

## Moments of clarity – how a contract is construed (on Appeal): Arcadis Consulting Limited v AMEC (BSC) Limited<sup>1</sup>

We previously analysed the first instance decision in this case in our article [\*Contract formation and terms – know the limits\*](#) of November 2016.

That decision constituted a precautionary tale for parties ‘prematurely’ carrying out work before contracts are properly finalised. Hyder Consulting (UK) Limited (“Hyder”) - now Arcadis - was left carrying unlimited liabilities having failed to persuade HHJ Coulson in the TCC that a limitation of liability clause was incorporated into its contract with CV Buchan Limited (“Buchan”) – now AMEC. The Court of Appeal has now reversed that decision, holding that a limitation of liability did in fact form part of the contract between the parties. The finding is fact specific given the complicated set of communications that lead to contract formation. However, the judgment serves as a useful reminder of the key legal elements when considering whether terms have been successfully incorporated into a contractual agreement between commercial parties.

The Court of Appeal alighted on a less extreme conclusion than HHJ Coulson. That said, the no doubt time consuming and costly legal proceedings to achieve that result stand as a reminder to parties to exercise caution where terms and conditions remain under negotiation. Contractual clarity, ideally in one document, ought to be the aim.

### Background

CV Buchan Limited (“Buchan”) was instructed on a number of large specialist concrete products by Kier Build Limited (“Kier”). Buchan, in turn, approached Hyder in relation to a framework / protocol agreement to enable the parties to work together on varying construction projects. The parties proceeded with the Castlepoint project together whilst the terms and conditions of the framework agreement were under negotiation. Importantly, each variation of

<sup>1</sup> [https://www.lawtel.com/UK/FullText/AC5004431CA\(CivDiv\).pdf](https://www.lawtel.com/UK/FullText/AC5004431CA(CivDiv).pdf)

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terms proposed by Hyder contained separate contractual limitations of liability in the event of loss by Buchan. Defects in the products were subsequently discovered by Kier, who pursued Buchan. Buchan settled and sought to recoup its considerable losses (c£40 million) from Hyder. Hyder relied on what it maintained was a 10% limitation of liability incorporated into the contract.

## First instance

HHJ Coulson found that there was no cap on Hyder's liability. Work had been carried out under a 'simple contract' whilst protocol terms and conditions were under negotiation and there were no grounds to incorporate a limitation of liability into a contract where there was no express agreement. It was concluded that it was impossible to "stop the music at any stage" where there were three competing versions of the terms and conditions and, accordingly, none of them could apply. Although the judge recognised the harshness of this outcome for Hyder, that did not dissuade him from his conclusion.

## Court of Appeal

Dame Elizabeth Gloster gave the leading judgment and found that HHJ Coulson had blurred the lines between the overarching protocol agreement and separate interim agreements.

The inquiry distilled into three key issues:

1. Offer and Acceptance – whether Buchan accepted the 10% limitation clause;
2. Distinction – whether the judge should have distinguished between the interim and final contractual position; and
3. Construction – whether the judge mistakenly interpreted the relevant documents.

Offer and Acceptance: Each individual construction project was found to be an 'if' contract as set out in *British Steel Corp v Cleveland Bridge & Engineering Co Ltd* [1984] – i.e. a contract under which A requests B to carry out a certain performance and promises B that he will receive a certain performance in return (usually remuneration). Crucially in this case 'if' contracts are standing offers which, if acted upon, result in a binding contract. On that basis, Hyder accepted Buchan's 'if' offer made in March 2012 through its conduct. The High Court was found to have placed too much emphasis on the judgment of *Day Morris Associates v Voyce*



The Court of Appeal found that HHJ Coulson had erroneously blurred the lines between the overarching agreement and the separate interim agreements ... Although correct that assent had to be final and unqualified, conduct and lack of rejection was enough in this instance to result in all of the terms being accepted.



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Distinction: On the basis that there was an interim contract from November 2011, then it was clear that the music *had* stopped. That contract incorporated the terms (including the limitation clause) of the March 2012 letters. Those terms were therefore binding and a failure to agree terms in respect of the final protocol contract did not preclude other agreements in the interim. Dame Gloster concluded that the judge had erred in “*considering it a necessary precondition for the parties to have previously reached a concluded agreement on a finalised set of terms and conditions (for the purpose of the protocol agreement)*”. The legal relationship was present “*as soon as Hyder accepted Buchan’s offer for consideration in the form of the interim contract*”.

Construction: The Court of Appeal took a pragmatic approach to the language and construction of the documents in line with working commercial realities. Lady Gloster was unconvinced with the explanation that “*working under*” in fact meant ‘*working on*’ (i.e. under negotiation) and concluded that the language of the documents evidenced the parties’ intentions that subsequent agreements could have retrospective. In this case, the finalised limitation clause contained within the latter March 2002 letters applied retrospectively to the acceptance of the November 2001 interim terms.

## Comment

This case is evidence of judicial reluctance to permit an unjust result, given that Hyder had sought to import a limitation of liability clause at every juncture and the first instance decision had provided a ‘windfall’ legal result for Buchan. This is a welcome result for Hyder (and its insurers) which has been able to significantly limit its liability to £610,515. It also represents acceptance by the Court of Appeal that commercial parties do not always have time to wait for non-contentious lawyers to negotiate clear signed-off terms and conditions prior to works commencing. The reality is that sometimes interim agreements will have to be interpreted from a series of communications and the conduct of the parties. The possibility of retrospective incorporation should be noted - any letters of intent or proposed terms/conditions should be scrutinised as they may subsequently become incorporated into previous or future agreements.

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The decision represents a continuation of the trend shown in *Swansea Stadium Management Company Ltd v City & County of Swansea & Anor [2018]* where the Court refused to accept that a new, extended, limitation period ran from the date of a collateral warranty (as opposed to practical completion). The justification for that decision was similar as it was also on the grounds that the parties intended for the agreement (and therefore any limitation periods) to have retrospective effect.

One should not lose sight of the obvious fact, though, that the most straightforward approach is to expressly agree to expressly agree binding contractual terms before spade strikes turf.

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