Neutral Citation Number: [2018] EWCA Civ 2222

Case No: A1/2016/4266

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
The Hon. Mr Justice Coulson
[2016] EWHC 2509 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/10/2018

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division)
LORD JUSTICE HOLROYDE
and
DAME ELIZABETH GLOSTER

- -

Between :

ARCADIS CONSULTING (UK) LIMITED **(formerly called Hyder Consulting (UK) Limited)**	**Appellant**
- and –	
AMEC (BCS) LIMITED **(formerly called CV Buchan Limited)**	**Respondent**

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- -

Mr Marcus Taverner QC and Mr Gideon Scott Holland
(instructed by **Herbert Smith Freehills LLP**) for the **Appellant**
Mr Simon Hughes QC and Mr Calum Lamont (instructed by **DAC Beachcroft LLP**) for the **Respondent**

Hearing date: 1 May 2018

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Judgment Approved

DAME ELIZABETH GLOSTER :

Introduction

1. This is an appeal by Arcadis Consulting (UK) Limited ("Hyder" or "the appellant") against the judgment dated 25 October 2016 ("the judgment") and the consequential order dated 18 November 2016 of Coulson J ("the judge") in which the judge found that Hyder and AMEC BCS Limited ("Buchan" or "the respondent") had agreed a simple contract ("the Contract") arising out of Buchan's first letter of 6 March 2002 ("the First 6 March Letter") and Hyder's acceptance of it. The judge further concluded that no set of terms and conditions were incorporated into the Contract.

2. Hyder is a management consultancy and engineering business. On 18 September 2015 Hyder changed its name to Arcadis Consulting (UK) Limited.

3. Buchan is a contractor specialising in the design, manufacture and installation of pre-cast concrete for the civil engineering and construction industries. In or about 2007, Buchan changed its name to AMEC (BCS) Limited.

4. Buchan acted as the specialist concrete sub-contractor on two large projects, referred to in the documents as the Wellcome Building and Castlepoint Car Park. Buchan engaged Hyder to carry out certain design works in connection with those projects in anticipation of a wider agreement between the parties which, in the event, did not materialise.

5. Kier Build Limited ("Kier") was the main contractor on the Castlepoint Project.

6. It is now alleged that the Castlepoint Car Park is defective and may need to be demolished and rebuilt. Rebuild costs are said to be many tens of millions of pounds but Buchan's claim against Hyder, linked to the former's settlement with Kier, together with its own damages claim, is put at £40 million. Hyder deny liability for the defects.

7. The substantive hearing took place before Coulson J from 10 October 2016 to 12 October 2016.

8. The central question on this appeal is whether the terms and conditions sent from Buchan to Hyder on 8 November 2001 ("the November Terms") were incorporated by reference into the Contract found by the judge.

Factual Background

9. The judgment of Coulson J sets out a summary of the relevant facts and documents, which I adopt here.

10. In early 2001, Buchan approached Hyder regarding the possibility of making a framework or protocol agreement under which the parties would work together on different construction projects involving pre-cast concrete components.

11. Stewart Tyler was Hyder's Area Director in its Birmingham Office at the relevant time with responsibility for co-ordinating and overseeing new business relationships. He was involved in the negotiations between the parties between about early 2001 and August 2002.

12. There were discussions between the parties which ranged over many months and many topics. Mr Shotliff, Buchan's commercial director, met his opposite number, Mr Tyler, on a number of occasions. One of the points which they discussed was a cap on Hyder's liability "where liability is not covered by insurance" (see Mr Shotliff's notes of his meeting with Mr Tyler dated 28 September 2001). This suggested a link between the cap and insurance which was sometimes clear in the exchanges, and sometimes not. On 8 November 2001, Mr Shotliff emailed Mr Tyler to say:

> "Please find attached the updated documents we propose to use for design work. The Terms and Conditions document is merely tidied up as I understand. The Protocol document is intended to be the instrument that creates the Agreement. It will be necessary to agree particular schedules for each contract in addition to these and further minor amendments may still be required. We intend to use the documents for the Wellcome Building works subject to your agreement and we will be providing more details shortly. Accordingly I would be grateful if you could make any comments you may have as soon as possible as we are about to start your works on the above basis on this contract."

