

Corporate Department

Update: Pre-incorporation Contracts

Date: October 2015

Update: Case note – Pre-incorporation Contracts

Published: October 2015

A recent decision of the High Court of England and Wales highlights the risks associated with pre-incorporation contracts for agents and company subscribers.

Pre-incorporation contracts

The [Royal Mail Estates Ltd v Teesdale \(a firm\) and another \[2015\] EWHC 1890 \(Ch\)](#) case highlights the perils associated with pre-incorporation contracts. The treatment of pre-incorporation contracts under the Irish Companies Act 2014 is similar to their treatment under the equivalent legislation in England and Wales and the case is of persuasive authority in this jurisdiction.

There are times when business opportunities cannot wait. Pre-incorporation contracts allow company promoters and/or agents to enter into contracts where time does not permit the formation of a company beforehand.

The Irish Companies Act 2014 allows pre-incorporation contracts to be approved by a company post-incorporation. Until that time, individual(s) who sign a pre-incorporation contract on behalf of a company are personally bound by it and entitled to the benefit of it unless there is an express agreement to the contrary.

Royal Mail Estates Case

The Royal Mail Estates case focuses on the obligations of signatories to a pre-incorporation contract.

A firm of solicitors had signed a contract for the sale of a property on behalf of the buyer which was a company that, unknown to the parties, had not yet been incorporated. The vendor, Royal Mail Estates Ltd, sought to enforce the contract against the solicitors on the basis of the English and Welsh law in relation to pre-incorporation contracts contained in the Companies Act 1985 (which is similar to the law in Ireland).

The solicitors argued that there was a provision in the contract for sale that constituted an agreement contrary to the proposition that the solicitors were personally liable for the purposes of the Companies Act 1985. The relevant provision stated that "The benefit of this contract is personal to the buyer" (i.e. the company). The Court had to decide whether the solicitors could rely on this provision constituting an "agreement to the contrary".

The Court held that an "agreement to the contrary" could only be established where there is an agreement between the parties by which they intended to exclude the effect of the relevant section of the Companies Act 1985. There was no such agreement between the solicitors and the buyers. Accordingly, the Court concluded that the firm of solicitors were not entitled to rely on the relevant provision in the contract for sale amounting to an "agreement to the contrary".

Conclusion

It is always advisable that agents/subscribers seek legal advice in advance of entering into a pre-incorporation contract to ensure that their liability under the contract is excluded to the fullest extent permissible by law.

For further information on this topic please contact: John Darmody, Solicitor, Corporate Department, E: JDarmody@EFC.ie