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# FORMATION OF CONTRACT: THE ROLE OF CONTRACTUAL INTENTION AND EMAIL DISCLAIMERS

GILLIAN BLACK\*

## Introduction

This article examines the role of intention in contract formation.<sup>1</sup> Whereas the focus of consent, and therefore formation, in the past has often been on the agreement between the parties—establishing whether or not they have reached *consensus in idem*—there has been increasing emphasis in recent cases on the role played by contractual intention. The question of whether the parties intended their agreement to be legally binding, while present in previous case law and literature, appears to be developing to play a much greater role; one which, it is submitted, can and should be used to allow the parties to regulate their contractual dealings with greater precision.

Before turning to review intention, it is helpful to set out in brief the essentials of contract formation, including historical developments. The second section of this article will then explore the nature of intention and the role it plays, particularly the potential for expanding the significance of intention in formation. The third and final section will look at the potential use of intention in the specific context of contracting by email.

The focus of this review will be very much on Scots case law and academic writing. Although reference will be made to other sources, including English law and the Draft Common Frame of Reference where appropriate, this work is primarily intended to analyse the current state of intention in Scots law.<sup>2</sup>

## Contract formation

Contracting is a juridical act and is therefore bound by juridical rules: the steps required to conclude a contract are legal in nature, rather than

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\* Lecturer in Law, University of Edinburgh. This article is based on a paper presented at the Edinburgh Centre for Commercial Law Workshop on “The Role of Consent in Contract Law”, in December 2009. I am very grateful to Laura J. Macgregor for her helpful comments on that paper and on earlier drafts of this article.

<sup>1</sup> Other essential requirements for formation, such as capacity and form, will not be discussed.

<sup>2</sup> English sources need to be treated with some caution here, given certain fundamental differences in approach north and south of the border. For example, one of the leading analyses of contract formation states that, “if an alleged agreement does not contain a promise then clearly there can be no intention to contract as one of the basal requirements for the presumption to operate, and for a contract, is missing”: Michael P. Furmston and Greg J. Tolhurst, *Contract Formation: Law and Practice* (Oxford: Oxford University Press, 2010), para.10.06. A further signifier of intention in English law is provision of a valuable consideration (Furmston and Tolhurst, *Contract Formation*, 2010, para.10.17), and see also *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14; [2010] 1 W.L.R. 753 at [58], [59]. While similar presumptions as to intention may operate in Scots law, they will not be based on the doctrines of promise or consideration.

commercial or social. The elements of contract formation are, in law, “tools of analysis”, to provide certainty and guidance.<sup>3</sup>

There is widespread agreement that agreement is at the heart of contract law. *Woolman on Contract* states: “Formation occurs when the parties reach agreement as to the essential features of their transaction.”<sup>4</sup> MacQueen and Thomson define a contract as:

“. . . an agreement between two or more parties having the capacity to make it, in the form demanded by law, to perform, on one side or both, acts which are not trifling, indeterminate, impossible or illegal.”<sup>5</sup>

Hogg states that a, “contract is an agreement, enforceable at law”,<sup>6</sup> which can be distinguished from a unilateral promise or obligation because the essence of contract is that it is bilateral.

Critically, while agreement in Scots law is necessary for contract, it is not by itself sufficient. It is possible for two parties to be in agreement about many things, without there being a contract. As McBryde says:

“Consent is the basis of contract. It is not enough that the parties are in agreement. X may wish to sell his car to Y. Y may wish to buy at X’s price. The minds may be in agreement, but there is no binding obligation until in some way the intentions of the parties are communicated to each other.”<sup>7</sup>

This passage helpfully draws attention to three different elements: consent, agreement and intention. The essential ingredient which transforms mutual consent and agreement into contract is intention. To refer to MacQueen and Thomson again:

“A contract is formed when the parties have reached agreement—*consensus in idem*—on the essential terms of the contract *always provided that they have intention to create legal obligations*.”<sup>8</sup>

Yet although intention is the essential ingredient, which converts an agreement into a contract, the academic and judicial focus on the process of

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<sup>3</sup> M. Hogg and G. Lubbe, “Formation of Contract”, in Reinhard Zimmermann, Daniel Visser and Kenneth G.C. Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford: Oxford University Press, 2004), p.61.

<sup>4</sup> G. Black, *Woolman on Contract*, 4th edn (Edinburgh: W. Green, 2010), para.2–02.

<sup>5</sup> Hector L. MacQueen and Joe Thomson, *Contract Law in Scotland* (West Sussex: Tottel, 2007), 2nd edn, para.1.09.

<sup>6</sup> M. Hogg, *Obligations*, 2nd edn (Edinburgh: Avizandum, 2006), para.2.02.

<sup>7</sup> William W. McBryde, *The Law of Contract in Scotland*, 3rd edn (Edinburgh: SULI/W. Green, 2007), para.6–02.

<sup>8</sup> MacQueen and Thomson, *Contract*, 2007, para.2.2, emphasis added, footnote omitted.

contract formation has typically been on the need for *consensus in idem*. The importance of *consensus in idem* is reflected in the fact that we have developed detailed rules on the mechanics of consensus, concerning offer and acceptance, invitations to treat, qualified acceptances, communication and revocation, and the postal acceptance rule. Intention is, by comparison, poorly served by academic and judicial consideration.<sup>9</sup>

Consideration of intention has typically consisted of reference to two rebuttable presumptions, in terms of which commercial agreements are presumed to be binding, and social ones not. Under this presumption, agreements concluded in a commercial or business setting are presumed to be intended to be binding contracts, whereas those concluded in domestic or social circumstances are presumed not to be.<sup>10</sup> The presumption can of course be rebutted in either case, and the courts have recognised that this division is not one of “watertight compartments”.<sup>11</sup>

There are signs that this is changing, however, as evidenced by a number of recent cases which have given priority to the need for intention, with some interesting results. The purpose of this article is to explore the function of contractual intention, and the nature of these developments. What impact will these have on professional and commercial practice? And what are the implications of this for contracts concluded by email, since email raises one potentially distinct issue?