13. The attached documents included:

(a) the Protocol Agreement, which was in the form of an umbrella agreement, which envisaged separate schedules and work instructions for each specific contract, but which nonetheless envisaged that each separate contract would be carried out pursuant to the same general terms and conditions; clause 2.1 of the Protocol Agreement envisaged that all these documents would then form a suite of contract documents, with a stated order of precedence; clause 5.3 required a £5 million level of PI insurance cover;

(b) the schedules to the Protocol Agreement, which included a template work instruction and a work instruction acceptance;

(c) the detailed terms and conditions, which would themselves form a schedule to the Protocol Agreement; Condition 2A was entitled 'Limit of Liability' and stated:

> "The Consultant's liability for defective work under the Agreement shall be limited to whichever is the lesser of the following:
>
> (a) The reasonable direct costs of repair, renewal and/or reinstatement of any part or part of the Sub-Contract Works to the extent that the Client incurs such costs and/or is or becomes liable either directly or by way of financial contribution for such costs; or
>
> (b) The sum stated in Schedule 1.";

this was the proposed liability cap in its original form;

(d) clause 7 of the terms and conditions required insurance in the form and to the level set out in Schedule 6 (which was blank in the version sent out on 8 November);

(e) schedule 1, at paragraph M, stated that "the limit, if any, on the Consultant's liability for defects in the design (as referred to in Clause 2A) is…; there was a space in which the relevant figure could then be entered; in the version that was sent, that was, of course, blank;

(f) schedule 2 was to be a detailed description of the services to be performed by Hyder under the specific work instruction; and

(g) schedule 3 dealt with fees.

14. On 9 November 2001, Hyder wrote to Buchan in relation to the Wellcome Centre and said:

> "I understand that discussions between David Shotliff and Stewart Tyler on the Design Services Agreement are well advanced. However, it may still take a little time before this Agreement is formally signed. In the meantime I should be grateful if you would confirm that you would underwrite our fees for the design and drawing work and in order that there is a basis for these, propose the following schedule of rates…"

15. On 13 November 2001, Buchan replied acknowledging Hyder's letter of 9 November 2001, anticipating agreement on the Protocol Agreement within two weeks. They instructed Hyder to start work on the design for the Wellcome Centre. They went on:

> "Your work done under this instruction is to be on the basis of our instructions from Wates and the conditions and terms detailed in the Protocol Agreement, Design Consultancy Terms and Conditions in your possession at present.
>
> It is our intention to enter these Agreements with yourselves in their present form with such minor amendments as maybe mutually agreed and to award you the Design Works on the Wellcome Building Precast Concrete Package in the sum of £55,000 as previously agreed.
>
> Pending formalisation of these Agreements, we will pay you for work done under this instruction up to a maximum £10,000.
>
> Once the Agreements are executed their terms and conditions shall supersede this letter and shall govern any work done retrospectively."

16. On 14 November 2001, Buchan wrote to Hyder referring, for the first time, to the Castlepoint Car Park. The letter said:

> "We are currently preparing our tender for a precast concrete frame and associated works at the above contract and would be pleased to receive your keenest fixed price quotation for the supply of design services as detailed herein…"

The letter said that the works were to be priced on the basis that the quotation was compliant with the "Proposed Design Agreement".

17. On 28 November 2001, Hyder replied to Buchan's letter of 14 November 2001, in respect of the Castlepoint Car Park. They offered to provide the required structural design and detailing services for the lump sum of £285,000 plus VAT, although this offer was subject to a number of express conditions including:

> "(1) Agreement on the terms and conditions of our appointment for provision of the services
>
> (2) Agreement of commencement date and the design programme
>
> …
>
> (4) Any variations or additional services required to be charged on a time basis at rates to be agreed…"

18. Mr Tyler was being advised by Mr Brand, another Hyder employee, about the acceptability of the Protocol Agreement, and the terms and conditions, which Buchan had proposed on 8 November 2001. On 19 November 2001, Mr Brand advised Mr Tyler that "you should not be considering entering into a contract with them on the basis of their draft, and Hyder should definitely not be using their draft for a standard for use between the companies." However, it was not until 12 December 2001 that Mr Tyler wrote to Mr Shotliff to express his opposition to the drafts, and he did so in milder terms than those used by Mr Brand.

