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**GLOBAL V AABAR: THE COURT OF APPEAL STATE THAT  
CONTRACTUAL NEGOTIATIONS SHOULD BE CLEAR AND  
UNEQUIVOCAL**

In the recent case of Global Asset Capital Inc and another v Aabar Block S.A.R.L and others [2017] EWCA Civ 37, the Court of Appeal held that the High Court was wrong to find that following a 'subject to contract' offer letter, a contract was concluded during a telephone call which was inconsistent with subsequent communications.

**BACKGROUND:**

For the purposes of the appeal the following version of events was accepted. On 23 April 2015, the claimants sent a letter marked 'without prejudice – subject to contract' wherein they proposed to pay €250 million for certain rights. On 5 May 2015, the second claimant was informed by the second defendant's CEO that a board meeting was due on 6 May 2015 where the letter would be considered. On 6 May 2015, the CEO of the second defendant telephoned the second claimant. The claimants case was, that during the call a contract had been agreed subject to two conditions.

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The claimants sought a declaration that there was a valid contract and applied for specific performance. The defendants requested summary judgment but this was refused by Walker J. The defendants appealed.

## **THE RULING:**

The Court of Appeal held that Walker J erred in not considering the parties' conduct after 6 May 2015 telephone conversation. Hamblen LJ delivering the judgment, with whom MacFarlane LJ agreed, emphasised that this was not a question of the interpretation of the terms of the contract, but was a determination whether a contract had been concluded. The court relied on the well-established principle set out in *Hussey v Horne-Payne* (1878) 4 App Cas 311, that in establishing whether a contract had been made the court will look at the whole of the negotiations. Hamblen LJ relying on *Pagnan SPA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, noted that the

rule also applied to situations where both oral and written communications form part of the negotiations.

The court further held that even ignoring the parties' subsequent communications, the claimants had no real prospect of success as the offer letter prior to the telephone call on 6 May 2015 was marked 'subject to contract'. This meant that it was not open to the defendants simply to accept the offer. The claimants' alternative case that the defendants made the offer also failed on two bases. First, this was not the claimants' pleaded case and second, the defendants' request that the claimant re-send the offer was inconsistent with this contention in any event.

During pupillage all our barristers to be are taught to take great care over settling cases and to read Foskett on Compromise. For frequently in a rush to close a file errors are made leading to claims now being made against the lawyer who erred. Undertaking drafting terminology is key.

So what effect does "subject to contract" actually have when inserted in an offer to settle? It shows that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged. With subject to contract, it is only reasonable to expect the parties to enter into a proper and comprehensive sale and purchase agreement documenting all the terms agreed upon between the parties before a valid and binding contract is in existence between the parties. In conclusion, an agreement will only come into force if it is intended to bound the parties at the time the agreement was made. An agreement "subject to contract" will only bind the parties upon the conclusion and creation of a binding and valid contract, after all the terms are agreed.

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