

# Subject To Contract

written by Dr Alan Ma

With more and more businesses choosing to hire agents, the careful drafting of contracts has never been more vital. When entering into negotiations with an agent, at what point do your negotiations become a binding agreement? Alan Ma finds the answer to this question with reference to a High Court case.

The growing trend in the commercial world towards the employment of agents means that disputes around commission payments are becoming increasingly common. For example, the agent's payment terms, scope of work and the extent to which they or the principal company can take credit for the results generated are all frequently contested points in this area. As such, understanding the importance of using the label "subject to contract" to prevent against unwittingly entering into a binding agreement is essential. The much cited case of *NEWBURY VS SUN MICROSYSTEMS LTD.* highlights the importance of always taking care in the formation of contracts between you and your agent.

"Subject to Contract"

When Mr Newbury began a 2-year period of litigation against Sun Microsystems Ltd. for alleged unpaid commission, Sun responded with a counterclaim for alleged overpayments. On 3 June 2013, just 9 days before the trial was due to begin, Sun's solicitors wrote to Mr Newbury, offering him £601,464.98 plus costs of £180,000 payable within 14 days of acceptance in full and final settlement of his claim. The correspondence specified, however, that "such settlement to be recorded in a suitably worded agreement." Yet after Mr Newbury accepted the agreement, Sun attempted to introduce additional terms regarding confidentiality, income tax and national insurance contributions. With Sun disputing the argument of Mr Newbury's lawyers that the terms of the letter, dated 3 June 2013, formed a binding contract, and that subsequent terms could not now be introduced, Newbury sought a declaration at court that a binding settlement had been reached.

In reaching a ruling, the court considered the words of the agreement in the context of the particular facts and circumstances from which it arose. It was held that because there was nothing in the relevant correspondence to suggest that its terms were subject to contract, the letters of offer and acceptance constituted a binding agreement between the parties. However, the court also stressed that

such a label may not always be decisive in such cases, and that the question of whether legal relations have been entered into will always depend on the facts rather than the form of communications between the parties.

### **Dr Ma's Comments**

The ruling in *NEWBURY VS SUN MICROSYSTEMS LTD.* is significant because it reminds us that the question of whether or not an agreement is binding is entirely an objective one; the subjective intention of the parties in such circumstances is irrelevant. Perhaps most importantly though, the case emphasises the importance of always expressing an agreement as being "subject to contract", clarifying that its terms will not be binding until a formal contract is agreed upon. Unless the agreement is marked in this way, the contract can come into existence immediately, meaning that any subsequent terms introduced will not be binding and parties may find themselves agreeing to more than they bargained for.

Dr Alan Ma, founder and partner  
Maxwell Alves Solicitors  
London | Edinburgh | Hong Kong