19. In his letter of 12 December 2001, Mr Tyler complained that the documents reflected "some but not all of our comments made on various versions" and stated that "additional items appear to have been added". In his oral evidence, he confirmed that there were elements of the Buchan proposals of 8 November 2001 with which he did not agree. However, Mr Tyler went on in the letter to say that he thought that the parties were "generally close to agreement". In order to conclude the exchanges between the parties, he sought documents relating just to the Wellcome Building, saying that Mr Shotliff "should be in a position to include all the specific project requirements in drafting the document and it will clearly indicate how the protocol and agreement will work". He added that "work continues apace on the Wellcome project under the instruction of your letter of 13 November".

20. On 29 January 2002, Mr Shotliff answered the request for a pack of documents relating to the Wellcome Building. He sent to Hyder what were described as "Design Consultancy Terms and Conditions and part complete set of Schedules" relating to the Wellcome Building ("the January Terms"). He said that "the Schedules reflect the current exchange of correspondence between ourselves and Wates" (the main contractor). He went on:

> "We have requested a completed Sub-Contract and will advise in due course of any changes to the Schedules arising.
>
> A PI insurance requirement of £5m is identified.
>
> Whilst the terms of the Warranty have yet to be agreed, we have attached a Franklin Andrews Consultant / Employer

> warranty document which we are advised will be applicable. We are, however, unable to confirm this at this stage, as sub-contract details have still to be finalised.
>
> In the meantime, you are to continue with work on the basis of the foregoing and our instructions from Wates. Pending finalisation of the Agreement, we will pay you for work done under this and our previous instruction to £40,000."

21. Neither party now has on their files a copy of the documents that were sent with this letter. However, the judge made two findings in relation to the documents that were sent. First, he found that Mr Shotliff included a version of Schedule 1 that was specific to the Wellcome Building, and which – amongst other things - proposed a limit on Hyder's liability in the sum of £110,000.

22. Secondly, the judge found that the version of the detailed terms and conditions that was sent included changes from the proposed contract documents which had been sent on 8 November 2001 (paragraphs 12-13 above).

23. Beyond finding that the January 2002 proposals made changes to the November 2001 proposals, the judge held it was not possible for the court to go further. However, he did find that the changes were not limited to the simple inclusion of the £110,000 cap figure in the schedule. That was because: (i) that was not a change as such, but an entirely new proposal; (ii) the email to Hyder expressly referred to 'changes' (plural) to the 'documents' (plural). The judge also rejected Hyder's suggestion that these proposals must have been contractually binding or they could not properly have been said to be 'of comfort' to Hyder; they were, and were intended to be, proposals only. It was for Hyder to say if they unequivocally accepted them. They did not.

24. The judge's attention was also drawn to an internal Buchan memo of 28 January 2002, which discussed various aspects of the proposed documentation in respect of the Wellcome Building. The unidentified author concluded:

> "I think Clause 24 of the T's and C's needs amending. Suggest the following:
>
> 'the Consultant's Liability for defective design and excluding amounts for which the Consultant is liable under the terms of the PI insurances provided under the Agreement is limited to the sums stated in Schedule 1'."

25. This appeared to be a reference to clause 2A of the proposed terms and conditions. The suggested alteration comprised a radical departure from the original proposal because it was seeking to put a cap on liability "excluding amounts for which the Consultant is liable under the terms of the PI insurances", which was of much more limited scope than the proposed liability cap in its original form (paragraph 13 (c) above). But although it seems quite possible, the judge could not say whether this suggested modification was in fact sent with the documents on 29 January 2002.

26. On 31 January 2002, Buchan sent Hyder a Scope document in respect of the Castlepoint Car Park which indicated "a number of design deliverables". This was part of a process by which Buchan were seeking to reduce the scope of Hyder's proposed design works, in order to reduce the lump sum fee. In response, on 1 February 2002, Hyder indicated a reduced fee of £260,000.

27. There was a 'kick-off' meeting between the parties in respect of Castlepoint on 7 February 2002. There are no minutes of that meeting and none of the witnesses who gave evidence before the judge attended the meeting itself. It appears that a revised Design Scope/Deliverables document was provided to Hyder at the meeting, and that this document reflected the fact that Buchan had decided not to reduce the scope of Hyder's work, as set out in their original quotation.

