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Legal update ——— April 2017

Corporate
What do you do if you fail to sign?

This is likely to be a familiar question for anyone who has ever done business with commissioners for the supply of health and care services. Within the sector it is common for providers not to have in place written and signed contracts for the services that they are providing.

This lends itself to the questions: (i) is there a legally binding contract in place, and (ii) if there is, what are its terms?

Contract basics

There are certain fundamental requirements that must be met in order to create a legally binding agreement. These include:

- Offer - an offer must contain the basic terms of the agreement;
- Acceptance - acceptance of an offer occurs when there is an unqualified acceptance of all the offered terms. There will normally be a period of negotiation. New terms and conditions introduced through negotiation amount to a series of counter offers to the original offer, cancelling the terms of the original offer;
- Consideration - consideration must have some value in the eyes of the law, even if it is not adequate; and
- Intention to create legal relations - an intention to create legal relations is presumed in most commercial situations.

Acceptance by conduct

The recent case of Reveille Independent LLC -v- Anotech International (UK) Limited [2016] EWCA 443, has re-confirmed that acceptance of the terms of a contract does not need to be in writing; acceptance can equally be demonstrated through the conduct.

Source: Fotolia

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Background

The claimant, Reveille (a US television company), brought a claim against the defendant, Anotech (a distributor of cookware), for breach of contract. The claim derived from an alleged agreement in which Reveille would licence to Anotech certain intellectual property rights relating to MasterChef US and permit the integration and promotion of Anotech's products into three episodes of the television series.

The terms of the negotiations were set out in a deal memo prepared by Reveille (the **Memo**). The Memo expressly stated that it was not to be binding until signed by both parties. Anotech marked up the Memo with handwritten amendments and additions and returned a signed copy to Reveille. Reveille never signed the revised Memo and negotiations to replace the deal Memo with a long form agreement broke down before anything could be agreed.

In the interim the relevant episodes of MasterChef were recorded and broadcast and Anotech had started using the MasterChef brand in its sales and marketing. Reveille invoiced Anotech but the invoice was never paid.

Reveille brought proceedings and contended that it entered into a binding agreement with Anotech on the terms set out in the Memo. Anotech's position was that it was not bound by the Memo because:

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- the Memo stated that it was not to be binding until signed by both parties and it had not been signed by Reveille; and

- it had not been accepted by conduct; any steps taken were in anticipation of agreement being reached either on the Memo or subsequently on the long form agreements.

Decision

Applying the principles of acceptance by conduct, the Court of Appeal found that there was clear evidence of acceptance of the terms by Reveille by their conduct, which included the integration of Anotech's products in episodes of MasterChef and approval of use of its intellectual property in press releases.

NHS Standard Contract

In relation to the provision of health care services (excluding primary care services) commissioners are mandated by NHS England to contract on the basis of the NHS Standard Contract. Whilst it is common for service providers to negotiate fees and hours/type of care with commissioners, it is also common for the parties to fail to sign a written contract documenting all of the agreed terms.

In this scenario the NHS technical guidance, which is supplementary to the NHS Standard Contract, provides that in the absence of a signed contract between the relevant commissioner and service provider, where the services continue to be provided and paid for: (i) there will be an implied contract which will reflect what has been agreed between the parties (for example there are usually e-mail exchanges setting out agreed fees and the number of hours of care to be supplied); and (ii) it would be reasonable to assume that the implied contract would incorporate the nationally drafted terms of the NHS Standard Contract for the applicable year.

Summary

The case of Reveille -v- Anotech and the position under the NHS Standard Contract illustrate the importance of ensuring that the terms of a contract are fully agreed and documented prior to commencing work. Where work is commenced before the terms are finalised, parties may unwittingly form a legally binding contract on the terms suggested by their conduct, regardless of whether these are the terms the parties envisaged agreeing in the formal written document.

The more significant the work undertaken the more likely the courts will be to conclude that a contract had already arisen by the conduct of the parties, even where the prescribed mode of acceptance has not been followed.

In order to best manage legal risks of a business, it should endeavour to agree all of the terms, take advice (where appropriate) on the implications of the contract and execute the agreement before performing the services. Without that, a business might find itself with a liability for which it has not planned for.

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