### A historical overview of contract formation

Prior to turning to these recent developments, a brief review of the historical role of contract law and contract formation can help shed light on certain aspects of current practice and doctrine. The development of Scots contract law has recently been examined by a South African academic, Professor Gerhard Lubbe.<sup>12</sup> He notes that early legal actions in Scotland, around the twelfth to fourteenth centuries, were not based on a principled body of

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<sup>9</sup> The most detailed academic analysis of contract law is indubitably McBryde’s, *Contract*, 2007. In this work, an entire 40 page chapter is dedicated to “Offer and Acceptance” (Ch.6), while intention receives six pages of analysis, in Ch.5. This pattern is not unusual, and is generally replicated in other academic writing. Perhaps the most notable academic exchange on the meaning of intention in *Stair* is that of McBryde and Stewart in this journal in the early 1990s: William J. Stewart, “‘Of Purpose to Oblige’: a Note on *Stair* I, x, 13”, 1991 J.R. 216; William W. McBryde, “The Intention to Create Legal Relations”, 1992 J.R. 274; William J. Stewart, “*Stair*, I, x, 13: A rejoinder”, 1993 J.R. 83. More recently, the concept of intention and a very useful discussion of the historical and natural law context in which *Stair* was writing has been provided by Martin Hogg, “Perspectives on Contract Theory from a Mixed Legal System” (2009) 29 OJLS 643.

<sup>10</sup> McBryde, *Contract*, 2007, para.5–06; MacQueen and Thomson, *Contract*, 2007, para.2.64.

<sup>11</sup> *Robertson v Anderson*, 2003 S.L.T. 235 at [13]. For a detailed discussion of the use of these presumptions in English law, see Furmston and Tolhurst, *Contract Formation*, 2010, Ch.10, Pt A.

<sup>12</sup> G. Lubbe, “Formation of Contract” in Kenneth G.C. Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (Oxford: Oxford University Press, 2000), Vol.2.

substantive law, but on brieves, similar to English writs. Thus, the early law reveals, “no generalized pattern of substantive rights and duties, but [instead it] approached matters from a procedural perspective.”<sup>13</sup> One consequence of this is that contract doctrine did not at that time exist in any coherent sense. Instead, the indications are that, pre-Stair, the basis for an action for debt was not a promise or an undertaking to render a performance, but the rendering of that performance itself.<sup>14</sup> Only where one had provided goods or services under an agreement, could one sue for failure to pay under that agreement. In common parlance, the law recognised executed contracts, rather than executory ones. Where one party had provided goods or services they had a right of relief against the other party, by way of an action for debt, for any failure to perform the reciprocal side of the arrangement. Performance was therefore at the centre of the earliest legal actions.

In the succeeding centuries, however, there was an evolution from procedural to substantive thought,<sup>15</sup> such that, by the seventeenth century, Viscount Stair could pen his famous dictum, “every paction produceth action”.<sup>16</sup> The focus had thus transferred from performance to agreement—paction. In Stair’s words:

“. . . in the act of contracting, it must be of purpose to oblige, either really or presumptively, and so much be serious, so that what is expressed in jest or scorn makes no contract.”<sup>17</sup>

This provides the basis, still present in current law, for the need for agreement *and* for an intention to be obligated: a serious commitment, not a light-hearted or jesting agreement. In the words of Martin Hogg and Gerhard Lubbe:

“Stair distinguish[es] two stages in the formation of a contract: will and engagement. Parties must pass from merely willing or wishing to contract, to evidencing this desire by an external manifestation of that will. Whether an *animus obligandi* is present is to be assessed objectively.”<sup>18</sup>

<sup>13</sup> Lubbe, “Formation of Contract” in *A History of Private Law in Scotland*, 2000, Vol.2, p.3.

<sup>14</sup> Lubbe, “Formation of Contract” in *A History of Private Law in Scotland*, 2000, Vol.2, p.4.

<sup>15</sup> Lubbe, “Formation of Contract” in *A History of Private Law in Scotland*, 2000, Vol.2, p.8.

<sup>16</sup> Stair, I, 10, 7.

<sup>17</sup> Stair, I, 10, 6; I, 10, 13. See further the discussion on the interpretation of this paragraph in Stair in the following articles: Stewart, “‘Of Purpose to Oblige’: a Note on Stair I, x, 13”, 1991 J.R. 216; McBryde, “The Intention to Create Legal Relations”, 1992 J.R. 274; Stewart, “Stair, I, x, 13: A rejoinder”, 1993 J.R. 83.

<sup>18</sup> Hogg and Lubbe, “Formation of Contract” in *Mixed Legal Systems in Comparative Perspective*, 2004, p.39, footnote omitted. See also Stair, who refers to the three stages of contracting as “desire, resolution and engagement”. The first two of these are insufficient to conclude a contract, so that, “the only act of the will, which is efficacious, is that whereby the will . . . becomes engaged to that other to perform”: Stair, I, 10, 2.

Ultimately, the question was (and is) one of intention:

“The focus of the concern was not whether the end of the transaction conformed to the sophisticated moral notions of the late scholastics, but merely whether the parties to an agreement had seriously and deliberately intended to conclude legal relations.”<sup>19</sup>

The position in Scots law today is that the parties must be in agreement and they must have contractual intention. However, as previously observed, the rules which have evolved over the years have typically focused on establishing *consensus in idem* through offer and acceptance. This is potentially due in part to the strength of English influence from the nineteenth century onwards. McBryde notes that, “English cases on offer and acceptance were frequently cited in Scotland”,<sup>20</sup> thus adding to the volume of authority in Scots law on the topic and potentially increasing its prominence in formation theory. In contrast, the need for intention has often been assumed or, in many cases, has been the subject of the rebuttable presumptions, based on the commercial/social agreement dichotomy.

#### **Intention: an objective standard**

This leads to the question: what is intention? The parties to a contract may have many different layers of intentions, not all of which are legally relevant.<sup>21</sup> They may intend to profit by the contract, but lack of profit is not then a ground for avoiding the contract. They may intend to perform X or to pay £Y. Again, these intentions may be manifest in the contractual obligations they undertake, but they are not directly relevant for the purposes of formation. Instead, the relevant intention is the intention of the parties to be bound to a legally enforceable obligation.

Moreover, this legally relevant intention may not even be their true intention: it is the outward expression of their inner thoughts which is relevant, rather than their subjective state of mind. Thus, the relevant standard of intention to be contractually bound is an *objective* standard. In a famous (and oft-quoted) line, Lord President Dunedin said in *Muirhead and Turnbull v Dickson* that:

“... commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say and do.”<sup>22</sup>

<sup>19</sup> Lubbe, “Formation of Contract” in *A History of Private Law in Scotland*, 2000, Vol.2, p18.

<sup>20</sup> McBryde, *Contract*, 2007, para.1–21.

<sup>21</sup> See McBryde, *Contract*, 2007, paras 5–02, 5–05.

<sup>22</sup> *Muirhead and Turnbull v Dickson* (1905) 7 F. 686 at 694. See the comment on this by Hogg, “Perspectives on Contract Theory from a Mixed Legal System” (2009) 29 OJLS 643 at 662.

