1

FORMATION AND THE CONCEPT OF AGREEMENT

A. Introduction

1.01 For any law student undertaking a course in contract law, the first substantive topic studied is that of contract formation. There is a certain logic to this because many other topics in a contract law course, such as construction, performance, breach and damages, depend on there being a contract in existence. The topic is also a nice introduction into contract law reasoning with many of the famous and entertaining cases contained in it. It is also considered by many students to be the easier part of the course seemingly made up of a lot of easy to understand rules that need to be applied to the facts of a case. It would then come as a surprise to many to learn that perhaps the most litigated area of contract law is that of formation. In particular the formation issue that takes up most of the courts' time is that of agreement.

1.02 For a contract to exist a number of requirements must be made out. The parties must come to an agreement, they must intend to contract, the agreement must be supported by valuable consideration and any formalities, such as the need for the contract to be evidenced in writing, must be satisfied. The concern of this book is with the requirement of agreement. As noted above, this issue takes up most of the courts' time in formation disputes. However, given that that issue is closely connected to the requirement of an intention to contract, this too is discussed in this book. The approach taken in the book is to look at the topic of agreement from the perspective of principle. The rules governing the formation of contracts are not difficult rules to state. However, they are difficult to apply and this, together with a failure to involve lawyers early on in any transaction, may be the basis for so much litigation in this area. It is difficult to provide comprehensive legal advice on any given set of facts and so both sides will tend to feel that they have a good case. This is perhaps a natural consequence when an issue largely depends on the intention of the parties.

1.03 Because our approach is one of principle we have not attempted to cite all the judgments that are handed down each year on this topic. Most of those judgments are not nor will ever be reported and there appears little point in a doctrinal driven work to give endless examples of a principle in practice when the issue before the court depends on the facts of each case.[1] Moreover, such a text would be out of date within a few hours of publication. This is particularly so in a text that attempts to look at as many jurisdictions as this one. In addition, given the amount of unreported cases now available online, any lawyer who has a formation issue coming across his or her desk can log into an electronic database and find a case with similar facts in a very short period of time. Of course reasoning through facts is not the best approach to legal research and such research will usually result in finding an unreported decision of a single judge that may or may not be in line with the leading cases and may be overruled at any time.

1.04 The approach to this text is to start with the leading decisions on a topic to discover a principle of contract formation and how that principle operates which is then followed by examples which we believe apply the principle in the way the highest authority has explained it.

1.05 This is principally a work on English law for English practitioners. For that reason it is necessary to discuss the leading English authorities. However, the practising English commercial lawyer is well versed in the classic English cases and to provide a different perspective from that found in most standard contract texts we have included a lot of cases from other jurisdictions. We were able to do this because the principles of contract formation are remarkably similar across many borders. When they are different they provide interesting contrasts. Very often a perceived difference can be accomodated under current common law principles should the need to change arise. In addition to comparative case law content we also discuss approaches to formation issues under the Restatement (2d) Contracts, the Uniform Commercial Code, the Unidroit Principles of International Commercial Contracts 2004, the Principles of European Contract Law and the Draft Common Frame of Reference.

1.06 For the most part, as the principles of formation are common throughout the jurisidictions discussed in the text we have not dealt with the law in each of these jurisdictions separately but have taken the liberty of using what we think are good case examples of a particular principle in operation from any of those jurisdictions. Separate treatment is given where there is some difference of approach.

B. The Objective Theory of Contract and Formation

1.07 Throughout the law of contract is the guiding principle of the objective theory of contract.[2] That theory has particular emphasis in the area of contract formation and is discussed in more detail in the text in those areas where it is relevant. In general terms whether or not

[1] This is not meant to suggest that someone with a lot of time, research assistants and a love of facts might not make some important empirical findings by reading through all these cases.

