

Has a binding contract been reached?

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Introduction

A recent judgement handed down by the Court of Appeal provides valuable guidance on contract formations and, in particular, under what circumstances the communications between the parties can be construed to have led to a legally binding contract.

The case of *Coupang, Corp v DAZN Limited* [2025] EWCA Civ 1083 concerned whether a contract had been concluded between the Appellant (“DAZN”) and the Respondent (“Coupang”), following the exchange of a series of WhatsApp messages and emails which were intended to be formalised by a signed contract.

Coupang had already sought, successfully, an injunction against DAZN in relation to broadcasting rights for the FIFA Club World Cup 2025 through its e-commerce platform in South Korea. The injunctive relief was based on the finding that a contract had been reached by two emails sent on 27 February and 3 March 2025, but against the background of the communications between the parties orally and through WhatsApp messages.

DAZN’s appeal from that decision was dismissed on all grounds, including Grounds 1 to 3 challenging the judge’s finding at first instance that a contract had been concluded.

The legal principles

At [5], Lord Justice Popplewell set out the legal principles, which apply when deciding whether parties have concluded a legally binding contract even though some matters are still to be agreed. It is well established that (paraphrasing):

- the whole course of the parties’ negotiations must be considered;
- it is possible for the parties to conclude a binding contract even though a formal document, containing terms not yet agreed, is to follow;
- such intention should be determined by an objective appraisal of their words and conduct;
- the burden of proof rests with the party asserting that such a contract has been concluded; and
- terms such as “subject to contract” make clear that the parties have not reached the stage of a binding contract, but the absence thereof is not decisive as it all depends on “*the parties’ words and conduct towards each other, considered in their context*”.

Popplewell LJ further observed, at [6], four aspects of those principles which are summarised below:

- i) When considering the parties’ negotiations, the whole course of dealing includes both before and after those which are supposed to be constituting the making of the contract, and not communications in isolation.
- ii) The question of whether the agreement is subject to contract will heavily depend on whether the parties have agreed all the terms that they regard essential to their rights and liabilities.

- iii) The communications must be interpreted *“by reference to the substance and sense of what is said, not by the kind of intense examination of the words, syntax and grammar to which a contract carefully drafted by lawyers may be subjected.”*
- iv) The urgency of the performance of the agreement to be reached will be relevant, because it makes it more likely that the parties would wish to be bound notwithstanding the remaining details to be agreed or the formal contract to follow.

Application of those principles to the formation of construction contracts

In the context of construction projects, it is very common for contractors to commence works in anticipation of the execution of a formal contract, the terms of which are supposed to have been agreed through the parties' early exchanges; often such formal execution never occurs at all or, even if it does and in the absence of an “entire agreement” clause, such contracts may have been concluded long before it.

It is important that the conduct of the parties is clear and unambiguous. If there is any doubt or hesitation to be legally bound by the terms communicated, this should be expressed by phrases such as “subject to contract”.

As explained above, the courts will always consider the parties' intention to be legally bound by reference to their conduct throughout, and not in isolation, taking into account how significant to their rights and liabilities were the terms negotiated together with the urgency of the performance.

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