Commercial negotiations, draft contracts and the formation of a con-tract (Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH)

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Commercial analysis: In Rotam Agrochemical, the High Court considered the familiar problem: at what point in commercial negotiations will a binding contract be concluded? Ultimately, that will depend on whether and when the parties' communications, by words or conduct, led objectively to the conclusion that they intended to be bound and had agreed the terms that they regarded as essential. This case demonstrates that, in principle, the parties may intend to enter into an earlier, preliminary contract while negotiating a complex, commercial contract, and when one party sends a draft contract which provides for signature, that signature may not be vital, and the offer may be capable of acceptance by other means. For contract draftsmen, clearly expressing when a contract is intended to be binding pro-vides the surest protection against the possibility of a contract being formed before the intended time. Written by Seb Oram, barrister at 3PB Barristers.

Rotam Agrochemical Co Ltd and another v GAT Microencapsulation GmbH [2018] EWHC 2765 (Comm)

What are the practical implications of this case?

When one of the parties pulls out of negotiations before a contract has been signed, particularly after one or both parties has started to perform the intended contract, the problem described above will be particularly acute. The judgment collects and considers a number of relatively recent appellate authorities as to:

- how the court will assess the parties' conduct to determine if a contract has been formed (*RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14)
- whether a draft contract that provides for signature can be accepted by another means (*Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWCA Civ 1334), and
- the scope and effect of contractual clauses that prevent variations occurring orally (*Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24)

For lawyers and their clients, the following themes can be extracted:

- where one of the parties has communicated its desire to be bound only when a formal contract is signed, the court will not lightly infer acceptance of a contract (including a preliminary 'heads of terms' contract) at some earlier stage
- the more complex the subject matter of the contract, the more likely the inference that the parties will not intend to be bound until a written draft has been produced on which they can take legal advice
- agreement is less likely to be found if agreement on significant commercial terms remains outstanding, and
- if a draft agreement is circulated that provides a space for signature, the annexation of a signature is not usually (unless the draft so provides) the only method by which it can be accepted—however, the parties' dealings may give rise to an understanding that this is the prescribed (and only) form of acceptance

What was the background?

The claimant (Rotam) wished to collaborate with the defendant (GAT), an agrochemical company, in relation to the production of an agricultural herbicide. GAT had developed a particular formulation of the active compound, known as 'microencapsulation.' The case concerned two aspects of the parties' attempts to commercialise that product:

- a data transfer agreement—to place the product on the EU market, a prospective seller needed to obtain regulatory approval. The process of obtaining data for that approval could be expensive, but GAT had already gathered some of the necessary data for its microencapsulation formulation when obtaining national registration in Romania. Rotam wished, first, to agree the terms on which it could receive and make use of GAT's data for that purpose, and
- a collaboration agreement—secondly, the parties sought to negotiate a further agreement providing for long-term collaboration for the joint development of chemical products, including GAT's microencapsulation formulation

The parties began discussing a possible collaboration in January 2009. GAT's minutes of various meetings made clear that 'Only written and signed agreement(s)…between Rotam and GAT shall become binding' and that no warranty was given before that time. The judge found that, to Rotam's knowledge, this reflected GAT's strict attitude to the documentation of contracts. In July 2009, the parties entered into a written confidentiality agreement relating to the supply of GAT's know-how in the formulation to Rotam. The confidentiality agreement contained a clause that no amendment, variation or waiver of it would be effective unless in writing.

In subsequent negotiations, various drafts of a collaboration agreement were exchanged. Thereafter, the parties undertook some acts that were referable to the intended agreement (eg GAT disclosed the recipe for, and samples of, its formulation—Rotam paid almost €300,000 for use of GAT's data). After half of that payment was made, the parties negotiated a 'data transfer agreement' which was intended to regulate the basis on which the data had been provided. Rotam supplied a draft data transfer agreement which, after some redrafts, Rotam signed and supplied to GAT in August 2012 for its signature.