The consent to contract—both the agreement and intention—must be objective. This is explicitly stated by Gloag, who has observed that the intention required to be proved is not internal intention, “as a matter of psychological fact”,<sup>23</sup> but rather the external indicia of agreement. Thus, the:

“... judicial task is not to discover the actual intention of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other”.<sup>24</sup>

More recently, judicial support for this approach comes from Lord Glennie, who has expressed the position as follows:

“... did the parties reach a stage at the meeting at which they intended to be (and regarded themselves) as bound—or at least, since their conduct must be viewed objectively and private reservations are irrelevant, *did they so conduct themselves as to lead the other reasonably to conclude that they had made such an agreement?*”<sup>25</sup>

From this, it is clear that the intention to contract is not an actual or inward intention, but is based on objective evidence: what the parties said and did, not what they thought in their inmost minds.

This objective assessment of intention can override the generally agreed understanding of certain terms in commerce. While documents such as “heads of agreement” and “heads of terms” may be assumed by commercial parties to be a roadmap to guide future relations, rather than a contract, this can be challenged if the parties did (objectively) demonstrate a serious intention to be contractually bound by them. Despite the defender’s submission that, “the Heads of Agreement were, as a generality, not intended to be legally binding, being only ‘an agreement to agree’”,<sup>26</sup> Lord Carloway disagreed:

“The document entitled ‘Heads of Agreement’ bears all the hallmarks of an agreement intended to be legally binding upon its parties. First, it deals with a commercial bargain and not some social or trivial engagement. Second, it purports to be ‘heads of agreement’, that is to say an expression of consensus reached by the parties. Thirdly, it is typed, signed, dated and even witnessed. All of these point towards it being, and intended to be, an enforceable contract.”<sup>27</sup>

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<sup>23</sup> William M. Gloag, *The Law of Contract*, 2nd edn (Edinburgh: W. Green, 1929), p.7.

<sup>24</sup> Gloag, *Contract*, 1929, p.7.

<sup>25</sup> *Aisling Developments Ltd v Persimmon Homes Ltd* [2008] CSOH 140; 2009 S.L.T. 494 at [56], emphasis added.

<sup>26</sup> *Latta v Burns* [2004] ScotCS 27 at [4].

<sup>27</sup> *Latta v Burns* [2004] ScotCS 27 at [10].

Nonetheless, the stated need for “intention” does have the potential to give rise to confusion, since intention could be thought of as the actual or inward intention of the parties, rather than the external manifestation of it. As McBryde says, in clarification:

“It is debatable to what extent, in Scots law, the parties’ intentions are relevant, in the positive sense of requiring intention to create legal relations as a prerequisite for an enforceable contract . . .”<sup>28</sup>

The most that can be said for the subjective will or intention of the parties is that, where there is a:

“. . . clash between ‘inward and unknown’ resolution and ‘words . . . clearly obligatory and serious’, preference will be given to the external impression of the subjective will communicated by the words used in the particular circumstances of the case.”<sup>29</sup>

Accordingly, the conclusion again is reached that:

“Parties’ *actual* intentions are irrelevant and they do not have to prove, and may not be allowed directly to prove, what their state of mind was.”<sup>30</sup>

Where intention equates to actual or subjective intention, then there can be no role for it in Scots law. So long as “intention” to contract is interpreted to mean the outward-facing intention, objectively discerned, however, then it is indeed part of Scots contract law.<sup>31</sup>

### Consequences of objective intention

The fact that intention is objectively discerned has a number of consequences. In the first place, there is no need for, or right to, any enquiry into the actual state of mind of the parties at the time of conclusion of the contract.<sup>32</sup> Nor is it possible for a party to escape from his contractual obligations at a later date

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<sup>28</sup> McBryde, *Contract*, 2007, para.5–02.

<sup>29</sup> Lubbe, “Formation of Contract” in *A History of Private Law in Scotland*, 2000, Vol.2, pp.17, 18.

<sup>30</sup> McBryde, *Contract*, 2007, para.5–02.

<sup>31</sup> This is not restricted to intention: the agreement of the parties is also discerned objectively, with the consequence that there may be contracts where the parties are not, subjectively, in agreement at all, but their objective actions give rise to an apparent *consensus in idem*. A good example of this is *Thomson v James* (1855) 18 D. 1, where the letter of withdrawal arrived the same day as the letter of acceptance, and the contract was nevertheless upheld, although the parties were never in subjective agreement at the same time, and barely in objective agreement at the same time.

<sup>32</sup> As confirmed by Lord President Dunedin in *Muirhead and Turnbull v Dickson* (1905) 7 F. 686 at 694.



by saying that he did not intend in his inmost mind to enter into a contract.<sup>33</sup> A further consequence of the objective standard of intention is that the whole circumstances of the case become relevant, since these will impact on what one party was entitled to deduce from the words and actions of the other. The objective interpretation of intention requires consideration of the objective circumstances of the case. Three such circumstances will be examined which are not necessarily explicit in the literature, but which can, it is submitted, be derived from case law. These are: transactions *in re mercatoria*; the specific commercial context in which the parties are operating; and the specific custom and practice of the parties themselves.

In the first place, transactions that are *in re mercatoria* will be treated as such by the courts. Where a dispute as to contractual formation arose in the 1964 case of *R&J Dempster v Motherwell Bridge and Engineering Co Ltd*,<sup>34</sup> with the defenders pleading that the arrangement was intended to bind only one party to reserve a steel quota, without obliging the other party to take up that reserved quota, the Inner House observed that: “It is difficult to believe that two commercial firms would make so one-sided a bargain”.<sup>35</sup> Thus, the objective intention of the parties was assessed against the commercial background of the transaction, and the court concluded that each party was entitled to interpret the actions of the other as intended to be legally binding, by virtue of the fact that they were dealing *in re mercatoria*. In this context, two parties would be unlikely to make a one-sided bargain, unless they both expressly stipulated it to be so.

More recently, the Outer House in *Aisling Developments Ltd v Persimmon Homes Ltd*<sup>36</sup> took similar consideration of the commercial nature of the parties and the deal; specifically, in this case, the fact that commercial parties could be expected to know that transactions for the sale and purchase of land required to be in writing. The Lord Ordinary was of the opinion that the law would require:

“ . . . some indication from the parties, from their words or conduct, that they did in fact intend to be bound notwithstanding the informality of their writings. The position is *a fortiori* where there is nothing in writing at all.”<sup>37</sup>

Thus, the lack of formal writing for a commercial property transaction would tend to indicate that the relationship was still at an informal stage, unless there was a clear indication to the contrary.

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<sup>33</sup> McBryde, *Contract*, 2007, para.5–02.

<sup>34</sup> *R&J Dempster Ltd v Motherwell Bridge & Engineering Co Ltd*, 1964 S.C. 308.

