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Insights

JAEVEE HOMES V FINCHAM: WHATSAPP USERS TAKE NOTE!

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SUMMARY

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In this Insight, first published in PLC, Anna Blest and Katharine Tulloch consider the decision in Jaevee Homes Ltd v Fincham (t/a Fincham Demolition) [2025] EWHC 942 (TCC), in which the court concluded, among other things, that informal WhatsApp messages and e-mails between the parties constituted a binding construction contract.

Jaevee Homes Ltd v Fincham (t/a Fincham Demolition) [2025] EWHC 942 (TCC) is one of those useful, multi-faceted cases that considers issues that are not only of interest to construction practitioners but also to anyone who enters into a contract.

For construction practitioners, it provides a useful reminder about the implication of the payment elements of the Scheme for Construction Contracts (England and Wales) Regulations 1998 (*SI 1998/649*) (Scheme for Construction Contracts) and how to determine whether a payment notice is valid for the purposes of the Housing Grants Construction and Regeneration Act 1996 (Construction Act 1996). For the wider audience, it provides a cold, stark warning of how easy it can be to enter into a contract unintentionally when using WhatsApp or e-mail in the course of negotiations and when exchanging messages in a very informal manner.

This article takes a look at the case and considers what lessons we can learn from it.

For more information about:

- Jaevee Homes v Fincham, see *Legal update, Contract agreed by WhatsApp and invoices were payment notices (TCC)*.

- Payment under construction contracts, see *Practice notes, Payment in construction contracts: Construction Act 1996* and *Payment in construction contracts: Scheme for Construction Contracts 1998*.

FACTUAL BACKGROUND

Jaevee Homes, the claimant developer, approached the defendant, Fincham Demolition, to carry out demolition works at a nightclub in Norwich. After a site visit in April 2023, the parties exchanged emails discussing the work scope, duration and sequencing of the works, price and even the provision of a quotation but no firm agreement was reached. However, the conversation moved to WhatsApp on 17 May 2023 with the following exchange:

> "[17/05/2023, 16:34:43] Steve Fincham: Hi Ben How did you get on mate is the job mine mate
>
> [17/05/2023, 16:38:32] Ben James: Can you start on Monday?
>
> Steve Fincham: I can start with getting the scaffolding sorted and stuff on Monday mate but men will start the following Monday Tom needs to get the scaffolders there on Monday too mate to alter the scaffolding with ladder beams above the door way and make gates into the hoarding to get the equipment in He will know what we are talking about mate Appreciate this work I really do Ben
>
> [17/05/2023, 17:43:15] Steve Fincham: Ben Are we saying it's my job mate so I can start getting organised mate
>
> [17/05/2023, 20:06:42] Ben James: Yes
>
> [17/05/2023, 20:06:51] Ben James: Monthly applications
>
> [17/05/2023, 20:11:50] Steve Fincham: Are you saying every 28 or 30 days from invoice that's a yes not on draw downs then good d) call you at 8.30 mate Thanks mate appreciated Ben
>
> [17/05/2023, 20:12:12] Ben James: OK"

On 26 May 2023, the defendant received a zip file of documents by e-mail, which included a purchase order and a sub-contract. The sub-contract was dated 22 May 2023, named the contracting parties as the claimant and the defendant, stated that the contract sum was £248,000 plus VAT and made provision for a monthly interim payment regime. The defendant never acknowledged or replied to the e-mail either accepting or rejecting the sub-contract terms.

DISPUTE

On 30 May 2023, the defendant commenced demolition works and then proceeded to issue four invoices for payment in quick succession (9 June, 23 June, 14 July and 27 July). The claimant

objected to the defendant submitting invoices with such frequency on the basis that monthly payments had been agreed, although it did pay some monies to the defendant. However, the parties fell into dispute regarding the amount of work executed and sums due and the claimant purported to terminate the sub-contract. The total sum invoiced by the defendant was £195,857.50 plus VAT while the total sum paid by the claimant was £80,000.

After serving a statutory demand, the defendant commenced an adjudication seeking the outstanding sum of £125,650.38 on the basis that the four invoices were payable because no pay less notices had been served. The key issue was whether these invoices were valid payment notices.

The adjudicator agreed with the defendant deciding that the 17 May WhatsApp messages constituted the contract and that there was no provision for the invoices to be issued monthly, only paid within 28-30 days of issue. The claimant refused to pay and instead issued a Part 8 claim asserting that there was no basis for payment. It sought the following declarations:

- The contract was the sub-contract attached to the 26 May e-mail (which made provision for monthly payments).
- Alternatively, the contract was the exchange of written communications by e-mail and WhatsApp between April 2023 and in or around 23 May 2023 that included a requirement for the defendant to issue applications for payment on a monthly basis; and
- In any event, regardless of the terms upon which the parties had contracted, the four invoices did not constitute valid "applications for payment" and/or "default payment notices" under the Construction Act 1996.

