Commercial negotiations and draft contracts: the formation of a binding contract

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The *Rotam Agrochemical Co Ltd v. GAT Microencapsulation GmbH* decision

1. In commercial negotiations, a contract will generally be formed at the point when the parties: intend (objectively) to be bound; and have agreed the terms that they regard as essential. In Rotam Agrochemical Co Ltd v. GAT Microencapsulation GmbH [2018] EWHC 2765 (Comm) the Court considered whether the parties' negotiations had resulted in a binding contract.

2. In principle the parties may, while negotiating their detailed agreement, intend to enter into an earlier, preliminary contract. Further, 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. In practice, however, the parties' dealings, particularly where the subject matter of the contract is complex, may readily justify the inference that they only intended to be bound when a written contract was signed.

3PB's Analysis

3. **The Facts.** 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.

4. *(1) A data transfer agreement.* In order to place the product on the EU market, a prospective seller needed to obtain regulatory approval. The process of obtaining data needed for that approval could be expensive, but GAT had already gathered some of it when obtaining national registration in Romania. Rotam wished, first, to agree terms on which it could receive and make use of GAT's data for that purpose.

5. *(2) A collaboration agreement.* Secondly, the parties wanted to negotiate a further, wider agreement providing for long-term collaboration for the joint development of chemical products, including GAT's microencapsulation formulation.

6. 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, that reflected GAT's strict attitude to the documentation of contracts.

7. In subsequent negotiations, various drafts of a collaboration agreement were exchanged. Thereafter, the parties undertook some acts that were referable to the intended agreement (*e.g.* GAT disclosed the recipe for, and samples of, its formulation; Rotam paid almost €300,000 in order to be able to use 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. GAT did not return it.

8. **The claim.** 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: (i) 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; (ii) 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.

9. **The decision.** Rotam's claims in contract were dismissed.

   9.1. Objectively, the parties had not intended to create legal relations at the relevant meeting, and they had not agreed all the terms of the collaboration agreement that they considered essential.

   9.2. In relation to the data transfer agreement, the parties had proceeded on the understanding that it would not be binding until signed by both parties, and it had not been.

10. **The reasoning.** On established authority, whether there was a binding contract depended on what was communicated between the parties, and whether that led objectively to a conclusion that the parties intended to create legal relations, and had agreed upon all the terms which they regarded (or the law requires) as essential for the formation of legally binding relations (at [139]-[140]).[1]

11. The Court accepted that parties can, in principle, agree to enter a binding, preliminary agreement (*e.g.* heads of terms) pending the formalisation of a detailed contract (at [143]). It also accepted that in order to determine the critical question, it was necessary to consider all the parties' communications, including those subsequent to the date of the alleged contract (at [141]). (That applies both to oral and written contracts; post-contractual conduct is relevant to determining the *existence or terms* of both. But such evidence cannot be used as an aid to *interpreting* a written contract.[2])

12. **No collaboration agreement reached at meeting.** The Court noted that commercial discussions could be '*subject to contract*' without the parties *expressly* stipulating for that (at [142]). Here, Rotam knew of, and had not challenged, GAT's understanding that any binding contract had to be the subject of a formal written agreement. Moreover, the collaboration agreement was bound to be a complex one, on which they would wish to take legal advice. Further, 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 orally 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.

13. **No data transfer agreement.** This limb of Rotam's case was based on it having signed the negotiated draft contract, which it had then sent to GAT for its signature but had not been returned. Again, the claim failed.

14. The Court accepted that, the mere fact that a draft agreement provides a space for signature does not make it a prescribed (*i.e.* 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 (at [172]-[173][3]). Nonetheless, the parties' previous relationships had demonstrated that they understood that a contract would not be 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.

[1] RTS Flexible Systems Ltd v. Molkerei Alois Müller GmbH & Co KG [2010] 1 WLR 753 (SC). So long as the contract has sufficient content to be capable of enforcement, it is for the parties (not the court) to decide what terms they consider essential: Pagnan SpA v Feed Products Ltd [1987] 2 Lloyd's Rep 610 (CA), cited in Rotam, at [140].

[2] Global Asset Capital Inc v. Aabar Block SARL [2017] 4 WLR 163 (CA), at [28]-[37]; Maggs v. Marsh [2006] BLR 395 (CA), at [21]-[26].

[3] Citing Maple Leaf Macro Volatility Master Fund v. Rouvroy [2010] 2 All ER (Comm) 788 (CA), at [16]. Even if signature *is* the prescribed mode of acceptance, the offeror may be bound by a contract if it waives that requirement and acquiesces in a different mode of acceptance; but waiver and acquiescence will not lightly be inferred: Reveille Independent LLC v Anotech International (UK) Ltd (2016) 166 ConLR 79 (CA), at [41].

Impact of the Decision

15. Courts (no less than businessmen) do not find it easy to determine when, in the course of commercial negotiations, a contract has been formed. The issue often becomes a live one when a negotiating party pulls out of negotiations before a contract is signed, by which time one party may have partly performed its anticipated obligations.

16. As the Court of Appeal has recently commented, the Courts steer a fine course between two policy objectives: the need for certainty in commercial contracts; and the need for the reasonable expectations of honest, sensible business persons to be protected in commercial dealings. "*When considering whether a contract has come into existence, 'the governing criterion is the reasonable expectations of honest sensible businessmen.'*"[4]

17. For commercial lawyers and their clients Rotam Agricultural demonstrates that clearly expressing when a contract is intended to be binding (in draft contracts and in negotiations) provides the surest protection against the possibility of a contract being formed before the intended time.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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[4] Reveille Independent LLC v Anotech International (UK) Ltd, above, at [42].