28. On 12 February 2002, Hyder wrote to Buchan referring to the kick-off meeting, noting that there were a number of things that had been identified which were "additional to the original brief and offer". Hyder said they would endeavour to include those within their fee offer but did not have sufficient information to determine their full implication. The letter then went on:

> "It was noted that the formal detail design commencement date and Frozen Scheme date are both 11 February 2002 and that you wished to commence on that date. I confirm that the start has been made but should be grateful for a formal letter of instruction and limitation of expenditure subject to preparation and signature of the services agreement in due course."

29. On 20 February, Kier instructed Buchan to start work on the Castlepoint Car Park pursuant to a letter of intent. There was a reference to Buchan's liability not exceeding 10% of the value of the sub-contract, which was about £6.1 million. Hyder knew nothing of this at that time. The final sub-contract between Kier and Buchan was not concluded until October 2002.

30. On 6 March 2002 Buchan sent two critical letters to Hyder.

31. The First 6 March Letter was in these terms:

> "Hampshire Centre – Castlepoint Car Park
>
> We have received an initial letter of intent for this project. The letter includes an instruction to commence work.
>
> Accordingly, we confirm our instructions to yourselves to commence design and detailing work on this project.
>
> Your work is to be carried out in accordance to the Protocol Agreement and Terms and Conditions associated that we are currently working under with yourselves, the Design Scope and Deliverables document for Castlepoint Car Park previously provided (copy attached) and your quotation of 28 November 2001 in the sum of £285,000.
>
> We also require you to carry out further works as instructed by ourselves under the same terms and conditions.
>
> Pending finalisation of the Agreement and our directions on this project, we will pay you for work done under our instructions up to a maximum of £56,000.

> Once the Agreement is executed and the Schedules for this project completed, their terms and conditions shall supersede this letter and shall govern any work done retrospectively.
>
> Please note where there will be requirements to enter into design warranties on this contract."

The Design Scope and Deliverables document which was attached was supposed to be in the same form as the one provided at the kick-off meeting, which effectively reinstated the original scope of work. Although Hyder originally stated that that was indeed so, the judge considered the issue was irrelevant to the dispute.

32. The second letter, also dated 6 March 2002 ("the Second 6 March Letter") (and obviously opened by Hyder immediately after the first, because the receipt numbers are sequential), was in these terms:

> "Design Agreement
>
> We wish to formally confirm the basis of our design and detailing work placed with yourselves.
>
> We consider that the Protocol Agreement, Terms and Conditions, Contract Schedules and Instructions documents should apply to all work executed for ourselves. Copies of the documents are enclosed. There are some minor amendments, in particular to the limitation of liability clause. We believe that they should be acceptable to yourselves.
>
> We trust that you will be able to agree to execution of the Protocol Agreement and would appreciate your confirmation.
>
> We consider that a PI insurance level of £5m will generally be suitable but may require a £10m cover if contracts entered into so require.
>
> We do not anticipate any requirement for Performance Bonds for presently anticipated work."

33. On the Hyder file, attached to this letter, were four short Schedules specific to Castlepoint. Schedule 1 referred to various documents that were not provided, left some sections blank, and noted that other matters were 'TBA'. At paragraph M of Schedule 1, the completed version read:

> "The limit, if any, on the Consultant's liability (as referred to in Clause 2A) is £610,515 – 10% of sub-contract package for uninsured losses."

34. Schedule 2 was entitled 'The Services'. This referred to a number of documents and drawings which, it was common ground, related not to the scope of Hyder's services for Buchan, but Buchan's services for Kier. The pre-contract design services were left blank and the post-contract design services were said to be set out in "appendix 1 to Schedule 2", which was not attached. Schedule 3, which related to fees, was almost entirely blank or 'TBA'. It provided for applications for payment of fees to be

submitted monthly. Schedule 4, dealing with the deed of warranty, noted that the beneficiaries of the deeds of warranty were 'TBA.'

35. There was a wider and potentially more important dispute about what else (if anything) was sent with the Second 6 March Letter. The judge found that extensive contractual documents were attached to the letter. The judge further found that the documents referred to in the second paragraph of the letter were attached to it.

36. The judge found that by letter dated 13 May (see paragraph 44), all the documents that were sent with the second letter of 6 March 2002 were re-sent. This is important because the parties were agreed about which documents were sent on 13 May 2002.