<sup>35</sup> *R&J Dempster Ltd v Motherwell Bridge & Engineering Co Ltd*, 1964 S.C. 308, per Lord President Clyde at 328.

<sup>36</sup> *Aisling Developments Ltd v Persimmon Homes Ltd* [2008] CSOH 140; 2009 S.L.T. 494.

<sup>37</sup> *Aisling Developments Ltd v Persimmon Homes Ltd* [2008] CSOH 140; 2009 S.L.T. 494 at [58].

Secondly, the courts are prepared to take into account the particular field in which the parties are operating, and what would be typical custom and practice in that field. In *R&J Dempster Ltd v Motherwell Bridge & Engineering Co Ltd*, the Inner House took notice of the “usual practice” in the relevant industry in general.<sup>38</sup> The fact that the parties here had not agreed a price was *not* to be taken as indicative of a lack of contractual intention, but was in fact simply reflective of the commercial situation, whereby the parties were contracting against a background of steel shortages and quota systems. This was an important element to be taken into account in determining the intention of the parties:

“The undertakings were expressed in quite unconditional terms on both sides, and *in the existing market conditions the obligations respectively undertaken represented a sound and intelligible business proposition for each party.*”<sup>39</sup>

These cases show that the situation and background to the parties’ negotiations is critical: any special circumstances and commercial custom in that sector will be relevant.

The third factor which impacts on the interpretation of intention in an individual case is evidence of the custom and practice of the parties themselves, as revealed through the past history of their dealings. Past behaviour between the two parties can be taken to shape their current dealings. This can be seen in *WS Karoulias SA v Drambuie Liqueur Co Ltd*,<sup>40</sup> where the Outer House accepted that the intention of the parties had to be objectively discerned against the background of their previous contractual relations. Since the previous four contracts concluded between the parties had all been in formal writing, the lack of a written contract on the fifth occasion indicated that the parties lacked the necessary contractual intention—albeit there was full consensus on all terms of the contract, and there was no legal requirement for formal writing.

Perhaps all these factors can be summarised by a recent judgment from Lord Hodge, *Baillie Estates Ltd v Du Pont (UK) Ltd*.<sup>41</sup> He refers to the standard of intention to be shown, which requires:

“. . . the court [to] adopt[s] an objective approach, having regard to what the parties said and did in the course of the negotiations . . . It asks what would reasonable and honest men in the position of the parties *and*

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<sup>38</sup> *R&J Dempster Ltd v Motherwell Bridge & Engineering Co Ltd*, 1964 S.C. 308.

<sup>39</sup> *R&J Dempster Ltd v Motherwell Bridge & Engineering Co Ltd*, 1964 S.C. 308, per Lord President Clyde at 326.

<sup>40</sup> *WS Karoulias SA v Drambuie Liqueur Co Ltd* [2004] ScotCS 189.

<sup>41</sup> *Baillie Estates Ltd v Du Pont (UK) Ltd* [2009] CSOH 95; affirmed at [2009] CSIH 95.

*having their shared knowledge of the surrounding circumstances have understood by the communications which passed between them.*<sup>42</sup>

This ability to take into account both wider circumstances and those peculiar to the parties is not unique in Scotland. The Draft Common Frame of Reference also requires intention and agreement to constitute a contract, and makes specific provision that:

“. . . the intention of a party to enter into a binding legal relationship . . . is to be determined from the party’s statements or conduct *as they were reasonably understood by the other party.*”<sup>43</sup>

This allows for an objective interpretation of intention, but set against the facts or circumstances which are specific to the parties.

To conclude this section on the role of intention in contract formation, it is helpful to make reference to a decision of the United Kingdom Supreme Court, in an English appeal: *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG*.<sup>44</sup> This case raised fundamental problems of formation of contract in a very realistic commercial setting, reflecting the complex dealings between the parties and protracted negotiations. Despite the complexities, the Supreme Court reiterated the applicability of the essential principles:

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.”<sup>45</sup>

### **Intention and post-contractual dealings**

A further aspect to ascertaining intention at the stage of contract formation (or what is alleged to be the point of contract formation) is that the courts are willing to take post-“contractual” dealings into account. At first sight, this may seem unusual, unnecessary and potentially unfair: why should actings *after* the

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<sup>42</sup> *Baillie Estates Ltd v Du Pont (UK) Ltd* [2009] CSOH 95 at [25], emphasis added.

<sup>43</sup> Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II* (The Hague: Kluwer, 2000), DCFR art.II.—4:102, emphasis added.

<sup>44</sup> *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14; [2010] 1 W.L.R. 753.

<sup>45</sup> *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14; [2010] 1 W.L.R. 753 at [45].

alleged moment of conclusion be relevant?<sup>46</sup> In fact, it does make sense. Any litigation is likely to involve some ex post facto rationalisation, as the parties attempt to interpret the facts as best fits their case. The parties have good reason to interpret their pre-contractual actings in a way that best suits their own ends, insofar as possible. Lord Glennie has observed of the witnesses in one case, that, although he was satisfied that their evidence was honestly given: “I consider [it] was coloured by a mixture of hindsight and reconstruction”,<sup>47</sup> while in another Lord Hodge noted that one witness had engaged in a considerable amount of “retrospective rationalisation”.<sup>48</sup>

Where however the court is not limited to the evidence of the parties given in the context of litigation, but can take account of the parties’ actions after the alleged moment of contract formation, this can potentially shed light on the intentions of the parties at that time. If, for example, the pursuer is attempting to claim that a contract was concluded on November 1, when there was agreement on all the essentials but not on a more minor matter regarding delivery, for example, then it may be illuminating to consider the party’s actions in the days and weeks following November 1. If, in that time, he sent repeated emails or letters requesting conclusion of the contract and urging speed so that he could have the certainty of a concluded contract, this would indicate, objectively, that whatever that party is now claiming he did not previously believe, objectively, that he was in a contractual relationship as at November 1.

This approach can be seen in *R&J Dempster Ltd v Motherwell Bridge & Engineering Co Ltd*. Here, Lord President Clyde stated that:

“I am confirmed in my conclusion that a binding contract had been made between the parties by a consideration of their subsequent actings . . . In my opinion the Lord Ordinary was well founded in concluding, as he did, that for more than a year after the bargain was made both parties *acted on the basis that there was a binding agreement*.”<sup>49</sup>

The utility of post-contractual dealings was considered in a recent English Court of Appeal decision. Here, the court noted that:

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<sup>46</sup> This requires particular consideration, in light of the fact that post-contractual conduct is, with some exceptions, not relevant or admissible in relation to the interpretation of contracts: see McBryde, *Contract*, 2007, para.8–30; Carole Lewis and Laura Macgregor, “Interpretation of Contract” in Kenneth Reid, Reinhard Zimmermann and Daniel Visser (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford: Oxford University Press, 2004), p.66. For further consideration of contractual interpretation, see David Cabrelli, “Interpretation of contracts, objectivity and the elision of the significance of consent achieved through concession and compromise”, 2011 J.R. 121.