In December 2012, GAT was the subject of a corporate buyout and discontinued the negotiations. The draft data transfer agreement had not been signed by GAT, and the collaboration agreement had not advanced beyond the exchange of various drafts. Rotam nonetheless contended that:

- 'core terms' of a collaboration agreement had been agreed orally at a meeting on 30 August 2010, by which the parties intended to be bound even though the detailed terms of a written contract had not been agreed, and
- a contract on the terms of the draft data transfer agreement, which it had signed (but GAT had not), had been concluded around 20 August 2012

What did the court decide?

(1) No 'core terms' of a collaboration agreement were agreed orally

Applying established authority, whether there was a binding agreement depended on whether the parties' communications (by words or conduct) led objectively to the conclusion that:

- they intended to create legal relations, and
- they had agreed on all the terms which they or the law regard as essential

Here, the court found that the parties had not intended to enter into an oral contract.

The chain of reasoning contains helpful reminders that:

- it is possible, in principle, that the parties will intend to be bound by some preliminary agreement while negotiating a long-form agreement. That depends on the same principle: the (objectively-assessed) intention of the parties (at [143])
- in deciding whether a contract has been formed, it is necessary to consider communications subsequent to the date of the alleged contract (at [140]–[141]). No distinction is drawn here between oral and written contracts. Post-contractual conduct is relevant in determining the existence or terms of both, but recall that such evidence cannot be used as an aid to interpreting (as opposed to identifying the terms of) a written contract (*Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37 at [28]–[37]—*Maggs v Marsh* [2006] EWCA Civ 1058 at [21]–[26]), and
- for negotiations to be 'subject to contract,' that does not need to be expressly stipulated. Where it is not, it is a question of construction. Indicators of negotiations being impliedly subject to contract include providing a draft agreement with an invitation to sign and return it,

the parties contemplating that they would obtain legal advice, and the complexity of the subject matter of the contract (at [142]). One might add a further factor, being the instruction of solicitors to conduct the negotiations

Rotam's claim that a 'core terms' agreement had been formed orally at one meeting was rejected. It had known of (not least from GAT's minutes of earlier meetings), and had not challenged, GAT's understanding that any binding contract had to be the subject of a formal written agreement. The collaboration agreement was bound to be a complex one, on which they would wish to take legal advice. Moreover, the negotiations had continued after the critical meeting, and it was of some significance that the attendees at that meeting were not the senior management who would have signed the written agreement. That suggested that it was not the parties' intention to conclude any contract at that meeting. Finally, even after the meeting, there were significant commercial issues that remained unresolved, which the parties intended (objectively) as essential to any contract.

(2) No contract on the terms of the draft data transfer agreement

The fact that a draft agreement provides a space for signature does not make it a prescribed (ie the only) form by which it is capable of acceptance. For that to occur, there must be some consensus between the parties, whether within or outside the draft agreement (see *Maple Leaf* at [16], applied in *Rotam Agrochemical* at [172]–[173]). Nonetheless, the parties' previous relationships had demonstrated that they understood that a contract would not have been binding until that point. Rotam had paid the data transfer fee in anticipation of a contract, but not in the belief that it had already been formed.

(3) The effect of the no-variation clause (NVC) of the confidentiality agreement

In obiter comments, the court rejected GAT's contention that the NVC was a complete answer to Rotam's claim that a collaboration had been formed orally. The two agreements dealt with different subject matters. Of more interest is that, if an NVC contained in one agreement was to have the effect of governing how a subsequent contract needed to be formed, the relevant term would have to be in clear words (at [137]). The court left open whether such a clause would be treated similarly to the 'no oral variation' clause in *Rock Advertising*.

Case details

- Court: High Court, Queen's Bench Division, Commercial Court
- Judge: Butcher J
- Date of judgment: 25 October 2018

Seb Oram is a barrister at 3PB, and a member of LexisPSL's Case Analysis Expert Panel. Suitable candidates are welcome to apply to become members of the panel. Please contact caseanalysis@lexisnexis.co.uk.

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