37. Amongst those agreed documents, which the judge found were originally sent by way of second letter of 6 March 2002, was a revamped set of terms and conditions. For present purposes, the most significant changes related to Clause 2A, the limit of liability. This now read:

> "2A LIMIT OF LIABILITY
>
> (a) The Consultant's liability in respect of his design shall be no greater than the Client's liability under the Sub-Contract.
>
> (b) The Consultant shall be liable for the reasonable direct costs of repair, renewal and/or reinstatement of any part or parts of the Sub-Contract Works to the extent that the Client incurs such costs and is or becomes liable either directly or by way of financial contribution for such cost due to a breach by the Consultant of his obligations under this Agreement.
>
> (c) Where the Consultant is in breach of this Agreement, otherwise than for a failure to use reasonable skill, care and diligence and the Client incurs any costs, losses, expenses or damages other than those indicated in (b) above, the liability of the Consultant shall be limited to the sum stated in Schedule 1."

38. The fact that the proposed changes to this limitation of liability clause were the most significant changes in the revamped version of the terms and conditions provided a further specific reason for the judge's conclusion that those amended terms and conditions were sent with the second letter of 6 March 2002.

39. On 8 March 2002, Hyder sent a fax to Buchan which said, amongst other things:

> "... (1) Appointment and instructions to proceed. We have today received a letter of instruction from David Shotliff, for which I thank you …"

It appeared to be common ground between the parties at trial that this was a reference to the first letter of 6 March 2002.

40. On 22 March 2002, Hyder wrote again to Buchan in respect of Castlepoint. They said:

> "Thank you for your letter dated 6th March 2002 instructing us to commence design and detailing work.
>
> Since our original offer dated 28 November 2001, there has been further discussion on the extent of services required and a revised offer, excluding the design element, was made in our letter dated 1st February 2002. It was subsequently decided by C V Buchan that design services were required and a revised Design Scope and Deliverables schedule was issued to us, at the "kick-off" meeting held on 7th February, as per the schedule attached to your letter. Following the meeting, we wrote to you on the 12th February 2002, copy of letter attached, setting out the main points arising. You will note from this that there are variations to our original offer and these have still to be agreed for incorporation into our formal agreement.
>
> There have also been discussions and correspondence with Kevin Wrigglesworth regarding additional work that we are doing on the general layout and issues delaying the design and detailing but believe that these can be dealt with under the terms of our Protocol Agreement."

41. It was again common ground that the reference to the letter of 6 March 2002 instructing Hyder to commence design and detailing work was a reference to the First 6 March Letter.

42. In addition, although it is not expressly stated, it would appear that Hyder were saying that the lump sum of £285,000 did not necessarily cover all the work that they were being asked to do.

43. On 26 April 2002, Hyder asked Buchan to increase the limit on expenditure identified in the first letter of 6 March 2002. It was submitted on behalf of Buchan that this was inconsistent with the content of Schedule 3 sent with the Second 6 March Letter (paragraph 34 above), because that envisaged monthly applications up to a lump sum of £285,000.

44. As already noted at paragraph 36, on 13 May 2002, Buchan sent Hyder a chasing letter in respect of the proposed Design Agreement and re-sent the material that had already been sent on 6 March 2002. The letter concluded: "The Schedules for particular contracts will be forwarded under separate cover within a few days." It may be that this was a reference to the fact that both project-specific schedules (Wellcome Building and Castlepoint Car Park), at least in the form originally sent to Hyder, were incomplete.

45. There was no reply by Hyder to the letter of 13 May 2002. This was unfortunate, in particular because Mr Brand advised Hyder in June that the revised limitation of liability clause was "worthless" from Hyder's point of view. In fact, the exchanges between the parties went dead for three months and it was not until 30 July 2002 that Buchan chased again for the completed Design Agreement. They said that the matter was now urgent because they did not wish to extend the 'letters of intent' arrangement.

46. This finally prompted Hyder into responding on the detail. They did so in a letter dated 2 August 2002. Amongst other things, they provided what can only be

described as a complete rewrite of clause 2A. It is unnecessary to set out those proposed new terms, although the judge noted that they included the proposal that there should be a limit of liability of £1 million and, if professional indemnity insurance became unavailable at commercially acceptable rates, the cap would fall still further, to £250,000.