JUDGMENT

Overall, the court ruled in favour of the defendant. Key elements of the judgment include:

EXCHANGE OF COMMUNICATIONS BY E-MAIL AND WHATSAPP MESSAGES CONSTITUTED A CONCLUDED CONTRACT

The court held in favour of the defendant ruling that the exchange of communications by e-mail and WhatsApp messages between April 2023 and 17 May 2023 "whilst informal, evidenced and constituted a concluded contract… ".

What is particularly interesting about this conclusion is the weight the court gave to the essential terms required for a contract to come into existence. In relation to the Claimant's contentions that:

- There was no agreement as to the duration of the works, the court commented that "agreement as to duration of contract works is not an essential element of a construction contract: absent

express agreement, there is an implied term that the contractor will complete within a reasonable period" (*paragraph 87, judgment*).

- It was unclear whether a start date had been agreed, the court concluded that "it had been agreed that the first part of the works (namely erection of scaffolding) would start on the following Monday, but even if that had not been agreed, agreement as to a precise start date was not an essential term of the contract" (*paragraph 88, judgment*).
- Payment terms had not been agreed, the court commented that "the absence of payment terms is not antithetical to the existence of a concluded contract – an important target of the [Construction Act 1996] is to fill the gap if a contract does not contain appropriate payment terms" (*paragraph 89, judgment*).

As far as the court was concerned the parties had agreed the scope of works, the price and payment terms and that works should be started as soon as possible and, further, had agreed when the defendant would start on site. That was all that was needed to create a contract in the construction context. In other words, everything else could be implied by common law or statute.

The court held that the following statement was evidence of a concluded agreement:

> "[17/05/2023, 17:43:15] Steve Fincham: Ben Are we saying it's my job mate so I can start getting organised mate
>
> [17/05/2023, 20:06:42] Ben James: Yes".

The findings in this case only serve to reinforce the observations of Jacobs J in *Southeaster Maritime Ltd v Trafigura Maritime Logistics Pte Ltd [2024] EWHC 255 (Comm)*, where again, in negotiating a charterparty arrangement, the parties had resorted to a combination of e-mails and WhatsApp messages and the exchanges between them featured very informal language.

In that case, as the messages were found to convey relevant contractual information and there was nothing in the correspondence to suggest that it was somehow impermissible to use WhatsApp (or other informal means of discussion between the brokers involved), the judge held it was:

"fanciful, and without any real prospect of success, the suggestion that the message should in some way be disregarded, or is somehow of less significance, because it came via WhatsApp rather than e-mail. There is nothing in the prior correspondence which indicates that messages, conveying the position of the Owners, could not be sent by WhatsApp, or that this was in the nature of an unofficial channel." (*Paragraph 129, judgment.)*

Interestingly, this decision was not cited to the judge in *Jaevee Homes v Fincham*, perhaps because the English courts consider the means/mode of communication of less importance than the substance of the messages/information exchanged and the intention with which a communication is made.

Also of note is the Canadian courts consideration as to whether the ever popular thumbs up emoji could be both a note or memorandum in writing and a signature (either of which is required to make a contract for the sale of goods over $50 enforceable in Canada). The Saskatchewan Court of Appeal held (in a majority decision) that the sending of a thumbs up emoji by text message in response to a text message reading "Please confirm flax contract" was enough to conclude a valid sale of goods contract under Canadian law.

For more information, see *Achter Land & Cattle Ltd. v South West Terminal Ltd, 2024 SKCA 115*

We can see circumstances where the English courts would make a similar finding, treating an emoji as a valid form of acceptance, but the question whether this would meet formalities requirements for contract signature has not yet been considered.

For more information, see Practice notes:

- *Contracts: formation*.
- *Contracts: formation and the battle of the forms*.

INVOICES TO BE ISSUED ON MONTHLY BASIS

While invoices were to be issued monthly, the defendant was not free to issue invoices whenever it chose.

The court held that "the agreement was that the Defendant was free to make one, but only one, application for payment each month…there was however, no agreement as to when in the month such application could be made… ". The defendant would then be paid 28 to 30 days following its application.

The court confirmed that because the short WhatsApp messages between the parties made no provision as to how monthly instalments were to be calculated, the Scheme for Construction Contracts would step in on a piecemeal basis to calculate the monthly instalments to which the defendant was entitled.

INVOICES WERE VALID PAYEE NOTICES IN DEFAULT

As to the question of whether the submitted invoices constituted default payment notices for the purposes of the Construction Act 1996 the court held that the invoices were valid notices.

