



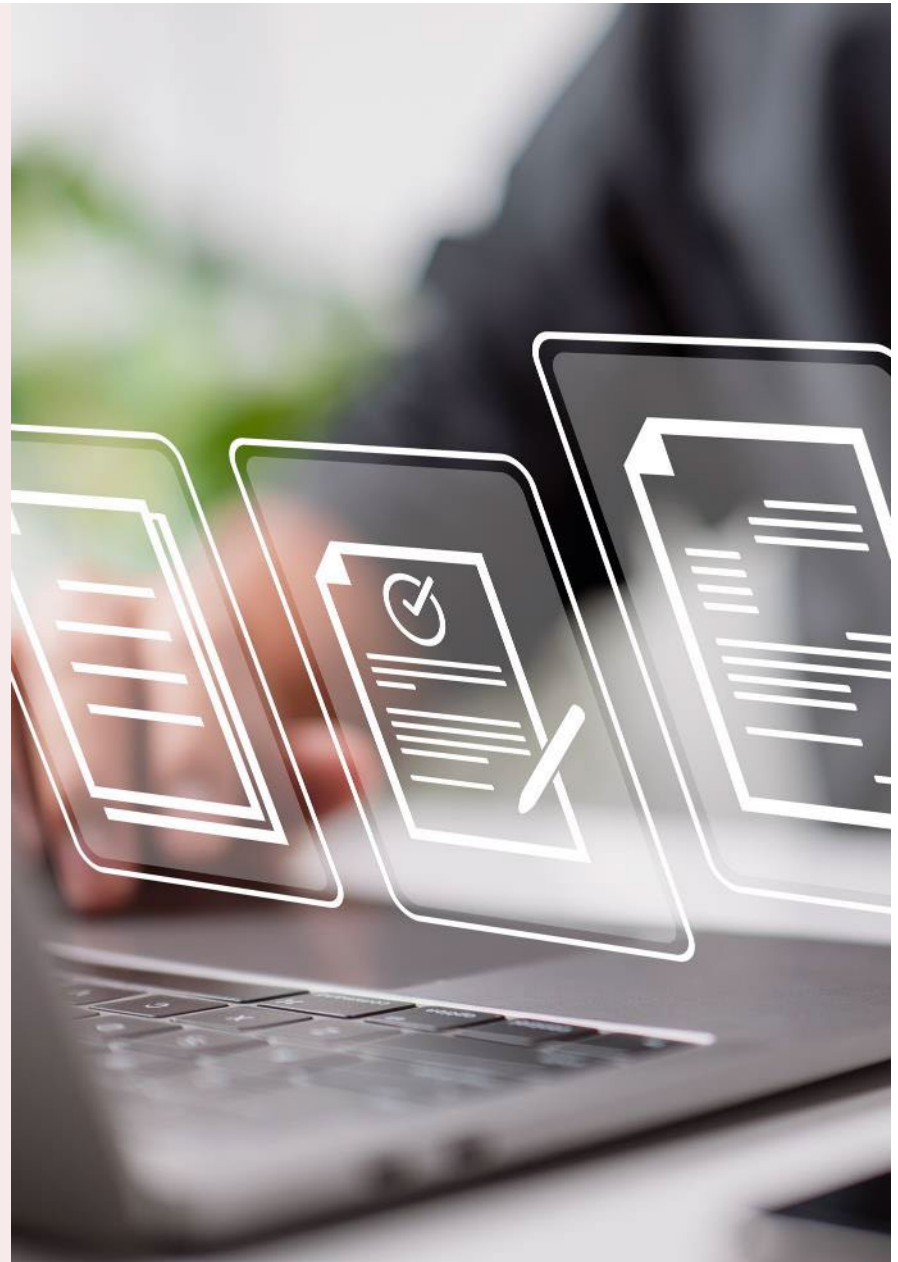
Preliminary agreements.

