

## A “Done” Deal?

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Businessmen oftentimes record their agreement in writing but there are instances where one party is under the impression that a deal is “done” or “concluded” despite the absence of a contract signed by both parties. The burning question is whether one is bound by such an informal contract.

It is trite that except in circumstances where it is required by law, the formality of an executed contract is the exception rather than the rule.<sup>1</sup> Simply put, as a general rule, contracts can be made informally.<sup>2</sup> Complications arise when one party considers a deal is concluded but the other party takes the opposite position.

### Subject to contract

In order to safeguard themselves, many a time, parties will expressly state that any pre-contractual negotiation is “subject to contract” or that there shall be *locus poenitentiae*<sup>3</sup> until and unless the agreed terms are reduced into a formal contract.

By and large, the “subject to contract” phrase can be divided into three distinct categories, where in each of the first two categories there is a binding contract:<sup>4</sup>

- (i) Where parties have reached an agreement on the terms and intend to be immediately bound by those terms, but at the same time propose to have the terms restated in a formal contract no difference in effect.
- (ii) Where parties have reached an agreement on the terms but nevertheless have made performance conditional upon execution of a formal contract.
- (iii) Intention of the parties is not to enter into a concluded contract at all, until and unless a formal contract is executed.

<sup>1</sup> *Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor* [2015] 6 MLJ 310 (FC)  
<sup>2</sup> *Treitel on The Law of Contract* (13th Ed) at para 5-003  
<sup>3</sup> The right to withdraw from a contract before it is deemed concluded  
<sup>4</sup> *Masters v Cameron* [1954] 91 CLR 353



Although the expression “subject to contract” would work to negate the intention of a party to be bound by an informal contract and be construed to suggest that parties are in the midst of negotiation, it may still be held as a “done” deal. The instances below are illustrative:

(a) Mere expression on execution of an agreed transaction:<sup>5</sup>

The vendor wrote “*I confirm, subject to contract, that the lowest price I am willing to sell the said property is ...*”. The purchaser accepted the vendor’s offer, but in return the vendor refused to complete the agreement. In allowing specific performance of the agreement sought by the purchaser, the court held that the phrase “subject to contract” was nothing more than a mere expression as to the manner in which the transaction already agreed upon by the parties will be effected.

(b) Open contract:<sup>6</sup>

The vendor’s offer for purchase of a property was accepted “*subject to the sale and purchase agreement*”. The vendor contended there was no concluded contract as parties were still negotiating on terms which had yet to be agreed upon. The court, in holding otherwise, emphasised that the essential terms namely the parties, property and price, had been sufficiently identified, and it was accordingly deemed as an “open contract”. Upon evaluation of the correspondences, the court found that there was an intention for parties to merely formalise the agreement concluded.

(c) Reasonable expectation of the parties:<sup>7</sup>

The developer accepted the vendor’s offer in purchasing several plots of land “*subject to your approval in signing the agreement*”. The developer proceeded to pay a deposit but later refused to execute a formal agreement. During trial, the vendor conceded that they would readily accept the balance purchase price without a formal agreement. The court, having applied the yardstick of the reasonable expectation of a sensible businessman, reasoned that both contracting parties deemed the execution of a formal agreement as unimportant and accordingly held that there was a concluded contract.

<sup>5</sup> *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39 (FC)  
<sup>6</sup> *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 (FC)  
<sup>7</sup> *Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* [2007] 2 MLJ 746 (CA)



More recently, the courts appear to place considerable significance on the complexity of the transaction<sup>8</sup> as well as the commercial prowess of the parties involved,<sup>9</sup> in concluding that parties in those instances would not likely consider themselves bound until a formal contract is effected. This was underscored by the apex court<sup>10</sup> which remarked as follows:

“The court should give effect to that intention and not foist an informal contract, which is not the practice of financial institutions and is highly unlikely in complex and intricate bargains ... In the case of a complex bargain, it will be more challenging to find the *consensus ad idem* on the terms.”

### Authors' comments

It has long been said that the law leans in favour of upholding bargains rather than striking them down willy-nilly. In spite of that, exclusionary expression such as “subject to contract” cannot be used by parties as a “be-all and end-all” phrase.

The courts have repeatedly cautioned against relying on such expression as a litmus test, but rather will ascertain objectively the intention of the parties from the expression employed,<sup>11</sup> based on a complete account of the exchanges between parties.<sup>12</sup>

Thus, in order to avoid pre-contractual negotiation from being construed as a “done” deal, it is best advised that parties, both by their conduct<sup>13</sup> and in writing, make it unequivocally clear that all negotiations and exchanges are strictly “subject to contract”.

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<sup>8</sup> *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2007] 1 All ER (Comm) 124  
<sup>9</sup> *Rim Alliance Inc Sdn Bhd v Haniffa Properties Sdn Bhd* [2015] 1 MLJ 149 (CA)  
<sup>10</sup> *Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor* [2015] 6 MLJ 310 (FC)  
<sup>11</sup> *Daiman Development Sdn Bhd v Matthew Lui Chin Teck & Anor Appeal* [1981] 1 MLJ 56 (PC)  
<sup>12</sup> *Lau Sieng Nguong v Hap Shing Co Ltd* [1969] 1 MLJ 190 (FC)  
<sup>13</sup> *Simplicity Network Sdn Bhd v Penang Port Sdn Bhd* [2018] 1 LNS 2145 (HC)

