



When the terms of a contract have not been agreed, can there still be a binding contract between the parties? If so, what would be its terms?

Arcadis Consulting (UK) Ltd v AMEC (BCS) Ltd [2018] EWCA Civ 2222

Failure to properly conclude your contractual negotiations can have major consequences.

It is not uncommon in construction projects for there to be lengthy negotiations about the specific contractual terms that will be used. This process can go back and forth for months and may still be ongoing after work has started. What then happens if a dispute arises before the negotiations are complete or if the negotiations are never completed? Is there a binding contract between the parties and if so, what terms would be in that contract? Can the parties rely on any of the terms that were being negotiated? The court had to decide these points in a dispute between Arcadis (previously Hyder) and AMEC (previously Buchan).

The facts of the case

Buchan engaged Hyder to carry out design work on two projects which included the design of a car park. Hyder carried out this design work under a letter of intent which required Hyder to carry out the design work and Buchan would pay for that design work up to an agreed limit. It was anticipated by both parties that a formal contract would be entered in to and different versions of a proposed formal contract were discussed and negotiated, but a formal contract was never fully concluded. Each version of the proposed formal contract included a limitation of Hyder's liability.

Buchan later alleged that the car park was defective and claimed costs of £40 million from Hyder for rectification of the defects. Hyder denied liability for the defects and also claimed that if they were liable for the defects then their liability was limited to £610,515 as set out in the proposed formal contract. Each version of the formal contract included the requirement for a limitation of Hyder's liability.

The court had to decide whether or not there was a contract, if so, on what terms and if there was a contract, whether or not there was a valid limitation of Hyder's liability.

Decision

The judge decided that there was a simple contract between the parties based on Buchan's instructions for Hyder to carry out work and for Buchan to pay for that work i.e. the letter of

intent. Often, a court will decide there is a contract even without there being an agreed price, when that happens, the court says the price will be a reasonable price.

The court also decided that even though a limitation of liability clause had been included in every set of proposed terms and conditions there was not a clear offer and acceptance of this clause and therefore neither the limitation of liability clause, nor the rest of the proposed terms, could apply. This meant that Hyder was exposed to a claim of £40 million instead of £610,515.

The judge noted that this was a classic case whereby Hyder would have been better protected had it accepted the other clauses it was challenging and got a binding agreement on the limitation of liability clause rather than carrying out its work without getting formal agreement on any of the terms that were in discussion.

Key points

- It cannot be assumed that if there is not an express agreement of terms that there is no contract. By progressing with the work it is likely that there will be a simple contract, at the very least. However, it is unlikely that the simple contract will include the terms and conditions that you want to rely on.
- It is important to deal with contract negotiations quickly. The judge was critical that Hyder's problems were partly down to its failure to respond quickly to Buchan.
- If you intend to agree to something or to reject it then be very clear about this in the email or letter.
- Do not start work if there is any uncertainty about the contractual basis for that work. If there is a genuine reason that a full contract cannot be put in place before you start work then at least address any headline issues that you need to have in place to protect your position. Taking this case as an example, Hyder may have been able to protect itself if it had said to start work Hyder needed, at the very least, to agree with Buchan about the limitation of liability clause.
- If you are in any doubt as to what the terms of your contract are or whether certain terms or documents are included in your contract then you may have a problem. This should be dealt with immediately so that you are clear as to whether or not you have a contract and what the terms of that contract are. If you end up in a dispute which starts with a question about what the contract is then you can double the time and costs that are likely to have to be spent on resolving that dispute.

Free initial consultation

If you have a contractual problem, are involved in a project which is going wrong, or if you have a dispute, we can assist. We offer a *free one hour initial consultation* to all clients. Please get in touch for more information.



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