issued a claim against Aabar for a declaration that the alleged contract was valid and binding and for specific performance.

The question for the courts was whether they could consider the events after the telephone conversation in deciding whether a contract had been concluded.

The Court of Appeal held that a contract had not been concluded during the telephone call, as this was inconsistent with the parties' subsequent communications. The court held the following:

(1) that the immediate communications following the telephone call should be taken into account when determining whether a contract had been formed;

(2) the general principle that the court cannot interpret the meaning of the words in a contract by reference to subsequent events, is not relevant when considering whether a contract has been formed. The principle is only relevant after a contract has been formed; and

(3) the general principle that once a contract is complete, further negotiations between the two parties can only negate an earlier contract if both parties consent only applies if a contract has been formed.

Principle: The court will consider the whole course of negotiations when deciding whether a contract has been formed during negotiations to avoid a misleading impression that an agreement has been reached, irrespective of whether the contract is concluded orally, written or by conduct. In considering 'subject to contract' offers, the court will not lightly infer acceptance without clear agreement from both parties.

Ideally parties should agree all the key terms and document them by signing a written contract. There is no general requirement for a contract to be written but it is easier for both evidential purposes and clearer understanding between the parties as to what has been agreed or not.

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TRADITION FINANCIAL SERVICES V GAMBERONI & OTHERS [2017] EWHC 768	This case considered the reasonableness of a six month non-compete clause in an employee's contract. The general principle is that employers should ensure post termination restrictions like non-compete and non-solicitation clauses in an employee's contract are reasonable in the circumstances. A junior inter-dealer broker signed a contract of employment that restricted him from competing with his employer for six months after leaving the business. The clause also allowed for the employer to put him on garden leave while still employed, however, this could not be set off against the six months non-compete unless it lasted more than three months. The effect of these terms meant that if his garden leave did not last longer than three months, he could be prevented from working for their competitors for a total of nine months. When the employee gave notice to leave, he was not put on garden leave but given three months' administrative work instead. After three months' the employee started working for a competitor. His employer applied for an injunction requiring him to comply with the non-compete clause. The High Court held that the clause was not unreasonable as the employer would not be adequately protected by a shorter non-compete clause as the employee was a member of a small community of business people, in which personal relationships were key to establishing work. A 9-12 month non-compete clause was a reasonable pre-estimate of time it would take for the employer to safeguard its clients and find a replacement. **Principle:** There is scope for an extended non-compete clause after a period of garden leave being validly imposed on a junior employee. The court will assess the whole period of restriction to determine if it is no	Employers must ensure that non-compete and other restrictive covenants in an employee's contract are reasonable or there is a great risk that the clause may be unenforceable. A widely restrictive covenant may still be enforceable if it follows industry standard and basic principles of reasonableness in relation to a business's particular circumstances. The length of time that a restrictive covenant is considered reasonable will depend on various factors so a 9-12 month post-termination non-compete clause will be acceptable in the right situation if it is necessary to protect a legitimate business interest. For example, if the non-compete is designed to protect valuable information the reasonable duration is for the time the information has value. Or as in the situation in Gamberoni, if the non-compete is needed to safeguard client relationships post termination. Therefore, when considering the reasonableness of duration for a restrictive covenant it should be drafted to reflect the commercial circumstances of the employee's position and the employer's business. As a rule, non-compete covenants are permitted for a maximum of 12 months.

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	wider than necessary to protect an employer's legitimate business interests. Various factors will be considered when determining the reasonableness of a non-compete clause, for example, industry standards, nature of employee's role, client connections and time needed to find a replacement.	
PERSIMMON HOMES LTD AND OTHERS V OVE ARUP & PARTNERS LTD AND ANOTHER [2017] EWCA CIV 373	This case considers the courts contractual interpretation of exclusions/limitations of liability in tort. Traditionally, the courts have favoured a very strict interpretation of clauses purporting to exclude liability for negligence. Any ambiguity in non-negotiated contracts have been generally resolved against the party relying on them (the contra proferentem rule) and that clear words are required to exclude liability for negligence (**the "Canada Steamship[1] guidelines"**). However, more recently the courts have begun to favour a more relaxed approach in some cases where there has been a fully negotiated commercial contract between parties of equal bargaining power. Persimmon Homes Ltd, Taylor Wimpey UK Ltd and BDW Trading Ltd (the "**Developers**") formed a consortium to successfully bid for and purchase an industrial site in Wales, with a view to its development. The Developers engaged Ove Arup & Partners Ltd and Ove Arup & Partners International Ltd (**"Arup"**), an engineering and environmental consultancy service to assist with site investigations advising on environmental and pollutant contamination. The developers sought to claim against Arup following the discovery of asbestos on the site. However, the agreement contained an exemption clause that stated "Liability for any claim in relation to asbestos is	A simply drafted exclusion clause may be enough to exclude liability for negligence if it is clear and unambiguously worded. However, the court will most likely take into consideration how the risk is allocated between the parties, looking at risk and insurance provisions to ascertain the parties' true intentions. Therefore, if a contractor or consultant is taking on a higher level of risk, it is entirely reasonable to increase fees in order to cover the added risk taken on. However, the safest way to exclude 'negligence' is to mention it expressly among the liabilities that you wish to exclude to avoid any doubt.