47. On 6 August 2002, Mr Shotliff replied. He told the judge that, by now, he was "extremely frustrated" because Hyder had never sought to amend the drafts at the time, and yet were now seeking to do so. The letter is set out below:

> "6th August 2002
>
> For the attention of Mr S Birch
>
> Dear Sirs,
>
> **AMEC Design Agreement**
>
> We acknowledge receipt of your letter of 2 August 2002 regarding the terms and conditions of the above.
>
> The basis of the Design Agreement was negotiated with your Mr S Tyler in November 2001 when we generally agreed upon terms and conditions and a means of implementing them via the Protocol Agreement.
>
> Hyder letter of 12th December 2001 recognises that the Wellcome Building will be done to the terms and conditions and instruction provided to you on l3 November 2001, although at that time you suggested that the Agreement be specific to the Wellcome Building pending finalisation of some minor details.
>
> We advised you that we wished to maintain an arrangement comprising Protocol and Terms and Conditions and Contract Specific Schedules and issued a set of schedules on January 2002.
>
> We issued our instruction to proceed on the Castlepoint contract on the same basis on 6th March 2002.
>
> The Terms and Conditions document was developed from the standard AMEC Design
>
> Agreement terms after extensive discussion with your Mr Tyler regarding the type and extent of design you would be likely to undertake for ourselves.
>
> These discussions took place in October 2001, culminating in the revised documents being e-mailed to S Tyler on 8th November 2001.
>
> We are not now in a position to negotiate the general terms of agreement between us.
>
> We enclose:

1. A copy of our e-mail of 8th November 2001, enclosed revised documents.

2. Our instruction to carry out design works on the Wellcome Building in accordance with the documents and our design deliverables document.

3. Your response of 12th December 2001 acknowledges that you will work in accordance with the documents on the Wellcome Building.

4. Our letter of 29th January 2002, including the specific project documents for the Wellcome Building.

5. Our programme for Castlepoint Car Park of 28th January 2002 and draft design deliverables.

6. Our Instruction to carry out design work on the Castlepoint Car Park of 6th March 2002.

7. Your acknowledgement of 22nd March 2002.

8. Our letter of 13th March 2002.

9. Relevant project schedules – Wellcome Building.

10. Relevant project schedules – Castlepoint.

We do not expect to be able to re-negotiate terms as your letter of 2nd August 2002 implies. However, we recognise the insurance matters and will agree how to incorporate them into our arrangement.

We also enclose a copy of our limitation of liability clause on the Castlepoint Car Park that we are incorporating into our sub-contract from Kier.

It is now urgent that the matters regarding design are now being resolved. You have already exceeded your current limit of expenditure under our current letter of intent and we will now have to extent [sic] this further.

This is clearly unsatisfactory and must be brought to a speedy resolution.

Yours faithfully

DL Shotliff

Commercial Director

Enc"

48. The letter enclosed various documents, almost all of which had been sent before. One of the documents that was new was the limitation of liability clause which Buchan were incorporating into their sub-contact with Kier.

49. Hyder did not agree to these proposals and no Protocol Agreement (or over-arching set of terms and conditions) was ever signed. Instead, the works at the Castlepoint Car Park were carried on and completed by Hyder by way of extensions to the financial limit originally placed on the value of work they could carry out by the First 6 March Letter. Thus, on 1 October 2002 Buchan increased the limit to £220,000 and, on 26 November 2002, they increased it again to £270,000.

50. For the purposes of the issues in this case, both parties sought to rely on documents as late as November and December 2002, which the judge found had no bearing on the issue as to whether or not the parties agreed a contract in March 2002 which included a cap on liability.

Legal framework

51. The legal principles and relevant authorities were largely common ground at the trial and there was no dispute as to their articulation on the appeal.

Nature of the contract

52. At the appeal, the only authority on which Mr Taverner QC relied was *British Steel Corp v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All ER 504. In his seminal judgment, Goff J (as he then was) held at p.119:

> "As a matter of analysis the contract (if any) which may come into existence following a letter of intent may take one of two forms: either there may be an ordinary executory contract, under which each party assumes reciprocal obligations to the other; or there may be what is sometimes called an 'if' contract, ie a contract under which A requests B to carry out a certain performance and promises B that, if he does so, he will receive a certain performance in return, usually remuneration for his performance. The latter transaction is really no more than a standing offer which, if acted on before it lapses or is lawfully withdrawn, will result in a binding contract."