Amy Ryburn and Elizabeth Rose

October 2024

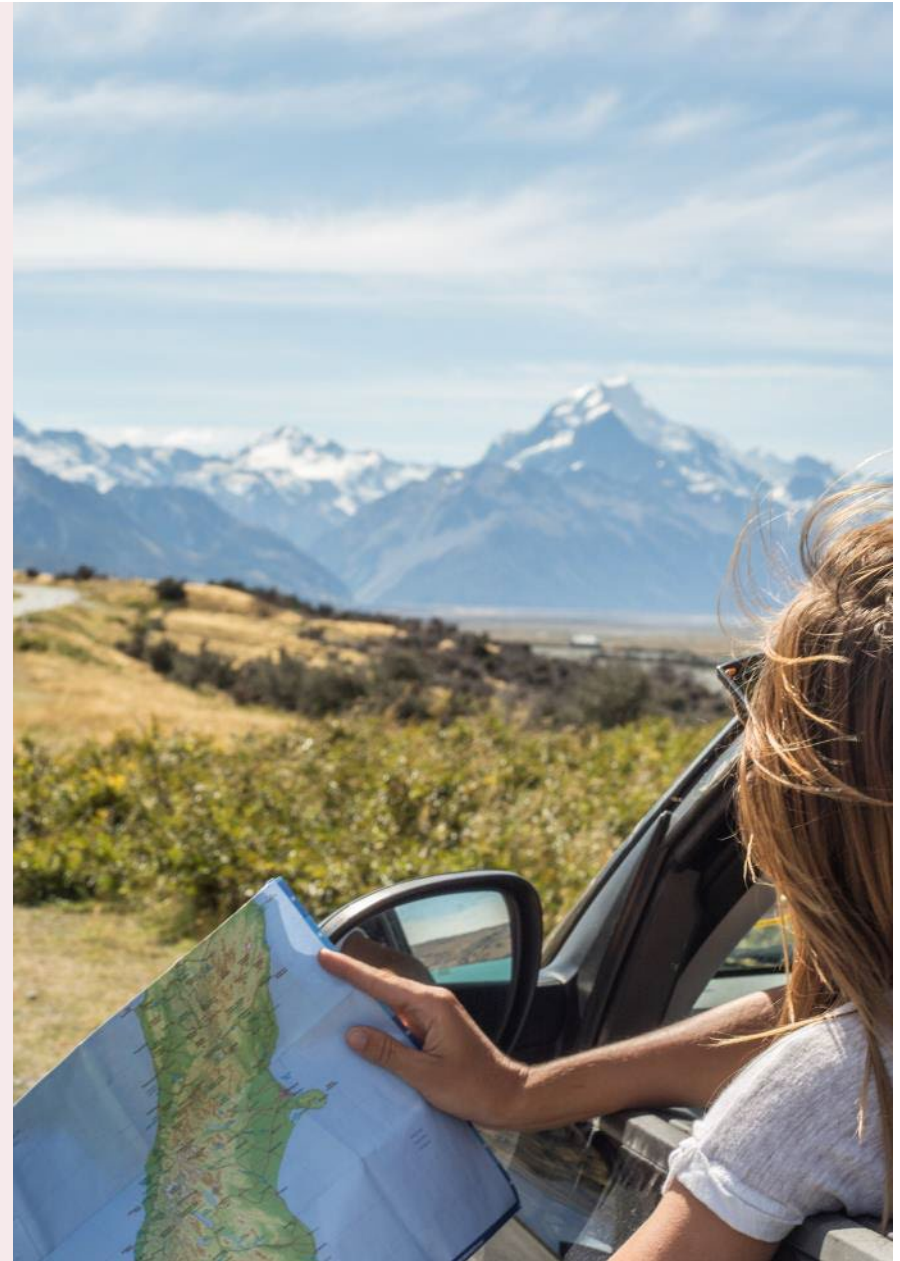
Agenda

- What is a preliminary agreement?
- Pros and cons
- Risks to be aware of
- A little bit of case law
- Tips for drafting
- Questions.



A roadmap to full agreement

- Entered into at the early stages of a project or transaction
- A roadmap to the full agreement
 - plans the route
 - defines the destination
- Separate to the primary agreement
- The name of the document doesn't really matter – the parties' intentions do.



Types of preliminary agreements

Letter of intent

- Early stage of any type of project
- Roadmap to full agreement
- Typically non-binding

Heads of agreement

- Used in complex commercial deals
- Sets out key agreed terms for use in full agreement
- Typically non-binding - can have binding elements (eg confidentiality)

Early procurement agreement

- Construction/infrastructure projects
- Allows purchase of materials before services start
- Binding - usually a reasonable amount of money involved.