<sup>47</sup> *Aisling Developments Ltd v Persimmon Homes Ltd* [2008] CSOH 140; 2009 S.L.T. 494 at [57].

<sup>48</sup> *Shaw v James Scott Builders & Co* [2010] CSOH 68 at [41].

<sup>49</sup> *R&J Dempster Ltd v Motherwell Bridge & Engineering Co Ltd*, 1964 S.C. 308, per Lord President Clyde at 327, emphasis added. See also *Shaw v James Scott Builders & Co* [2010] CSOH 68 where the (lack of) reaction from the pursuer and her agents was indicative of the defender’s contractual actions (at [39]).

“The defendant’s fourth submission was that the judge wrongly had regard to the parties’ conduct and exchanges after 9 January 2009 in determining whether a contract was concluded on that day. It is clear from the judgment that he did take account of subsequent conduct and exchanges. Whether or not he was entitled to do so, we are satisfied that the existence of a contract made on 9 January 2009 is clearly established by reference only to exchanges [before and on that date].”<sup>50</sup>

While it is perhaps disappointing that the court did not take the opportunity (for English law at least) to clarify whether actions after the alleged date of completion were judicially relevant, it is nevertheless interesting to note that the High Court judge was clearly minded to refer to them as relevant and that the Court of Appeal did not think it necessary to overrule that approach explicitly.<sup>51</sup>

#### **Application of intention to contract formation**

Having established how intention is assessed, and the factors that the courts will take into account in determining the objective intention of the parties, it is now possible to consider how intention impacts on contract formation, and how it can be used by the parties to protect their own interests.

It is submitted that intention fulfils a number of different roles. In the first place, and most obviously, intention to be contractually bound transforms agreements into contracts. Intention in this case helps us to distinguish between agreements which are intended to have the full backing of the law, and those which are informal. In many cases, this will map on to the commonly stated presumption that commercial agreements are intended to be legally binding, while social and domestic arrangements are not,<sup>52</sup> albeit these presumptions are rebuttable—and can of course be rebutted by bringing evidence of the objective intention of the parties.<sup>53</sup>

While this is a critical role for intention, however, it is well established and non-controversial. I would suggest that a close reading of recent cases demonstrates an expanding role for intention, such that it can be applied in a more sophisticated way to achieve two different ends. In these cases, the emphasis has moved away from *consensus*, to consider instead whether there is a binding relationship by virtue of the intention of the parties.

This has led to some interesting results, including one where what would appear to be a contract under the “offer and acceptance” analysis has been held not to be a contract at all, because of a lack of contractual intention: *WS*

<sup>50</sup> *Immingham Storage Co Ltd v Clear Plc* [2011] EWCA Civ 89 at [34].

<sup>51</sup> See also the approach taken by the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14; [2010] 1 W.L.R. 753.

<sup>52</sup> McBryde, *Contract*, 2007, para.5–06.

<sup>53</sup> *Robertson v Anderson*, 2003 S.L.T. 235.

*Karoulias SA v Drambuie Liqueur Co Ltd*.<sup>54</sup> Here, the parties were in full agreement on all the terms of the deal, and those terms had been reduced to writing. The only missing element was the signature of each party on the written document. Since the subject matter of the agreement was the provision of distributorship services, rather than the sale and purchase of land, this should not have been an issue.<sup>55</sup> There was no legal requirement that the agreement be reduced to writing: the law simply required *consensus in idem* and an intention to be bound.

If the court had only been looking for agreement on the contract terms, then there would have been nothing further to be done: the parties were clearly in full agreement as to the contract terms. But when the court considered *intention*, the absence of a signature on the paper enabled the Lord Ordinary to conclude that there was no binding contract:

“The evidence in this case . . . persuaded me that the intention of the parties was that they would only become bound by the terms of that document only when it was signed on behalf of them.”<sup>56</sup>

Thus, intention was used to delay the moment of contract formation, despite the fact that an offer and acceptance analysis would hold that the parties had consented and were in full agreement.

Interestingly, it is not clear that the English approach goes quite this far. In *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* the parties had agreed on certain key details, including the price, and this was viewed as strong evidence of an intention to be bound.<sup>57</sup> Whether there was an intention to be bound:

“. . . can be tested by asking whether the price of £1,682,000 was agreed. Both parties accept that it was. If it was, as we see it, it must have formed a part of a contract between the parties.”<sup>58</sup>

While this decision may indeed be the correct one based on the evidence of the parties’ intention to be contractually bound, it arguably should not be based (in Scotland at least) simply on the fact that the parties had agreed a price. It is suggested that, absent a doctrine of consideration, agreement of a price in itself should not be equated with a concluded contract. As *WS*

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<sup>54</sup> *WS Karoulias SA v Drambuie Liqueur Co Ltd* [2004] ScotCS 189.

<sup>55</sup> The Requirements of Writing (Scotland) Act 1995 does not require distributorship agreements to be in formal writing: see s.1.

<sup>56</sup> *WS Karoulias SA v Drambuie Liqueur Co Ltd* [2004] ScotCS 189 at [53].

<sup>57</sup> *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14; [2010] 1 W.L.R. 753 at [58], [59].

<sup>58</sup> *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14; [2010] 1 W.L.R. 753 at [58].

*Karoulias SA v Drambuie Liqueur Co Ltd*<sup>59</sup> demonstrates, there may well be a situation where the parties agree a price for work to be done but nevertheless have no intention to be contractually bound at that stage, and do not ever then reach a stage of contracting. While *WS Karoulias SA v Drambuie Liqueur Co Ltd* is of course a decision of the Outer House, rather than the Supreme Court, it is submitted that there is a significant reason for preferring the Scottish authority on this point, given that Scots law does not require a consideration as part of the formation of contract.

In light of the significance of the parties' intention in formation of contract, it would seem that intention can be used by the parties to regulate their relationship with more precision than the standard rules on offer and acceptance allow for. Whereas the rules of offer and acceptance would hold a contract concluded as soon as agreement on the essentials can be discerned, when we place the emphasis on the need for intention, the question moves from agreement on the essentials, to the desire of the parties to be contractually bound.

This enables the parties to take two contrasting positions. In the first place, they can agree that they do not intend their arrangement to be legally binding, notwithstanding the fact that they have reached full agreement on the essentials or, indeed, on every term. Conversely, they can use intention to indicate that they *do* intend to be legally bound, notwithstanding the fact that certain essentials or formalities have not been complied with.

