

# BOUND TO A CONTRACT, BUT NOT TO AN EMAIL

**Email is frequently used to conduct business negotiations but a recent court case revealed that email negotiations alone do not constitute a legal and binding contract. This is an important ruling as it means that customers or suppliers may simply be able to walk away.**

## Background

In the recent case of *Pretty Pictures Sarl v Quixote Films Ltd*, the court was asked to consider whether a contract existed following various email exchanges between the two companies.

The claimant, Pretty Pictures, specialises in film distribution. The defendant, Quixote, was interested in buying the rights to a certain film and emailed Pretty Pictures its intent to acquire the rights. Further negotiations took place mostly via email.

Initial discussions between the two parties addressed the basic terms of the agreement and the minimum guaranteed payment Quixote would pay for film rights. As the parties neared agreement, Pretty Pictures requested that, on agreement of terms, Quixote send it a "deal memo".

Quixote sent the claimant an email setting out the terms of the deal and that it had agreed to the terms. No written document was sent by Quixote to Pretty Pictures stating the same thing.

## The claim

Once negotiations had broken down, Pretty Pictures issued proceedings against Quixote claiming that its email "agreeing" to the terms and conditions was an acceptance of an offer and so created a binding contract.

In January 2003, the court dismissed the claim stating: "On the evidence, during the negotiations it had been in the contemplation of the claimant that

a binding contract would be entered into once a deal memo had been signed, and not before. The email approving the deal was clearly not a deal memo and it had been intended to convey nothing more than that the defendant approved the terms that had been negotiated at that stage. In those circumstances, the email had not created a binding contract."

## Advice

According to Alastair Breward of Taylor Wessing, for a contract to arise under English law, the following conditions must be met:

1. There must be an offer by one party, which is accepted by the other (as opposed to the recipient accepting some points but not others, in which case the reply is a counter offer still in need of acceptance by the first party).
2. All key terms must be encapsulated in that offer/acceptance (so that all important matters are clear – minor matters can be left for later).
3. There must be an intention to enter a legally binding arrangement (as opposed to an intention to settle details in principle pending a formal affirmation).
4. The people dealing must be capable of binding the contract parties (children cannot bind themselves and employees manifestly not authorised cannot bind their employers. For example; a receptionist cannot agree to sell the factory to a casual visitor).
5. Each party receives some benefit from the arrangement (my promise

to gift you my car is not binding unless I get some benefit back).

6. There may be other formalities as well, but there can be no contract without points 1-6, although a court may find that, in the interest of justice, an arrangement has some effect on what the parties can later do.

Breward states that a contract does not necessarily have to be in writing (save in special cases) and email is, in principle, a satisfactory form of communication. Emails are not such clear evidence of a contract as a hard copy, ink-signed document, but the evidence of a conversation is much flimsier and, in principle, a conversation could suffice to create a contract.

In this case, there was no contract because point 3 wasn't met. Quixote had asked that the key terms agreed by email be formalised in a written deal memo, which it seems was a common industry practice, and when Pretty Pictures sent its final email it confirmed it would do so. Presumably, the parties understood the deal memo to be something which would then be signed off. If they meant only that a summarised record of key points would be sucked out of the emails into a single page purely for ease of reference, that would not imply lack of intent to be bound by the emails.

## Lessons

- Assuming you want a contract, make sure points 1-6 are met.
- To avoid point 3 being met too early, the words 'subject to

contract' often appear on documents in negotiation. Disclaimers can be used, which say the company concerned never enters into contracts via email and no employee can override that policy (if prominent and not routinely overridden in practice).

- Having a contract is different from being able to prove its existence, or what the details are, so document all salient points in a way that makes denial unconvincing.
- Beware that common problems with email include the multiplicity of copies embedding earlier texts and passing between numerous people, their tendency to get deleted, uncertainty about the timing and place of their receipt, and their apparent informality. On the last point, note that Pretty Pictures was unusual in that, more often, one sees cases where an entity finds an informal exchange to be binding.
- On top of the headaches and embarrassment facing any company that gets it wrong, public companies should beware of misleading investors (albeit unintentionally) by announcing contracts that are still only arrangements. If that happens, a false market may result and directors may become liable to civil or even criminal penalties.

*Tom Berry.*

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- For a briefing, contact Vanessa Barnett of Berwin Leighton Paisner at [Vanessa.Barnett@blplaw.com](mailto:Vanessa.Barnett@blplaw.com)
- Alastair Breward can be contacted at [abreward@taylorwessing.com](mailto:abreward@taylorwessing.com)