The judge had regard to *Advance JV v ENISCA Ltd [2022] EWHC 1152 (TCC)*, which provided guidance (at paragraph 47 of that judgment) for how a court should decide whether notices are valid including:

- The construction of notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices.
- The notice must be construed taking into account the "relevant objective contextual scene".
- The purpose of the notice will be relevant to its construction and validity.
- Payment notices and pay less notices must clearly set out the sum that is due and/or to be deducted and the basis on which the sum is calculated. Beyond that, the question of whether a notice is or is not a valid notice is "a question of fact and degree".
- There is no requirement for a particular type of notice such as a pay less notice, to have that title or to make specific reference to the contractual clause in order to be valid. The question is whether, viewed objectively, it had the requisite intention to fulfil that function.

Having regard to this guidance, the court ruled that all four invoices were valid applications or claims for payment that satisfied section 110B(4) of the Construction Act 1996 in circumstances where the payer (claimant) failed to issue payment notices; they constituted payee notices in default. However, as the defendant was only entitled to issue one payment notice a month only three of the four invoices were valid.

For more information on *Advance JV v Enisca*, see *Legal update, Pay less notice must clearly refer to the notice setting out the notified sum (TCC)*.

THOUGHTS

The commentary this case provides on implying the Scheme for Construction Contracts into a contract and evaluating whether an invoice constitutes a payment notice for the purposes of the Construction Act 1996, is very much as those familiar with construction caselaw would expect.

However, the commentary on formation of contract gives pause for thought because it illustrates the significant risks associated with using WhatsApp or even e-mail for business communications and the potential for forming a legally binding contract without necessarily wishing (with hindsight) to have done so or earlier than you may have intended. The particular issue with this is that it means that if the WhatsApp/e-mail messages are not clear as to what the parties have agreed in relation to key aspects of the contract such as the payment regime or disputes or perhaps the standard of care or time for completion, the common law and certain statutes (most notably the Construction Act 1996 in the construction context) will fill in the gaps, implying terms that, had the parties engaged in formal negotiations, they may not have agreed.

This is not the fault of WhatsApp or e-mail providers of course. This is down to parties using these messaging services for casual conversations that amount to informal agreements. If the parties subsequently fail to enter into a written contract and a dispute arises in relation to works or services

that have been carried out, such communications may be construed as contractual commitments if they meet the basic elements of a contract, that is offer, acceptance, consideration and intention to create legal relations.

As can be seen from this judgment, in the construction context very few elements need to be agreed to form a binding contract as the remainder of the terms can be readily supplied by common law and statute. This can lead to unintended obligations and liabilities for the parties, especially if the terms are ambiguous or not clearly defined, and legislation such as the Supply of Goods and Services Act 1982 may import obligations and liabilities that one or other of the parties did not intend. Where the project is required to meet a particular parameter, such as a BREEAM outstanding rating (or equivalent) or where particular goods or products must be used, these must always be expressly stated and will not be implied.

To avoid this situation, best practice when starting a project is to:

- Make clear from the outset that you wish to enter into a written contract. Send the contract to the other party as soon as possible and mark all negotiating correspondence "subject to contract" in the meantime.
- Make sure the contract is actually signed by both parties so it comes into existence. Once signed don't ignore it but make sure the parties are clear on what they have agreed.
- Clearly define what documents form part of the contract. Don't include pre-contract negotiations or "contract clarifications" as a contract document as they often contain imprecise and conflicting statements. Also consider including an entire agreement clause.
- Include a clear procedure for varying the contract and ideally, a no oral modification clause to ensure that variations to the contract can only be made in writing and signed by the parties to avoid:
  - any risk of future e-mail/WhatsApp correspondence informally varying the contract; and
  - any argument that key terms of the contract sit outside the formal written document in unmonitored WhatsApp (or other) chat channels.

We would also recommend ensuring that all business team members are aware of the downside of using informal communication channels (particularly more junior members of staff who have grown up with these messaging platforms and who communicate wholly or mainly using them), given the risks around:

- Informality of tone and content leading to ambiguity about the terms of the contract, as well as the risk that those terms are not fully documented or are documented piecemeal across a

series of messages or messaging platforms/devices (both work and personal), which can make oversight of contractual performance extremely challenging.

- Regulatory compliance (as some usages of messaging platforms will not be compliant with regulatory requirements, including data protection and privacy laws).
- Exposure to litigation risk if messages are not retained on the company's systems, which can pose significant challenges during litigation. These messages may in any event be disclosable in litigation as they will fall within the definition of documents under the Civil Procedure Rules. If they cannot be produced in litigation when required it can lead to adverse inferences being drawn from a failure to disclose, sanctions, and/or even unfavourable judgments. It is essential to use communication platforms that ensure proper retention and accessibility of business records to comply with legal obligations and support the position in any potential legal disputes.

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