[2] See Spencer, 'Signature, Consent, and the Rule in *L'Estrange v Graucob*' [1973] CLJ 104; Howarth, 'The Meaning of Objectivity in Contract' (1984) 100 LQR 265; Vorster, 'A Comment in the Meaning of Objectivity in Contract' (1987) 103 LQR 274; de Moor, 'Intention in the Law of Contract: Elusive or

the parties have agreed to enter into a contract is determined on an objective basis.[3] However, the objective theory of contract is not a form of detached 'fly on the wall' objectivity. The focus of the theory is that of a reasonable person in the position of the parties.[4] Often this is expressed as a quest for the presumed intention of the parties. As noted by others this approach is one of commercial convenience, a purely subjective approach to contract formation is not workable.[5]

1.08 The objective theory dictates that when determing whether or not a statement made by a person was intended to form the basis of a contract, it is construed by reference to a reasonable person in the position of the party to whom the statement is directed. Thus, when trying to determine whether a statement was intended to be an offer, it is construed by reference to a reasonable person in the position of the offeree.

1.09 To some extent the approach to finding intention is purely objective as the available evidence is what the parties said or did.[6] It is generally not possible to put to the parties a direct question as to what was their intention. Nevertheless, the subjective beliefs of the parties are relevant.[7] Although the law is not concerned with the subjective belief of a person making a statement, it may be concerned with the subjective beliefs of the person to whom it is addressed. A useful starting point is a simple example. Assume it is alleged by B that A made an offer to B which B accepted and that A wishes to argue that his or her statement to B was not an offer. The starting point is to ask whether a reasonable person in the position of B would have construed the statement as an offer? If the answer to that is 'yes' then one turns to the subjective beliefs of B. If there is evidence that B did not believe that A was making an offer then the court will take cognizance of that and rule that there was no offer.[8]

Illusory?' (1990) 106 LQR 632; Perillo, 'The Origins of the Objective Theory of Contract Formation and Interpretation' (2000–2001) 69 Fordham L Rev 427; Solan, 'Contract as Agreement' (2007) 83 Notre Dame L Rev 353; Goddard, 'The Myth of Subjectivity' (1987) 7 Legal Studies 263; Farnsworth, *Farnsworth on Contracts* (3rd edn, Vol 1, Aspen Publishers, New York, 2004) § 3.6, p 208ff; Beever, 'Agreements, Mistakes, and Contract Formation' (2009) 20 KCLJ 21. See also *Ricketts v Pennsylvania R Co* 153 F 2d 757, 760ff (1946).

[3] *Smith v Hughes* (1871) LR 6 QB 597, 607. Contrast the position under civil law, see Nicholas, *The French Law of Contract* (2nd edn, OUP, Oxford, 1992), 32ff.

[4] Although the expression 'a reasonable person in the position of the parties' is a convenient expression it is more appropriate to contract construction where a document must be taken to represent the agreement and understanding of both parties.

[5] Peel, *Treitel, The Law of Contract* (12th edn, Thomson, Sweet & Maxwell, London, 2007) para 1-002.

[6] *Norwich Union Fire Insurance Society Ltd v WM H Price Ltd* [1934] AC 455, 463.

[7] Once there is a concluded contract, the terms must be treated as if agreed to by both parties. Therefore, in interpreting those terms the court must give to it a meaning that represents the intention of both parties. That this is the required approach is implied by the fact that in interpretation the court is not simply determining the meaning of terms but the legal effect of the terms and so the parties are generally taken to have meant what they said. Therefore, as noted above, the construction given will be one that represents the understanding of a reasonable person in the position of the parties, *Kell v Harris* (1915) 15 SR (NSW) 473, 479. It would not be sufficient for A (a party to a contract) to argue that a particular meaning should be given to a term because A subjectively believed it had that meaning and the other party (B) knew of A's belief. It would be necessary for A to prove that B assented to that meaning.

