

Construction Law Update

When is a Contract Formed?

Parties often face tight deadlines and are eager to commence works as soon as possible. As a result, letters of intent are commonly used within the construction industry on the joint understanding that a formal contract will be executed soon after. However, this does not always happen. In the recent case of *Anchor 2020 Limited* (“Anchor”) v *Midas Construction Limited* (“Midas”), the court had to determine whether the parties had entered into a contract after the letters of intent had expired.

Background

Anchor and Midas had intended to enter into an amended JCT Design and Build Contract 2011 (the “Contract”) under which Midas was to design and construct a new retirement community.

Midas commenced the works under a letter of intent which was renewed several times. Anchor then sent the Contract to Midas which Midas signed and returned to Anchor on 21 July 2014. On 29 July 2014, Midas provided Anchor with signed copies of each appendix to the Contract and also included a risk register which purported to exclude certain elements from its scope of works as a new appendix. Anchor did not sign the Contract.

A dispute arose between the parties as to whether the risk register was part of the Contract. This led Midas to contend that the Contract had not been agreed and that it was entitled to be paid on a quantum meruit basis i.e. by reference to the value of the works which it had carried out.

Was there a contract?

Whether there is a binding contract depends on an objective assessment of whether the parties intended to create legal relations and had agreed upon all of the essential terms required for the formation of a contract.

The court held that as of 21 July 2014, Anchor and Midas had agreed the essential terms and the Contract was therefore legally binding on that date. The inclusion of the risk register as a new appendix did not amount to a counter-offer despite the fact that it had not been included in the Contract by Anchor. Further, the fact that the parties were later arguing about the inclusion of the risk register did not mean there was no binding Contract as this was equally consistent with the Contract being in existence but Midas wishing to vary it.

The fact that both parties originally contemplated that each would sign the Contract did not mean that there was no binding contract because Anchor had not signed. Midas had insisted on the Contract being in place and the court concluded that it would not have carried out the works if it did not believe the Contract had been concluded on 21 July 2014. Midas, in fact, continued to carry out the works in accordance with the Contract right through to completion of the works in December 2015. The emergence of the risk register issue caused each party to take different positions on the question of contract formation, but this could not retrospectively determine whether the Contract had been formed.

The court, therefore, found that the parties entered into the Contract on 21 July 2014 but that it did not include the risk register.

How would the works have been valued?

Having concluded that the Contract existed, the court nevertheless considered how the works would have been valued following the expiry of the last letter of intent if there was not a contract in place. The court stated that Midas would have been entitled to be paid a reasonable sum based upon the quantum meruit principles. However, the assessment of that reasonable sum would have been made by reference to the terms of the proposed Contract. This was because, under the letters of intent, the works had been carried out in

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accordance with the terms of the proposed Contract, the contract sum analysis had been agreed and Midas continued to carry out the works in accordance with those same terms after the letters of intent had expired. Accordingly, there was no reason to alter the basis of the valuation because “a price that was reasonable before expiry [of the letters of intent] did not become unreasonable afterwards just because of the expiry”.

Analysis

The fact that a contract is performed on both sides, as it was in this case, makes it difficult, but not impossible, to argue that a contract has not been formed. Whilst the decision in this case will no doubt provide some comfort to parties who think they have agreed a contract but have not executed it, it also serves as a very stark reminder that the failure to have a properly executed contract in place may well prove very fertile ground for the development of serious disputes.

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