While the first point has been illustrated in *WS Karoulias SA v Drambuie Liqueur Co Ltd*, the second use of intention gains support from the Outer House decision in *Aisling Developments Ltd v Persimmon Homes Ltd*.<sup>60</sup> Here, the parties had been in negotiations for several years for the sale and purchase of land, and had reached agreement on the land to be sold and the price to be paid, although the detailed terms of the development deal remained outstanding. When the sellers changed their mind about the sale and tried to walk away, the purchasers argued that there was a concluded oral contract, which was binding despite the fact that it had not been reduced to writing as it needed to be.

Lord Glennie considered whether the parties could overcome the need for agreement on the essentials by their objective intention, and held that this was possible:

“As the case law has developed, it has become clear that the test of what is or is not ‘essential’, in the sense of needing to be agreed before the parties will be held to have concluded a bargain, is subjective, not objective. The court does not categorise a term as essential, and then

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<sup>59</sup> *WS Karoulias SA v Drambuie Liqueur Co Ltd* [2004] ScotCS 189.

<sup>60</sup> *Aisling Developments Ltd v Persimmon Homes Ltd* [2008] CSOH 140; 2009 S.L.T. 494.

require agreement to have been reached on it, if the parties have made it clear that they intend to be bound regardless of not having agreed it. In other words it is up to the parties to decide, expressly or by implication, which terms are essential for these purposes and which are not.”<sup>61</sup>

However, he continued that:

“[But] the point works both ways. A matter which objectively might not appear to be one of the essentials of the contract may be regarded by the parties themselves as something which they require to agree before they are to be bound.”<sup>62</sup>

Having considered the evidence in *Aisling Developments Ltd v Persimmon Homes Ltd*, Lord Glennie concluded that there was no binding agreement, not least because the parties did not obviously demonstrate any intention to be bound following the key meetings that the pursuers relied upon:

“I cannot find on the evidence that there was any intent on either side to be bound at that meeting or that, looking at the matter objectively, anyone would reasonably come to the conclusion that there was such an intent.”<sup>63</sup>

The Supreme Court has also adopted this approach, making it quite clear that the formation of a contract turns on an objective assessment of the subjective requirements of the parties, and what they themselves regarded as essential:

“Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.”<sup>64</sup>

This interpretation of the evolving role of intention can be seen to confer upon contracting parties the freedom to introduce their own contractual rules

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<sup>61</sup> *Aisling Developments Ltd v Persimmon Homes Ltd* [2008] CSOH 140; 2009 S.L.T. 494 at [49]. At first sight, Lord Glennie’s reference to a subjective test, not an objective one, seems to contradict the foregoing discussion. However, this comment is made in relation to what the parties, jointly, regard as essential for their contract—which is a subjective test (albeit one presumably based on the objective expressions of the parties). Thus, the essentials of the contract are not determined by objective standards, but according to what the parties themselves view as essential: a subjective standard.

<sup>62</sup> *Aisling Developments Ltd v Persimmon Homes Ltd* [2008] CSOH 140; 2009 S.L.T. 494 at [50].

<sup>63</sup> *Aisling Developments Ltd v Persimmon Homes Ltd* [2008] CSOH 140; 2009 S.L.T. 494 at [57].

<sup>64</sup> *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14; [2010] 1 W.L.R. 753 at [45].



governing formation of contract. These could take the form of a requirement for a formal written document where one would not otherwise be required, as in *WS Karoulias SA v Drambuie Liqueur Co Ltd*, or conversely waiver of elements which would otherwise be demanded by law, where the parties nonetheless wish to be contractually bound without them, such as an essential term of the contract, for example the price as in *R&J Dempster Ltd v Motherwell Bridge & Engineering Co Ltd*. If we take this approach a stage further, it would even enable parties to conclude a binding contract even absent a legal formality such as writing, as was discussed in *Aisling Developments Ltd v Persimmon Homes Ltd*.

This interpretation would allow parties to regulate their relationship in accordance with their own preferences, through the need to cross this final hurdle prior to conclusion: the need for evidence of intention to enter into a binding legal relationship. Until that moment, where objectively communicated intention can be ascertained, either party can walk away. Support for this approach comes from Lord Clarke's judgment in *WS Karoulias SA v Drambuie Liqueur Co Ltd*, where he states that the question at issue was:

“. . . whether or not it was the parties' intentions, as objectively discerned from the relevant facts and circumstances that, notwithstanding that they had agreed the terms of the deal, they had *postponed its coming into legal effect* until they acknowledged its terms formally by executing the document in which the terms were set out.”<sup>65</sup>

Taken to its logical conclusion, the lack of intention to enter into legal relations means that, in the words of McBryde:

“The parties may expressly state that their agreement is not to be enforced by law. It is thought that, generally, this can be effective just as parties may exclude the jurisdiction of the courts by referring their dispute to arbitration.”<sup>66</sup>

Intention also helps explain why incomplete contracts are nevertheless treated as binding in one particular situation: where there has been performance. It is certainly noticeable that courts are more willing to uphold and enforce “contracts”, even where the existence of that contract is disputed, where there has been performance. Thus, although the parties in *Avintair Ltd v Ryder Airline Services Ltd* had clearly not reached consensus on one of the essential terms, the fee to be paid, the court was prepared to imply the necessary term into the contract, to allow the pursuer to recover for the work done.<sup>67</sup> This too

<sup>65</sup> *WS Karoulias SA v Drambuie Liqueur Co Ltd* [2004] ScotCS 189 at [50], emphasis added.

<sup>66</sup> McBryde, *Contract*, 2007, para.5–09. One example of this in practice is the English case of *Rose & Frank Co v JR Crompton & Bros Ltd* [1925] A.C. 445.

<sup>67</sup> *Avintair Ltd v Ryder Airline Services Ltd*, 1994 S.C. 270.

was at issue in *R&J Dempster Ltd v Motherwell Bridge & Engineering Co Ltd*, and again the court upheld the contract.<sup>68</sup>

Performance also helps explain the outcome in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG*.<sup>69</sup> Here, the draft agreement between the parties contained a “subject to contract” clause, such that the contract was not intended to be binding until the written documents had been signed by the parties. Although the draft documents remained unsigned (and in draft), the Supreme Court nevertheless held that a concluded contract was in existence. This would also appear to conflict with the decision in *WS Karoulias SA v Drambuie Liqueur Co Ltd*, where a concluded but unsigned contract was held by Lord Clarke not to be binding. However, the key difference is performance. The fact that negotiations stalled in August, yet performance continued up until November was highly significant. The actings of the parties are thus a very strong indicator that matters have moved from negotiation to consensus. In the *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* case, performance was effectively taken to be a waiver of the need for a written agreement between the parties, and demonstration of their intention to be contractually bound.