[8] *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309, 330–1. See also *OT Africa Line Ltd v Vickers plc* [1996] 1 Lloyd's Rep 700. Such evidence may include the conduct of B and the course of negotiations. See further 4.62. Similarly if an offeror is aware that the offeree does not intend to accept, it will not be sufficent proof of the existence of a contract that objectively viewed the offeree's conduct might

1.10 The relevance of the subjective state of mind of the parties as set out in the above parargraph is well accepted. It is a negative formulation of the relevance of subjective belief. In the example the statement by A will be an offer if a reasonable person in the position of B would construe it as an offer unless B is aware that A did not intend to make an offer. There is no doubt that in practice this is the principal situation where the issue of subjective belief arises, that is, where one party wishes to contest the existence of a contract by showing that the other party was aware that the first party had no intention to contract. Nevertheless, there has been a long debate as to whether this represents a full statement of the relevance of subjective belief or whether it is necessary for B, in the example, to hold the positive belief that A was making an offer. It is suggested that this latter positive formulation reflects the need for a consensus—the requirement that each party intends to contract on the same terms as the other party—and an intention to contract. It also sets the limits on the concept of consensus, it is one sided, the law is not concerned with the subjective belief of the person making a statement. Thus, in *Smith v Hughes*,[9] Blackburn J said:[10]

> If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, *and that other party upon that belief* enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

1.11 Similarly in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal*,[11] Lord Diplock said:[12]

> To create a contract by exchange of promises between two parties where the promise of each party constitutes the consideration for the promise of the other, what is necessary is that the intention of each *as it has been communicated to and understood by the other* (even though that which has been communicated does not represent the actual state of mind of the communicator) should coincide.

1.12 In the same case Lord Brightman stated:[13]

> To entitle the sellers to rely on abandonment, they must show that the buyers so conducted themselves as to entitle the sellers to assume, *and that the sellers did assume,* that the contract was agreed to be abandoned sub silentio.

evidence an acceptance, see *Airways Corp of New Zealand Ltd v Geyserland Airways Ltd* [1996] 1 NZLR 116; *Transpower New Zealand Ltd v Meridian Energy Ltd* [2001] 3 NZLR 700.

[9] (1871) LR 6 QB 597.

[10] (1871) LR 6 QB 597, 607 (emphasis added).

[11] [1983] 1 AC 854.

[12] [1983] 1 AC 854, 915. See also *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] 1 Lloyd's Rep 475, 512 per Andrew Smith J suggesting that in addition to there being no contract if one party knew or had reason to believe that the other party did not intend to contract, there will be no contract if one party formed no view one way or the other as to the other party's intention. Cf the analysis of this situation in Peel, *Treitel, The Law of Contract* (12th edn, Thomson, Sweet & Maxwell, London, 2007) para 2-003. In *Excomm Ltd v Guan Guan Shipping (Pte) Ltd (The Golden Bear)* [1987] 1 L1oyd's Rep 330, 341 Staughton J said: 'For my part I cannot see why it should in practice make any difference whether on the one hand the respondent in fact assumed that the claimant was offering to abandon the reference, or on the other hand, he would have made that assumption if he had thought about the case at all. Indeed the older a case is, the less likely it is that the respondent will give it consideration from time to time. When the case is so old that he has ceased to consider it at all, a fortiori the doctrine of abandonment should apply.'

[13] [1983] 1 AC 854, 924.

1.13 These statements are not meant to suggest that for a contract to exist there is a need for B in our example to prove that he or she held a positive belief that A intended to make an offer. If there is no evidence led by A to the contrary that belief will be presumed. This presumption is very important to contract formation. For example, assume A in London agrees to pay £100 to the the first person who runs from Cambridge to London. Next assume B runs from Cambridge to London and is the first person to do so after publication of the offer. That fact alone is not sufficient to bring about a contract. Nevertheless, the law is such that so long as B had knowledge of the offer and carries out the act of acceptance there is a presumption that B arrived in London in reliance on the offer. However, it is open to A to show that B did the act without intending to accept the offer.