Types of preliminary agreements

Interim service agreement

- Provides for interim services before primary services begin
- Binding - generally paying for services

Term sheet and indicative offer

- Used in mergers and acquisitions
- Sets out the main terms if transaction proceeds
- Can be required for funding
- Typically non-binding - can have binding elements (eg confidentiality)

Memorandum of understanding

- Similar to letter of intent
- Can be used as the main agreement when parties can't contract (eg Crown-Crown)
- Typically non-binding
- Not necessarily a precursor to a full agreement.

Pros and cons to be considered at the outset

Pros	Cons
Crystallises the core elements of a deal from meetings, emails and initial documents	Can involve extra time and money in the long run - particularly if you end up in “no man’s land”
Paves way for smooth negotiation by setting out key steps and timeframes	Can involve a significant loss of negotiation leverage
Avoids getting bogged down in details too early on	If too woolly, can make distracting disputes on interpretation more likely
Gives the parties confidence and some certainty to proceed and spend some time and money. Exclusivity can bring some certainty in a competitive landscape	If driven by time pressure, can be put in place without sufficient consideration of the issues
Can allow initial work to commence	

Early procurement agreements and interim service agreements

- Project phases typically covered:
 - mobilisation - workshops, discovery work
 - design
 - order of goods/equipment
- Short-form services contract or letters are the most common forms of agreement we see
 - a letter covering work will generally need additional terms
 - Government often uses the Government model contract (GMC)
- Starting significant work proper? Beware!
- Relationship with full agreement can be unclear

Scope Creep



To bind or not to bind

Highly dependent on what agreement covers, but typical examples:

Binding



- Governing law/jurisdiction
 - Confidentiality, IP, use of data and data security
 - Exclusivity, duration and right to withdraw
 - Price and payment timing/mechanics (if one party is paying for work to be done under the preliminary agreement)
 - Limits and exclusions of liability
-
- Key elements of the proposed transaction or the proposed deal (e.g. who is doing what and to what standards and by when)
 - Key commercial details (e.g. charges/cost sharing) – typically these details might be indicative but are subject to further due diligence and so cannot be binding

Non-binding



Agreements often split into two sections of binding and non-binding terms.

A matter of interpretation

- If an agreement is expressed to be non-binding, a court will generally give effect to this (eg *Verissimo v Walker* [2006] 1 NZLR 760)
- However, if the court believes there is evidence of an intention to be bound, it will uphold the agreement - even if the important terms aren't all included and there are ambiguities (eg *Fletcher Challenge Ltd v ECNZ Ltd* [2002] 2 NZLR 433), *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14)
- Context is important. In *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85 the Supreme Court confirmed that both pre-contractual negotiations and the parties' post-contractual conduct can be admissible when interpreting a contract. Communications and conduct around preliminary agreement as may be used to determine whether the agreement is binding, and to interpret its content.

'Subject to contract'

- Indicative but not determinative
- *College Rifles Rugby Union Football v the Minister of Lands and the Ministry of Education* [2015] NZHC 2011
- *KBL Investments Ltd v KBL Courtenay Limited* [2015] NZHC 30
- *Immingham Storage Co Ltd v Clear PLC* [2010] EWHC 1085
- *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119
- *Sentinel Property Group Pty Ltd v ABH Hotel PTY Ltd* [2022] QSC 165 (AUS)
- *Croser v Focus Genetics Ltd Partnership* [2020] NZCA 367
- *Reading Cinemas Aus Pty Ltd v AMP Capital Shopping Centres Pty Ltd* [2017] NZHC 2337.