To some extent, the significance of performance appears to reflect the historical basis for recovery in medieval actions, where the action for debt was only possible if there had been performance, rather than simply agreement to perform. Performance renders the contract executed and therefore subject to enforcement. As McBryde has stated: “The fact that a contract is executed rather than executory has been described as ‘a consideration of the first importance on a number of levels.’”<sup>70</sup>

While these cases are understandable from the perspective of the courts’ desire to see justice done between the parties (by enabling the one who has done the work or provided the goods to recover the cost of those goods or services) they can also be explained on the grounds of intention. The performance itself is demonstrative of the practical, and objective, intention of the parties to be legally bound. It does, however, fail to address the situation where the performance is entirely unilateral, such that one party can effectively complete the contract by carrying out his side of the bargain without any input from the other party, and then raise an action for the contract price.<sup>71</sup> In

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<sup>68</sup> *R&J Dempster Ltd v Motherwell Bridge & Engineering Co Ltd*, 1964 S.C. 308. See also McBryde, *Contract*, 2007, paras 5–68–5–70.

<sup>69</sup> *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14; [2010] 1 W.L.R. 753.

<sup>70</sup> McBryde, *Contract*, 2007, para.5–16, in the context of contracts void from uncertainty, and citing Steyn L.J. in *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd’s Rep. 25 at 27.

<sup>71</sup> Although this was the situation in *White & Carter (Councils) Ltd v McGregor* [1962] A.C. 413; 1962 S.C. (HL) 1, where unilateral (and unwanted) performance—in the face of an attempt to terminate the contract—was upheld and gave rise to a claim for payment.

these situations, the basis for recovery may more accurately lie in the field of unjustified enrichment.<sup>72</sup>

### **Email disclaimers**

Having examined recent case law which has recognised that intention can be used to allow the parties to control the moment of contract formation, I now wish to turn to some consequences of email disclaimers. These disclaimers, as will be seen, are used by parties in an attempt to control their obligations and liabilities to other parties. Accordingly, the interaction between email disclaimers and intention to contract is worth exploring.

Email is now an inevitable part of commercial life: most commercial contracting parties are likely to advance their negotiations partially or even wholly by an exchange of emails. There is nothing inherently different about concluding contracts by email, as opposed to by fax or by letter. It is still possible to analyse the correspondence to identify the offer and acceptance, and the moment of *consensus in idem*, although there may be a lot of emails to review, some in admittedly rather informal language.

This informality of language has been considered judicially, and in fact it appears that it does not stand in the way of ascertaining an objective intention to be contractually bound. As Lord Hodge concluded in *Baillie Estates Ltd v Du Pont (UK) Ltd*:

“In the circumstances, I am not persuaded that the informal nature of the email communications of 17 and 19 November 2006 points towards an intention to postpone the formation of a contract. On the contrary, the instruction to go ahead and the response that it’s on the way would suggest to reasonable persons that the parties were agreeing a binding deal.”<sup>73</sup>

Accordingly, the informality of what was said is not necessarily an issue in demonstrating either intention or agreement.

These comments echo those of the Inner House from the 2003 decision of *Robertson v Anderson*. Here, the court held that the agreement to share the bingo winnings was:

“. . . undoubtedly an informal arrangement made between friends, [yet] the Lord Ordinary was nevertheless entitled to conclude that it was an agreement which gave rise to legal consequences . . . an intention to create legal relations can be inferred.”<sup>74</sup>

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<sup>72</sup> Hector L MacQueen, *Unjustified Enrichment: Law Basics*, 2nd edn (Edinburgh: W. Green, 2009), especially Chs 4 and 8.

<sup>73</sup> *Baillie Estates Ltd v Du Pont (UK) Ltd* [2009] CSOH 95 at [28].

<sup>74</sup> *Robertson v Anderson*, 2003 S.L.T. 235 at [15].

Thus, the informality of the communication, whether by email or otherwise, does not stand in the way of its contractual intent, so long as that can be ascertained from the communications of the parties, as in every question of formation.

One particular element of emails is novel, however, and does set them aside from other forms of commercial correspondence. This is the standard use of email disclaimers. The email disclaimer is the wording which is automatically appended to each email leaving a company or firm. It is added by the email system once the sender has hit “send”, and is usually only appended when the email is directed to a recipient outside the company or firm. Typically, the disclaimer will only be visible to the recipient, rather than to the sender.

The organisation sending the email, and therefore the email disclaimer, can use this automatic wording as a way of conveying certain information to the recipient, usually in the form (as the name suggests) of a disclaimer of legal liability. Standard wording might state that the sender accepts no liability for any viruses in the email, that the message is confidential, that there is copyright in the content of the message, and that the email is not intended to give rise to any legal liability.

The earlier discussion made the point that the parties can use contractual intention as a way of determining when a contract is concluded, by making it explicitly clear *whether* and, if so, *when* they intend to be legally bound. When we combine this with the use of an email disclaimer this should, in theory, allow the sender to take this control, by using the disclaimer to make it quite clear whether or not the email is to have legal effect. For example, standard disclaimer wording might read:

“Unless expressly stated to the contrary, this email and its contents shall not have any contractually binding effect on the firm or its clients and any writings which are or could form the basis of any agreement are subject to contract.”<sup>75</sup>

This purports to negate any contractual effect of the substantive content of the email.

A slightly different approach could be:

“The contents of this email do not give rise to any binding legal obligation upon the company unless subsequently confirmed on headed business notepaper sent by fax, letter or as an email attachment.”

Here, the disclaimer seems to envisage that the email could give rise to a binding obligation, but only where additional steps have been taken to attach the details as a letter on headed notepaper, or sent on by fax.

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<sup>75</sup> This of course gives rise to the tricky question of “subject to contract”—a debate which will not be pursued here. See further McBryde, *Contract*, 2007, paras 5–35–5–44, especially 5–42 and Furmston and Tolhurst, *Contract Formation*, 2010, Ch.9, Pt C.

**Some problems and pitfalls with email disclaimers**

Whether either or both of these attempted disclaimers (or others in similar terms) would be successful is open to question. It is certainly the case that email disclaimers give rise to a number of different problems and, on the one occasion where they have been judicially considered in Scotland, the court did not embrace them enthusiastically, as will be seen. Before turning to that case, it is helpful to consider five possible sources of uncertainty arising from the use of email disclaimers.