1.14 In addition, a party will be estopped from giving evidence as to their own state of mind in order to resile from a contract. For example, assume the situation is that A makes an offer to B which is accepted by B in circumstances where a reasonable person in the position of A would construe B's statement as an acceptance. It is not possible for A to seek to resile from the contract by attempting to lead evidence that he or she did not subjectively believe B was accepting. A has acted in a way that a reasonable person 'B' would interpret as suggesting an intention to contract and is estopped from resiling from that position unless A can prove that B did not rely or could not have relied on the representation implied from A's conduct because B knew that, in fact, A did not intend to contract.[14] Thus in *Smith v Hughes*,[15] Blackburn J said:[16]

> I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other.

1.15 This concept of 'estoppel' pervades contract formation and prevents a person leading evidence of their state of mind even though such subjective intent may form part of contract formation theory at some level. It follows that in the result the positive formulation of the relevance of subjective beliefs will not in practice produce different results from the negative formulation.

1.16 There is yet another debate concerning the subjective beliefs of the parties. As noted above, the relevance of these subjective beliefs is well accepted but there has been a long debate as to whether they operate as an exception to the objective theory of contract and effectively render the theory a fiction or whether they are captured by it. For many, as noted above, the objective theory is a theory of convenience and 'applies only where serious inconvenience would be caused by allowing a party to rely on his "real intention"'.[17] However, for others because the objective theory operates by reference to a reasonable person in the position of the parties that reasonable person must take on the characteristics of the parties including

[14] This is not an adoption of a reliance theory of contract and the 'estoppel' operates upon the giving of a counter-promise. Cf the formulation of estoppel by Lord Brandon in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854, 914.

[15] (1871) LR 6 QB 597.

[16] (1871) LR 6 QB 597, 607.

[17] Peel, *Treitel, The Law of Contract* (12th edn, Thomson, Sweet & Maxwell, London, 2007) para 1-002.

their background and knowledge and this brings within the objective theory those subjective beliefs to the extent that they are relevant and admissible.[18]

C. The Concept of Agreement

1.17 It is a general principle of contract formation that the parties must have reached an agreement. This has traditionally been expressed as a requirement that there be a consensus *ad idem*. As noted above there are limits in the extent to which the common law requires a consensus.[19] The objective theory of contract necessarily dictates that there is no requirement of a true subjective meeting of the minds.[20] As a general proposition the requirement of an agreement necessitates that the parties agree the terms of bargain, that those terms be certain and complete and that the bargain is informed by an intention to contract as well as an intention to immediately assume legal obligations.

1.18 This description of an agreement raises numerous issues in practice that are the subject matter of this text. For example, what is the impact of an agreement made 'subject to contract'? What is the legal significance of an 'agreement to agree'? It will be seen that modern courts are changing the way some of these issues are dealt with. For example, it has long been stressed that the courts should not be the destroyer of bargains but should seek to give effect to transactions entered into by commercial people: in short the courts should 'oil the wheels of commerce' and not 'put a spanner in the works'.[21] On this basis courts have long sought to uphold contracts despite any difficulties that might arise.[22] But today that has been given new meaning whereby courts are emphasizing the need to give effect to the overall expectation of parties that there will be a contract even if in doing so that might contradict a term of the agreement.[23] At the same time the courts maintain the principle that they will not make a contract for the parties and this sets an upper limit on what a court can do.

1.19 The traditional method for discovering the existence of an agreement is that of offer and acceptance. Courts are quick to point out that offer and acceptance are merely tools that can be used to determine whether an agreement has been reached, they are not exhaustive and in many situations may be unworkable and innapropriate.[24] This is true and the

[18] See generally McLauchlan, 'Objectivity in Contract' (2005) 24 Uni Qld L Jnl 479, 484. However, where the issue is one of construction the background facts that are taken into account are those known to both parties and inform the objective interpretation of the contract, see *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179.

[19] See 1.10.

[20] However, this would be sufficient if it could be proved.

[21] Goff, 'Commercial Contracts and the Commercial Court' [1984] LMCLQ 382, 391. See also *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715, 749.

