

## SCOPE & PURPOSE OF HEADS OF TERMS

Don't lose your head!



Heds of terms are used by the parties:

- to determine the overall scope of the transaction; and
- to record the main points of principle and commercial matters.

The aim is to agree and outline the important deal - making terms before legal costs are incurred.

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**Full and clear heads of terms:**

- Help to identify issues that may prevent the transaction from taking place;
- Help to identify issues that will determine how to structure the transaction;
- Speed up the drafting of the legal documentation;
- Provide focus and clear up confusion;
- Act as instructions; and
- Aide memoire.

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## STATUS OF THE HEADS OF TERMS

**Preventing heads of terms from being legally binding**

- It is important that heads of terms are not legally binding.
- Marking heads of terms “subject to contract” may prevent the document becoming legally binding.
- Even though not legally binding, the heads of terms should be accurate.
- Most property contracts make express provision limiting liability.

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**Beware Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989**

There is a risk that the heads of terms will create a binding contract if they satisfy both the following:-

- The general legal requirements for the creation of a contract; and
- The requirements of Section 2 of the LP (MP) Act 1989.

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**Subject to Contract**

- The phrase “subject to contract” helps to rebut the presumption of contractual intent.
- However, the phrase is not foolproof. For the sake of certainty, the parties may wish to include a statement in the heads of terms that the provisions are not intended to be legally binding.

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### **Intention to be bound despite “subject to contract”**


- Courts may be prepared to find that the parties actually intended to be bound even when the phrase “subject to contract” is used. This will depend on the conduct of the parties.
- *Proforce Recruit Limited vs The Rugby Group Limited (2005)* – an agreement expressed to be “subject to contract” constituted an implied binding contract.

### **PRODUCING THE HEADS OF TERMS**

- The heads of terms may be produced by the parties themselves or by their advisors (surveyors or conveyancers). In general, they are produced by the same party whose conveyancer will produce the first draft of the relevant legal documentation.
- Heads of terms should be signed by a person with suitable authority but, as they are not intended to be legally binding, this need not be a director of the company. In some cases, heads of terms will be signed by surveyors acting as agent for their client.

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# HEADS UP



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Each deal is different – but here are some pointers:

**Property details:**

- What property is being sold? A plan is often helpful.
- Is this a sale of part?
- Is it a freehold or leasehold interest being sold?
- Is the land being sold with vacant possession or subject to leases?

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**Parties details**

- Who is the buyer and who is the seller?
- Give the company or industrial and provident society number.
- Details of the buyer and seller include addresses, phone numbers, the name of the main contact and his/her email address. Do the same for the buyers and sellers solicitors as well.

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**Money and timing**

- What is the purchase price?
- Is there a deposit?
- Is there to be any overage?
- What are the target dates for exchange and completion?
- Is the contract conditional on anything - like planning?
- Is each party responsible for its own legal costs?

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**VAT and SDLT**

- Has the seller opted to tax?
- Will the buyer dis-apply the seller's option to tax
- Any commercial leases?
- TOGC and VAT
- Will you delay transfer of the property until Golden Brick?
- Is the buyer a registered provider and/or a charity?
- Will the acquisition be partly funded with grant?
- Is the intended use 100% affordable/social housing?
- Is more than 50% (in value) for affordable/social housing?

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**Construction**

- Newly or recently built property - collateral warranties?

**Planning**

- What is the description of the proposed scheme?
- Is a Section 106 or Section 278 Agreement anticipated?
- What affordable housing obligations are anticipated?
- What other obligations are anticipated?
- What stage has been reached in relation to planning?
- Existing planning permission?
- Copyright and duty of care?

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### **Anything else?**

- Matters which are important to your client in the transaction.

### **Contract race**


- Actions that could trigger a contract race situation.



# *What Could Possibly Go Wrong?*

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## Misrepresentations

- Things said or written other than in the contract
- Could be
  - i. sales puff;
  - ii. a representation (statement of opinion or fact that induces a contractor to contract) or
  - iii. something that becomes a term of the contract
- Misrepresentation untrue statements
- Can be made fraudulently, negligently or innocently. Remedies are damages and / or rescission.
- Sales particulars? Property Information Forms? Things said or implied during a viewing?

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## Exclusion Clauses

- Various methods employed to avoid seller's liability
- Some work but courts do not like them
- Exclusion clauses
- Entire agreement clauses
- Non-reliance clauses
- Statutory restrictions – Business to business contracts S.3 UCTA a term excluding liability for misrepresentation is only valid if it passes the test of reasonableness.
- Trader to consumer context – Consumer Rights Act 2015 considerable protection to ensure fair terms and transparency.

## Disclaimers

- Beware when advising clients on response to pre contact questions.
- “Not so far as seller is aware”
- Means a) the seller has no actual knowledge and b) the seller had made all investigations that a prudent seller and sellers’ solicitor would be expected to have made (William Sindall plc v Cambs CC [1994] 1 W.L.R. 1016)

## Construction

- Courts will construe a contract to give it business sense. Limited scope but court can have regard to all the background details and facts that would have reasonably been available to the parties at the time of contracting. So not a literal approach.

## Implied Terms

- Terms can be implied where a) it would be the obvious but unspoken understanding between the parties, or b) where necessary to give business efficacy to the agreement
- However courts will not perfect an imperfect agreement or imply terms where the term to be implied is not obvious.

## Rectification

- Courts can order rectification of a conveyance if its terms do not accord with an outward expression of the parties intention as evidence in an early documents (which need not have had contractual force) e.g. a heads of terms.
- So even though HoTs not binding, they can remain vital to determining the agreement between the parties!

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