The first issue is that the email disclaimer is not tailored to each individual situation, but uses standard wording which is applied indiscriminately to each and every email leaving the sender's organisation. It is therefore not the expression of the organisation's contractual intention on a particular occasion, but the contractual intention of the organisation as a general rule. Since the wording is generic rather than specific, questions could arise as to what extent it reflects the intention of the sender or the organisation on any specific occasion.

The second and third points are closely related to each other, and to the generality of disclaimers. Because they are applied centrally and automatically, neither the sender nor the recipient usually knows what the disclaimer says. The individual sender is unlikely even to see the wording because it is applied only when leaving the sender's email system, thus potentially leaving him unaware that one is used or, even if aware that a disclaimer is used, he may be in ignorance as to what it says. As regards the recipient, human nature suggests that he is unlikely to read the small print in an email, especially where it follows the substantive content and the sender's signature. Where the email is part of a lengthy chain, the email disclaimer usually appears at the very bottom, thus making it even less likely to be spotted or read by the recipient.

Fourthly, the precise extent of the disclaimer may be uncertain, even if the parties read it. Both samples provided above refer to the email and its contents, but without making specific reference to any attachments. Does the disclaimer cover only the wording in the email, or does it extend to any attachments sent by the email? Related to this is the problem that arises where the email is sent by a solicitor on behalf of a client, in which case, the contractual effect of the email relates to the client, while the email disclaimer—potentially—applies to the (lack of) contractual intention on the part of the solicitor's firm. The first example cited above does attempt to address this problem, but the likelihood of success must be considerably diminished when trying to ascertain the intention of one party (the client) by reference to an email disclaimer drafted and appended for general use by another (the firm). Moreover, even if the firm's disclaimer were to be upheld, there is of course the risk that the client wishes to rely on the contractual effect of the email, contrary to the disclaimer, thus exposing the firm to an action by its disgruntled client.

A fifth issue is that of authority. The email disclaimer is likely to have been drafted and applied by or on the authority of the board of directors or the

partnership board. It is therefore the explicit intention of the company or firm. The email which has purported contractual effect may well have been typed and sent by someone who does not have authority to bind the company or partnership.<sup>76</sup>

When taken together, these five issues combine to create a number of potential problems. The most important question to be resolved in this context is whether the organisation is expressing its contractual intention through its email disclaimer, or through the substantive content of the email. How can we reconcile the situation when the email disclaimer states that the email shall *not* be legally binding, in stark contrast to the *content* of the email, which states that the sender is pleased to accept the previous offer from the recipient to buy the stated goods at the stated price, and thereby holds the contract between them concluded? And how is the court to deal with a situation where an expressly contractual email is sent by someone who lacks authority to send it, while the expressly non-contractual disclaimer has been applied on the authority of the board of directors? In all these situations, the question to be resolved is which is to be taken as the objective intention of the party: the substantive content of the email or the email disclaimer?

As yet there has been little case law on the role of email disclaimers, but Lord Hodge did consider them briefly in *Baillie Estates Ltd v Du Pont (UK) Ltd* in 2009, indicating that the email disclaimer did not affect the contractual offer, which was contained in a document attached to the email:

“Du Pont did not advance the argument set out in their defences that their emails contained a standard disclaimer that the email did not constitute a contractual offer or acceptance unless it was designated that an e-contract was intended. Such an argument would have been inconsistent with [counsel’s] approach and *would have been met by the response that it was the attached proposal rather than the email which was the offer document.*”<sup>77</sup>

In fact, in that case, the parties were in dispute as to the terms on which the contract had been concluded, each seeking to advance their own standard terms and conditions as the basis for the contract—so it would not have helped either party to point to their own email disclaimer on the one hand, while advancing their own terms and conditions, sent by email, on the other.

Further, the lack of weight given to the email disclaimer in *Baillie Estates Ltd v Du Pont (UK) Ltd* has to be balanced against the reality that there were

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<sup>76</sup> The third party may of course benefit from the agent’s apparent authority, or from statutory protection, e.g. the power of directors is presumed not to be limited by the company’s constitution in relation to their dealings with third parties, thereby protecting those acting in good faith: see the Companies Act 2006 s.40. In relation to apparent authority, see Laura J. Macgregor, “Agency and Mandate”, in *Stair Memorial Encyclopaedia*, Reissue 2002, paras 49 and 75–83.

<sup>77</sup> *Baillie Estates Ltd v Du Pont (UK) Ltd* [2009] CSOH 95 at [32], emphasis added.

no detailed submissions from counsel on that point. However, there are a number of possible options to consider.

It may be that in some cases performance can help to solve the problem: as noted above, performance can be seen as indicative of contractual intention. Accordingly, where the party goes ahead and acts on the basis of its email contract, this could be treated as objective evidence of an intention to be contractually bound.

Further, if parties do wish to ensure their intention is expressed as clearly as possible, it would be open to them to ensure that any contractual document is sent as an attachment, with clear wording on the front page, stating whether the agreement is still at draft stage—and not intended to be contractually binding—or whether the negotiations have concluded and this is intended to be a contractually binding document.

Perhaps part of the solution lies in simply encouraging parties to take account of their email disclaimer and to consider whether, on balance, it is preferable to have a disclaimer which disclaims contractual intent, or not. At any rate, it seems that the current practice of blanket email disclaimers, broadly worded, provides a good example of commercial confusion, where the right hand does not necessarily know what the left hand is doing.

### **Conclusion**

Contract formation is increasingly tied to the consent of the parties as evidenced not only through their agreement as to the essential terms, but also their mutual intention to contract. This intention will be determined from the available evidence, according to what each party objectively demonstrated, subject to any trade practices or commercial customs which affect the parties. However, so long as the parties are explicit about their intention to be contractually bound, they can use this intention to retain control over the moment of contract formation.

This would enable them, for example, to stipulate that there will be no contract until the written document has been signed, regardless of the fact that, at common law, there is no need for a written document, such that the contract would otherwise be concluded once the parties have reached agreement on the essentials. Conversely, they could demonstrate an intention to be legally bound although there is no price, for example, or in extreme cases where their agreement for land has not yet been reduced to formal writing.

Using intention to control the moment of contract formation should also, in theory, allow parties to control, through their email disclaimers, whether or not they are contractually bound by their emails. It seems that email disclaimers have been developed to solve one problem (the danger of unregulated, informal correspondence) without giving due consideration to another: the importance of contractual intention.

The problem appears to arise either when the disclaimer does not cover the precise facts, by referring to the content and not the attachment or, alternatively, where one party does indeed want to rely on the contractual effect of

the email, despite their disclaimer. In this case, the courts will have to resolve the question of which of two possible “intentions” it should attribute to the party, taking into account all the circumstances of the case including of course any performance of the contract. In the meantime, parties are urged to think carefully about how they express their intention to be contractually bound, not least when using email disclaimers.