[1] R v Canada SS Lines Ltd [1952] AC 192

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	excluded". The issue for the Court of Appeal was that if there is no express reference to excluding negligence, were the words used wide enough to cover negligence. **Principle:** The Court of Appeal held that the simply worded exclusion clause was adequate to exclude all liability, including liability for negligence. The court drew a distinction between indemnity and exclusion clauses holding that a plain exemption clause without reference to negligence may exclude liability for all claims, whether arising from negligence or not in situations of equal bargaining power. The court commented that exemption clauses are part of the 'contractual apparatus for distributing risk' and will look at the remainder of the contract, in particular the relevant risk and insurance provisions. Contractors and consultants who accept large risks will charge for doing so and will most likely take out the appropriate insurance. And those who accept lesser degrees of risk would reflect that in their fees. In regards to interpreting indemnity clauses, the Canada Steamship's stricter guidelines are more relevant. This means the court will still consider whether the words used were wide enough to cover negligence and if so, whether the heads of damage may be based on some ground other than negligence. A more simply worded indemnity clause attempting to exclude liability may therefore, not be enough to exclude liability for negligence without expressly referring to negligence. Moreover, the court confirmed that the contra proferentem rule was not relevant as the meaning of the clause was clear and not ambiguous. The rule now has a very limited role in the interpretation of commercial contracts negotiated between parties of equal bargaining power.	
ROYAL DEVON AND	This case considered the meaning of a contractual limitation of liability	Ensure bespoke liability clauses and caps on liability

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EXETER NHS FOUNDATION TRUST V ATOS IT SERVICES UK LTD [2017] EWCA CIV 2196	clause. The Royal Devon and Exeter NHS Foundation Trust (the **"claimant"**), entered into a contract with ATOS IT Services UK Limited (the **"defendant"**) for the provision of a computer system enabling, among other things, electronic document management and scanning. The claimant alleged defects in the system, which it claimed the defendant had not remedied, and terminated the contract. The claimant argued that although the contract contained a provision limiting the liability of the defendant for all defaults under the contract, the provision was unenforceable for ambiguity or uncertainty. Moreover, they argued that the liability cap was not capable of being properly construed as it was not clear whether there was a single aggregated cap calculated by reference to a claim or whether there was a separate cap for each claim that arose. The issue for the courts was what was the natural meaning of the words used, applying the objective test of a reasonable person who had all the background knowledge of the parties. **Principle:** The courts considered the natural meaning of the words that 'yielded the least bizarre consequences' and held that there were two separate caps. The court said that this interpretation made the most commercial common sense. Although the terms where poorly drafted, they were 'perfectly rational'.	are drafted as clearly as possible, particularly if multiple versions are created during negotiations. Try working through several scenarios to ensure both parties have the same understanding of the legal effect of what exactly is being agreed. Consider the following when drafting a liability clause: – risks each party will accept without limits such as fraud or death caused by negligence; – risks each party accepts with a cap. This could be a list of all the liabilities subject to a cap or simply a total cap on all liability. Make sure that if using different caps that it is clear when the different caps apply; and – risks each party wholly excludes. Consider excluding any losses relating to risks that are out of your control or risks that the party can insure against.
WOOD V CAPITA INSURANCE SERVICES LTD [2017] UKSC 24	This case considered the principles governing the contractual interpretation of express terms of written contracts. Capita Insurance Services LTD (the **"appellant"**) entered into a share purchase agreement (the **"SPA"**) with Mr Wood (the **"respondent"**) for the acquisition of a specialist insurance company. The SPA included	This case highlights the importance of precise and careful drafting as the court will not improve a party's bad bargain by reading in words when interpreting the language of the contract. Ensure your contract reads as a cohesive whole. As