[22] *York Air Conditioning and Refrigeration (A/sia) Pty Ltd v Commonwealth* (1949) 80 CLR 11, 26; *AG v Barker Bros Ltd* [1976] 2 NZLR 495, 498; *Toyota Motor Corporation Australia Ltd v Ken Morgan Motors Pty Ltd* [1994] 2 VR 106, 130, 201; *Barrett v IBC International Ltd* [1995] 3 NZLR 170, 173.

[23] *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433, 462–5. See further 11.06.

[24] *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154, 167. See also *Boulder Consolidated Ltd v Tangaere* [1980] 1 NZLR 560, 562; *Meates v Attorney General* [1983] NZLR

existence of many commercial agreements is proven by the execution of a formal contract with any formation issue going before a court being one of certainty and completeness. Moreover, it is possible to prove a contract by conduct without reference to offer and acceptance if all the essential elements of a contract are made out.[25] Such conduct must prove the parties intend to be bound by the agreed terms.[26] It is not enough that the conduct is consistent with there being a contract.[27] Despite this, any basic search of formation cases will show that the tools of offer and acceptance remain the primary method used to determine the existence of an agreement where there is no executed contract. Therefore, they are the subject of detailed discussion in this book.[28]

D. Contract Formation: An Issue of Fact or Law?

1.20 As a general statement whether or not the parties intended to contract is an issue of fact and may be proven by reference to relevant extrinsic evidence which includes pre and post contract conduct.[29] Despite this, there are many statements made in the cases to the effect that the issue is one of construction and involves a question of law.[30] Usually such statements are made where the alleged agreement is in writing.[31] These are dealt with in more detail in the text in the context in which they arise. However, a couple of introductory remarks can be made here.

1.21 The process of construction is concerned with the meaning and legal effect of the terms of a contract. Where there is a true issue of construction this will impact on the evidence available. As a general rule access to prior negotiations in construing a contract is limited and access to post-contractual conduct prohibited.[32] On one level this process of construction is distinct from determining the terms of a contract. However, it has been said that the less comprehensive an agreement is the more a court must draw inferences in order

308, 377; *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32, 83; *Pobjie Agencies v Vinidex Tubemakers* [2000] NSWCA 105, [24]. See further Lucke, 'Striking a Bargain' (1960–62) 1 Adelaide l Rev 293.

[25] *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Australia) Pty Ltd* (1988) 5 BPR 11,110, 11,117–18.

[26] *Kriketos v Livschitz* [2009] NSWCA 96.

[27] *Adnunat Pty Ltd v Olivetti Concrete Lifting Systems Pty Ltd* [2009] FCA 499, [39]. See further 2.02ff.

[28] See further *Gibson v Manchester City Council* [1979] 1 WLR 294, 297.

[29] *Hussey v Horne-Payne* (1879) 4 App Cas 311, 316; *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68, 78; *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647; *B Seppelt & Sons Ltd v Commissioner for Main Roads* (1975) 1 BPR 9147; *Allen v Carbone* (1975) 132 CLR 528, 533; *Australian Energy Ltd v Lennard Oil NL* [1986] 2 QdR 216; *Hughes v NM Superannuation Pty Ltd* (1993) 29 NSWLR 653, 670; *Elmslie v FCT* (1993) 118 ALR 357, 368–9; *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 163–4; *Kriketos v Livschitz* [2009] NSWCA 96.

[30] Eg *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, 513–14.

[31] *Woodside Offshore Petroleum Pty Ltd v Atwood Oceanics Inc* [1986] WAR 253; *Australian Broadcasting Corp v XIVTH Commonwealth Games Ltd* (1988) 18 NSWLR 540.

