

Construction Law Update

Letters of Intent – A Tale of Uncertain Terms

In the recent case of *Arcadis Consulting (UK) Ltd v AMEC (BCS) Ltd*, the Court of Appeal overturned the decision of Coulson J (then of the Technology and Construction Court). Contrary to Coulson J's Judgment, it was held that, the interim contract (formed by way of letter of intent), incorporated terms and conditions which (crucially) included a cap on liability.

Background

Arcadis Construction (UK) Limited, or Hyder Consulting (UK) Limited ("**Hyder**") as it was then known and AMEC BCS Limited, or CV Buchan Limited ("**Buchan**") as it was then known, decided to create a framework agreement under which they would work.

Whilst the parties negotiated the terms, Hyder wrote to Buchan about the first project they were planning to undertake – The Wellcome Centre. In this letter, Hyder acknowledged that completion of the framework agreement may take some time and requested that Buchan "*underwrite their fee for the design and drawing work*" so they could begin work whilst negotiations on the framework agreement continued.

In response, Buchan sent to Hyder a letter of intent stating "*your work done under this instruction is to be on the basis of... the conditions and terms detailed in the Protocol Agreement, Design and Consultancy Terms and Conditions in your possession at present... once the Agreements are executed their terms and conditions shall supersede this letter and shall govern the work retrospectively*". The terms and conditions in Hyder's possession were those emailed to them by Buchan in November 2001 (the "**November Terms**") and included a limit of liability clause limiting Hyder's liability to the lesser of "*the reasonable direct costs of repair...or...the sum stated in Schedule 1*" (which was incomplete). This letter was an offer based on incomplete terms. Hyder accepted this offer by conduct when it began work shortly thereafter and formally confirmed acceptance in an email in December 2001 which stated, "*work continues apace... under the instruction of your letter of*

the 13 November 2001". Thus, a contract was formed, incorporating the November terms, for The Wellcome Centre project.

The Castlepoint Car Park

Extensive negotiations continued between the parties on the terms and conditions of the framework agreement but they failed to reach a consensus. By letter dated 6 March 2002, Buchan wrote to Hyder instructing them to begin work on a second project (Castlepoint Car Park), "*in accordance with the Protocol Agreement and Terms and Conditions associated that we are currently working under with yourselves*". Buchan then sent a second letter on the same day, with an amended set of terms and conditions, and asked for Hyder's acceptance. On 8 March 2002, Hyder accepted the letter of instruction and work commenced on the Castlepoint Car Park (it was common ground between the parties that Hyder's acceptance related to the first March letter and not the second). The parties continued to negotiate the terms of the framework agreement but failed to reach an accord. It was then alleged by Buchan that the Castlepoint Car Park was defective giving rise to claims against Hyder for up to £40 million and proceedings were commenced in the TCC.

The TCC Decision

In the TCC, Coulson J accepted that a contract existed for the Castlepoint Car Park based on the first letter dated 6 March 2002. However, he decided that there was too much uncertainty and too much was not agreed for the Court to conclude that the parties intended to be bound by a liability cap as alleged by Hyder. He therefore held that no limit on liability applied.

The Court of Appeal Judgment

The Court of Appeal agreed that a contract for the Castlepoint Car Park had been formed by the 6 March 2002 letter. However, it disagreed fundamentally with

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Coulson J's analysis of the terms upon which that contract was formed. It held that the November Terms were incorporated because the 6 March letter stated that the work was to be carried out "*in accordance with... the Terms and Conditions associated that [the parties] are currently working under*". This reference clearly indicated that an interim contract existed, the terms of which would be superseded by the final framework agreement. In this case, the framework agreement was never finalised and accordingly the incomplete November Terms (including the cap on liability) therefore continued to bind the parties to completion and beyond. Hyder's limit on liability was therefore the lesser of "*the reasonable direct costs of repair, renewal and or/reinstatement of any part or part of the Sub-Contract Works...*" or as stated in the Schedule, which was blank.

Analysis

This case is highly fact specific but contains an important message. Hyder was fortunate the Court of Appeal found that a limitation of liability clause which was incomplete remained effective. If not, they would have had completely unlimited liability to Buchan for direct and indirect losses. This case illustrated the importance of only beginning work when an acceptable set of contractual terms have been agreed, even where they are only basic and 'interim' before a full contract is negotiated. This case also emphasises the uncertainty which can occur when terms are not properly incorporated into a contract.

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