

The Dangers of Gentlemen's Agreements

Nick Richardson, partner, Howell-Jones rhw solicitors, Guildford, warns of the Perils of Verbal or Gentlemen's Agreements.

If you want to do business with a gentleman (or lady), why on earth would you use a gentlemen's agreement? Images of cads and bounders and Hugh Laurie may spring to mind, but the real issue here is one of trust.

We all trust other people's driving, yet invariably we put on a seat belt. Not just because that's the law, but because we would be plain daft not to. The same applies to gentlemen's agreements.

Let's be clear what's at stake here. Basically, the issue is whether or not you trust the other person, shake their hand and accept their word that certain things covered by the agreement will happen.

In a commercial environment or any environment of practical common sense, the question must be "why take a chance?" Why indeed? At its best, a gentlemen's agreement (realistically this is a verbal agreement) is as enforceable (or unenforceable) as any other verbal contract.

Much will depend on trying to establish the exact terms of the agreement, whether they are in a letter, a series of letters, an e-mail or exchange of e-mails, or even scribbled on a napkin during a meal – the traditional "back of envelope" document.

Whilst it may be possible to establish some of the terms of an agreement, it will at best be cumbersome and time consuming putting together all the various documents

containing reference to these. There is also a substantial risk that some points may be missed out altogether.

Another risk here for someone trying to rely on a verbal agreement is that to bring any successful claim on a verbal agreement it will be necessary to establish to the satisfaction of a Court that the terms of the contract were actually agreed between the parties.

For the most simple agreement it would be necessary to establish with some degree of certainty the following elements.

- The parties.
- What was actually agreed i.e. who was supplying or “doing” what for whom?
- What price was to be paid and what other terms for payment were agreed?
- What timescale was agreed?
- What default procedures were agreed (if any).
- What other points were agreed.

The bottom line is that you really do not want to rely on any form of verbal or gentlemen’s agreement – *get it in writing!*

To do this it may not need an all singing all dancing contract; indeed, simple bullet points of what has been agreed may well suffice.

So, consider for a moment “Heads of Terms” or “Heads of Agreement” - a very useful compromise between having nothing at all or something as ineffective as a gentlemen’s agreement and the “all singing all dancing” full commercial agreement referred to above.

Whilst Heads of Agreement are more often than not expressed to be non-binding and of no legal effect (save for a couple of points e.g. confidentiality provisions), it is possible to have binding Heads of Terms. This happens ***if*** the parties are confident that

the bullet points are sufficiently detailed to give a concise "mini-contract" from the date of signing.

The risk is that the Heads of Terms will not be detailed enough to do this and the parties will back themselves into a corner and agree to take on obligations which may prove difficult or impossible to enforce.

However, one person's difficulty is another person's benefit and benefits are very genuine if they are perceived as such whether or not they are real.

Let's put it another way. The parties might enter into binding Heads of Terms, even if there are difficulties with some of the provisions of those Heads of Terms. Nevertheless, the parties may be substantially better off with such a document than nothing at all.

As with so many things in life, it is a matter of applying the right size spanner to the nut in question – frequently a better tool than a sledgehammer for a nut!

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