

Property Law Update



Transparency

Important Decision Affecting All Property Transactions

A case decided in the Court of Session recently has just been reported, and is already causing widespread dismay and disbelief in the legal profession.

The Court decided that missives concluded by fax are not binding until the principal copies of the faxed missives letters are received by the parties' solicitors. This overturns the universal understanding and practice whereby missive letters transmitted by fax were deemed to be contractually binding at the time of the fax transmission.

The case in question related to the sale of restaurant premises in Bothwell. Missives were concluded by faxes exchanged before 5pm on 31 August 2007. The hard copies were posted that day but not received by the respective solicitors until the morning of 3 September 2007. Meanwhile, a court order was granted at midnight on 31 August 2007 to a third party (the seller's former business partners) prohibiting the sale.

The Judge had to decide when binding missives were concluded. If binding missives were concluded at the time of the fax transmission, then the court order was ineffective whereas if binding missives were not concluded until the morning of 3 September, the court order was effective and the sale could not proceed.

The Judge held that the faxed missives did not create a contract and that binding missives were not properly "concluded" until the morning of 3 September. The court order granted to the former business partners was therefore effective, and the sale of the restaurant was stopped.



Comment

Faxed missives – and missives sent by email – are therefore not binding on transmission. There are immediate repercussions:

- Even although a deal is agreed by fax, it is open to either party to withdraw from the deal before the hard copy missives are received by the parties' solicitors.
- Some deals are time sensitive – for example where tax changes are imminent. HMRC may take a keen interest in the exact timing of the delivery of the missives in such cases.
- The decision overturns earlier cases which appeared to support the creation of a contract by electronic means: and it runs contrary to EU directives that require member states to ensure that their domestic legal systems facilitate the creation of contracts electronically.
- It makes sense to ensure that principal copies of faxed missive letters are delivered as quickly as possible. It may be possible for the parties or their solicitors to exchange letters confirming that physical delivery is deemed to have occurred on transmission of the fax (by the sender of the fax holding the principal letter as agent for the recipient) although this seems somewhat convoluted. The important point is not to assume that the deal is binding by merely pressing the "send" button on the fax machine.

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