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## Without Prejudice and Subject to Contract

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## Topics for Discussion

- Subject to Contract
  - What is it and when should you use it
  - Examples of use and misuse
- Without Prejudice
  - What is it and when should you use it
  - Examples of use and misuse
- Questions

## “Subject to Contract”

- Makes negotiations conditional upon the execution of a formal document at a later date.
- Makes negotiations non-binding (*Landvest Pcc Limited v The Most Reverend Leo William Cushley And Others [2016] CSOH 109*)
- Allows parties to agree “in principal” key commercial terms

## Examples of Subject to Contract negotiations

- Letters of Intent
- Heads of Terms
- Memorandums of Understanding

## Contract Formation

### Key points

- A party must make an offer
- That offer must be accepted
- There must be certainty of the essential terms of the contract
- There must be **intent** to create a binding agreement
- Need not be in writing or oral

## Intent and “Subject to Contract”

- Objective test
- **Newbury v. Sun Microsystems [2013] EWHC 2180 (QB)**
  - *such settlement to be recorded in a suitably worded agreement*
  - Had the claimant’s lawyer marked the offer letter “Subject to Contract” then “a different outcome would have been reached”.
- **Gladman Developments Limited v Sitton and others [2016] EWHC 1597 (Ch)**
  - This situation “could be easily avoided by conducting negotiations Subject to Contract”

## Key features 1

- Is “subject to contract” a failsafe?
  - “it would require a very strong and exceptional case for this clear prima facie meaning to be displaced” [Chillingworth v Esche \[1924\] 1 Ch 97](#)
  - **But** [Confetti Records & Others v Warner Music UK Ltd. \[2003\] EWHC 1274](#)
    - A contract had formed due to subsequent offer an acceptance
- Is there a magic formula for the words
  - England: “Subject to contract” is fine and so is an elaborated version [Winn v Bull 1877](#)
  - Scotland: better safe than sorry, something like

*“these communications are subject to contract and nothing in this communication constitutes a legal offer that is open for acceptance”.*

## Key features 2

- How do you make subject to contract negotiations into a binding contract?
  - Signing of contract
  - Agreement to waiver
  - Inferred waiver [RTS Flexible Systems Ltd v Molkerei Alois Müller \(“M.A.M.”\) \[2010\] UKSC 14](#)
- Do you need to keep using the term in every email or letter?
  - The court have held no [Cohen v Nissdale LTD CA 1982 ALL ER 97](#)
  - But be practical!

## Letters of Intent

- A letter of intent is a document outlining an agreement between two or more parties before the agreement is finalised.
- They can take many forms so beware!
  - as a non-binding statement of the future intention of both parties, sometimes called a 'comfort letter';
  - But sometimes as an interim contract on its own terms, which will govern the relationship between the parties unless and until a formal contract is in place

## Example 1 –Lease

- Discussion for lease all “subject to contract”.
- Heads of terms agreed
  - Extent of premises
  - Parties
  - Monthly rent
  - Duration
- Documents to be finalised
- Lawyers take time, prospective tenants move in with Landlord’s consent

## Example 2 – Construction Contract

- Tenders invited for construction of an industrial unit
- Tenders received but Employer considers changes to building
- Footprint won't change so letter of intent for civils and enabling works
- No work yet but contractor takes steps
- Contract?
- Quantum meruit?
- What could have changed the situation?

## Example 3 – IT Contract

- Tenders invited for provision of new internal IT system, both hardware and software
- Ongoing discussions with company which was best tender on scope and capability – all “subject to contract”
- IT company purchases hardware as negotiations continue
- Firm decides to stick with what they have
- Contract formed? Any comeback?

## Subject to Contract – Key messages

- Only a declaration of intent
- Actions speak louder than words
- Consistency

## Without Prejudice

*This letter is written without prejudice to our clients whole rights and pleas and is not to be founded upon in this or any subsequent litigation*

or,

*This letter is written entirely without prejudice to and under reservation of our clients' rights and pleas and neither this letter (nor any copy of it) nor its contents may be produced, exhibited, referred to or founded upon in any Court action or in any other proceedings except (a) with our client's express consent or (b) at our clients' instance.*

Many other variations exist.

## Without Prejudice

### What is a 'without prejudice' clause and why use them?

- Phrase commonly used with the intention of making correspondence inadmissible in future litigation
- Old concept that has evolved
- Encourages extra-judicial settlements
- Exclude all negotiations genuinely aimed at settlement from being used in evidence
- It's not a magic spell

## Without Prejudice

### English position

- Context based
- Wider application, easier to invoke protection

### Scottish position

- Content based, irrelevant how the document is headed up or qualified
- Must be concessionary in nature
- Clear statements of fact are not protected



## Legal Privilege

Part of the wider concept of confidentiality of communications.

### Legal Advice Privilege

- Qualified lawyer acting in that capacity
- Advice given must be of a confidential nature
- Be careful of who the client is

### Litigation Privilege

- Litigation must be in contemplation
- Sole or dominant purpose rule
- Doesn't apply to investigative situations, only adversarial ones

## Example 1 – Settlement negotiations

- Dilapidations claim
- Court action raised seeking damages
- Settlement offer put forward advising for “commercial reasons” the tenant was willing to pay a sum to conclude
- Letter did not mention “without prejudice”
- Landlord lodged the letter as a production in the court action pointing to the tenant admitting guilt
- Could the Court rely on it?

## Example 2 – Adjudication

- Valuation dispute in a construction contract
- “Dispute” crystallised but parties try to resolve matter before adjudication starts
- Employer admits it received timeous application for payment in “without prejudice” correspondence
- Adjudication raised
- Letter put before adjudicator

## Example 3 – Privilege

- Surveyors managing a shopping centre
- Cladding panel injures a shopper
- Junior surveyor asked to interview shop and centre staff
- In conjunction with legal advice, drafts report highlighting likely causes and impact on possible claims
- What is privileged?

## **Without Prejudice – Key messages**

- Include suitable wording
- Ignore it when drafting
- Avoid concessions and potentially damaging statements of fact
- Beware of difference in jurisdictions

## **“Subject to Contract” and “Without Prejudice”**

Questions?



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