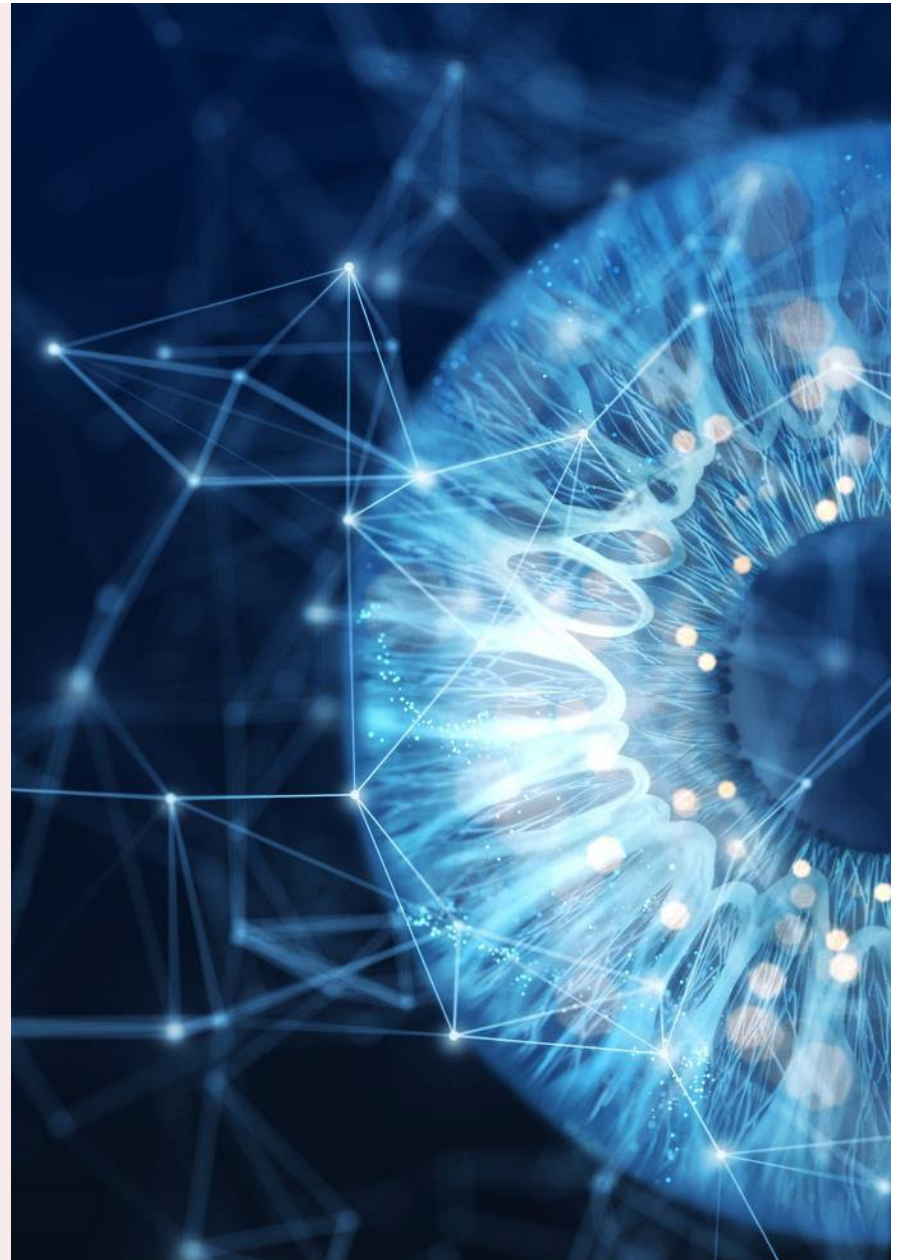
Preliminary agreement gone bad

Parklane Infrastruct Ltd v LU Trustee Ltd [2022] NZHC 2702

- Facts: Access required to land for development - preliminary agreement by way of letter used to help Parklane get development contract stating Parklane would have access to land. Subdivision advertised, didn't provide for access, caveat lodged by Parklane
- Court applied *Fletcher Challenge Energy* and *Bathurst* to determine whether binding agreement
- Court concluded that a reasonable person, having all background knowledge available to the parties at the time of signing of the letter, would not have considered that the letter had the intention of concluding a binding agreement granting Parklane a legal interest in land
- Parklane's claim was dismissed, Court ordered caveat removed.

Key areas of focus

- The future - what further agreement is to come and what is the process of getting there?
- Enforceability – what is binding and enforceable? What is indicative only?
- Initial work - what work or tasks will be undertaken under the preliminary agreement (if any)?
- Termination/expiry - what happens if the full agreement is never reached?
- Relationship with the full agreement - what happens when the further agreement is reached? To what extent does it supersede the preliminary agreement?



Additional key messages



Consider whether you need a preliminary agreement at all



Be aware of communications and conduct which may be taken into account to interpret agreement



Keep in mind quantum meruit - compensation may still be due in the absence of a contract



Don't let it drag on to cover substantive work if that is not intended, as terms may not be suitable.



Questions?

Thank you.



Amy Ryburn

Partner, Wellington

amy.ryburn@buddlefindlay.com



Elizabeth Rose

Senior Associate, Wellington

elizabeth.rose@buddlefindlay.com