[32] *James Miller & Parnters Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 3 WLR 267. See also *Bruner v Moore* [1904] 1 Ch 305; *Australian Energy Ltd v Lennard Oil NL* [1986] 2 QdR 216; *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) NSWLR 310. See further *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 163, 164. For a powerful critique of this view and the inconsistency between construction and contract formation, see McLauchlan, 'Contract Formation, Contract Interpretation, and Subsequent Conduct' (2006) 25 Uni Qld L Jnl 77.

to determine the intention of the parties and here resort may be had to the words or conduct of the parties.[33] This represents a technique of identfying the terms of a contract by construction. Terms may be implied by construction and so it is not entirely possible to distinguish between these processes and, moreover, the identification of the terms of a contract is intimately tied to issues of contract formation. It follows that there will be aspects of formation that are dealt with as issues of construction.

1.22 Very often where statements are made in the context of contract formation that the issue is one of construction, the court will nevertheless have regard to extrinsic evidence which suggests that any reference to construction was not meant in a technical sense.[34] Nevertheless, some issues around contract formation are clearly issues of construction. For example, if a court is determining whether a term is void for uncertainty, that will be an issue of construction.[35] However, where the issue is whether or not the parties intended to contract that is an issue of fact. Here the court can have regard to all the circumstances to determine whether the parties have entered into a contract. Thus, the whole of the communications between the parties must be looked at to determine whether there is an offer and acceptance.[36] As already noted, this process is related to the identification of the terms of a contract and extrinsic evidence is allowed to determine the terms of a contract.[37]

1.23 Often issues of formation and construction can become blurred when the agreement is in writing and many cases have referred to questions of formation as being questions of mixed law and fact.[38] Thus, if on construction a term is found to be void then whether or not it can be severed has been said to turn on construction,[39] but, at the same time, whether or not the parties intended to contract if that term was found to be void goes to the intention to contract and is an issue of formation. A practical example of where both processes are relevant to contract formation would be the approach to a 'subject to contract' clause. When a court is confronted with such a provision it must decide whether the clause impacts on the formation of a contract or its performance. Such a clause may evidence a lack of

[33] *Allen v Carbone* (1955) 132 CLR 528, 532; *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd Trading as 'Uncle Bens of Australia'* (1992) 27 NSWLR 326, 344.

[34] See *Marek v Australasian Conference Association Pty Ltd* [1994] 2 Qd R 521, 529; *Elmslie v FCT* (1993) 118 ALR 357, 367–9; *The Commercial Bank of Australia Ltd v GH Dean & Co Pty Ltd and Dean* [1983] 2 Qd R 204, 209; *B Seppelt & Sons Ltd v Commissioner for Main Roads* (1975) 1 BPR 9147.

[35] *Kell v Harris* (1915) 15 SR (NSW) 473, 479.

[36] *Hussey v Horne-Payne* (1879) 4 App Cas 311, 316; *Pagnan SpA v Granaria BV* [1986] 2 Lloyd's Rep 547.

[37] *R W Cameron & Co v L Slutzkin Pty Ltd* (1923) 32 CLR 81; *Sinclair Scott & Co Ltd v Naughton* (1929) 43 CLR 310; *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348, 362–3. See further *Interway Inc v Alagna* 407 NE 2d 615, 618-19 (1980) ('The determination of the intent of the parties to a contract may be a question of law or a question of fact, depending on the documents presented … If [the] language is ambiguous, then the determination of its meaning is a question of fact ... However, if the language is unambiguous, then the construction of the alleged contract is a question of law ... If the trial court finds that the agreement is ambiguous, then "parol evidence is admissible to explain and ascertain what the parties intended." ... However, if the trial court classifies the writings as unambiguous, then the intention of the parties must necessarily be determined solely from the language used in the document.')

[38] *Covington Marine Corp v Xiamen Shipbuilding Industry Co Ltd* [2006] 1 Lloyd' Rep 745, 756. Cf *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25.

[39] See 11.124.

an intention to contract. This is a question of fact. Once a decision on that issue is made, then, assuming there is an intention to contract, it is still necessary to construe the clause to determine whether the parties intended to immediately assume legal obligations or not, and if they did, whether performance is or is not suspended until execution.