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	several warranties and an indemnity, all intended to protect the appellant from any miss-selling claims from customers. The clause covered loss by miss-selling only where such loss followed or arose from a claim or complaint from a customer to the Financial Services Authority (**"FSA"**) (now the Financial Conduct Authority). However, shortly after the acquisition it was discovered that the company had possibly miss-sold insurance to customers. The findings were reported to the FSA who ordered a remediation scheme be put in place to compensate affected customers. The clause was badly drafted and thus left up to interpretation. The appellant argued a broad interpretation of the clause that allowed it to recover compensation for the scheme. However, under the restrictive interpretation put forward by the respondent, the appellant could not recover under the indemnity unless there had been a claim made against the Company. **Principle:** The Supreme Court held on proper construction that no liability could arise unless either a miss-selling claim had been made against the company or a complaint had been registered with the FSA by a customer. The indemnity did not apply where the company referred itself to the FSA. While this case considered the specifics of an indemnity clause, the Supreme Court made a number of rulings on the interpretation of clauses generally. Courts will look to both the language of the clause (textualism) and the commercial context in which it was drafted (contextualism) for determining the objective meaning of the language chosen by parties within an agreement. The extent to which each tool is used will vary according to the circumstance. For example, where parties are more sophisticated and professionally advised, greater emphasis will be given to textual analysis. Conversely, the commercial context may have more emphasis where the agreement is more informal.	in this case, had the indemnity stood on its own it may have been given a more liberal approach but when read together with the warranties, the commercial context suggested more specific circumstances in which the indemnity would be triggered. Consider explaining the commercial or factual background of an agreement by making use of the recitals and acknowledgement provisions. This could be particularly useful when drafting if the agreement contains an onerous or unusual provision.

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ASTOR MANAGEMENT AG & ANR V ATALAYA MINING PLC & ORS [2017] EWHC 425 (COMM)	This case concerns when an 'all reasonable endeavours' obligation was unenforceable. Astor Management entered into an agreement with Atalaya Mining, where Atalaya wished to buy Astor's interest in a dormant copper mine in exchange for payment by way of deferred consideration. The agreement contained an undertaking given by Atalaya to use 'all reasonable endeavours' to obtain a senior debt facility and to the restart the mine on or before the 31 December 2010. Under the agreement, the first instalment would only become payable once Atalaya had received all necessary permits to restart the mining activities and could draw down on the senior debt facility. Atalaya raised the necessary funds by issuing shares through its parent company, instead of obtaining a senior debt facility. They also received the necessary permits for the mine, and mining was restarted. Astor subsequently requested payment however, Atalaya argued that as they had not raised the money by a senior debt facility, deferred consideration was not payable. The question for the court was whether there was a legally enforceable obligation to use 'all reasonable endeavours' to obtain the senior debt facility and if so whether that had expired on 31 December 2010. **Principle:** The courts held that the 'all reasonable endeavours' undertaking in the agreement was enforceable. The court found that the obligation did not end on 31 December 2010 as this was merely a target date. The obligation continued and Atalaya was then required to use 'all reasonable endeavours' to obtain the facility as soon as practicable after the target date. Nevertheless, based on the facts of the case the court found that Atalaya was not in breach. The parties' commercial financial interests were	Parties should expressly set out what reasonable endeavours obligations actually entail. In order to achieve the aims and intentions of the parties when drafting contracts, the parties should make sure that they clearly identify what each party is required to do. This should include among other things detailed specific steps to be taken, how long the obligation lasts, whether the end result could be obtained through any other means other than required by the undertaking and consequences of failure.

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	relevant to an extent and taken into consideration. In regards to good faith, the court commented that as the agreement contained an obligation to use all reasonable endeavours, there was no scope or need to imply a duty to act in good faith as this was already encompassed in the express obligation. Moreover, it was found that there was no 'principle of futility', that enabled a contractual precondition to the accrual of a right or obligation to be disapplied, just because Atalaya obtained funding by other means as compliance would have served no useful purpose.	

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CONTACT

EMMA CLEVELAND

Managing Director

+44.79.6387.8756
ecleveland@cleveland-co.com
www.cleveland-co.com