53. Goff J went on to state at p. 120:

> "I therefore reject CBE's submission that a binding executory contract came into existence in this case. There remains the question whether, by reason of BSC carrying out work pursuant to the request contained in CBE's letter of intent, there came into existence a contract by virtue of which BSC were entitled to claim reasonable remuneration; ie whether there was an 'if ' contract of the kind I have described. In the course of argument, I was attracted by this alternative (really on the basis that, not only was it analytically possible, but also that it could provide a vehicle for certain contractual obligations of BSC concerning their performance, eg implied terms as to the quality of goods supplied by them). But the more I have considered the case, the less attractive I have found this alternative. The real difficulty is to be found in the factual matrix of the trans-action, and in particular the fact that the work was being done pending a formal sub-contract the terms of which were still in a state of negotiation. It is, of course, a notorious fact that, when a contract is made for the supply of goods on a scale and in circumstances

such as the present, it will in all probability be subject to standard terms, usually the standard terms of the supplier. Such standard terms will frequently legislate, not only for the liability of the seller for defects, but also for the damages (if any) for which the seller will be liable in the event not only of defects in the goods but also of late delivery. It is a commonplace that a seller of goods may exclude liability for consequential loss, and may agree liquidated damages for delay. In the present case, an unresolved dispute broke out between the parties on the question whether CBE's or BSC's standard terms were to apply, the former providing no limit to the seller's liability for delay and the latter excluding such liability altogether. Accordingly, when, in a case such as the present, the parties are still in a state of negotiation, it is impossible to predicate what liability (if any) will be assumed by the seller for, eg, defective goods or late delivery, if a formal contract should be entered into. In these circumstances, if the buyer asks the seller to commence work 'pending' the parties entering into a formal contract, it is difficult to infer from the buyer acting on that request that he is assuming any responsibility for his performance, except such responsibility as will rest on him under the terms of the contract which both parties confidently anticipate they will shortly enter into. It would be an extraordinary result if, by acting on such a request in such circumstances, the buyer were to assume an unlimited liability for his contractual performance, when he would never assume such liability under any contract which he entered into. For these reasons, I reject the solution of the 'if ' contract. In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we now say, in restitution. Consistently with that solution, the party making the request may find himself liable to pay for work which he would not have had to pay for as such if the anticipated contract had come into existence, eg preparatory work which will, if the contract is made, be allowed for in the price of the finished work."

54. The parties also continued to rely on *RTS Limited v Molkerei Alois Müller GmbH* [2010] 1 WLR 753, as they had below, for the principles determining whether or not there was a binding contract between the parties, and, if so, what the terms of such a contract might be. At [45] Lord Clarke stated the well-established relevant principles as follows:

> "45. …It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion

> that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

Incorporation

55. The principles set out in *RTS* above are again relevant for the purpose of incorporation. Also of relevance is the judgment of Rix LJ in *Tradigrain SA v King Diamond Shipping SA* [2000] C.L.C. 1503 when he said at [78]:

> "The first rule relating to the incorporation of one document's terms into another document is to construe the incorporating clause in order to decide on the width of the incorporation…A second rule, however, is to read the incorporated wording into the host document *in extenso* to see if, in that setting, some parts of the incorporated wording nevertheless have to be rejected as inconsistent or insensible when read in their new context."

The judgment below

56. At [4] – [46], the judge laid out a detailed summary of the facts and documents relevant to the issues in the case.

57. On the critical issue, the judge found that, in the absence of any agreement of the overarching Protocol Agreement and its terms and conditions ("the Final Agreement"), the parties could not be taken to have agreed that Hyder's liability in respect of the Castlepoint Car Park was to be capped at £610,515. He considered that there was too much uncertainty and too much that was not agreed for the court to conclude, on any objective analysis of the correspondence, that the parties intended to be bound by a liability cap in the way alleged by Hyder.

58. Whilst the judge accepted that a court should always strive to find a concluded contract in circumstances where work has been performed (see per Steyn LJ in *G Percy Trentham v Archital Luxfer Limited* [1993] 1 Lloyd's Rep 25), as the judge indeed did, he nonetheless held the court was not entitled to rewrite history so as to incorporate into that contract express terms which were not the subject of a clear and binding agreement.

59. The judge determined the various issues as follows.

1. Was there a contract between the parties?

60. At [50] – [54], the judge laid out the legal principles on which he relied.

61. The judge found there was a "simple contract" between the parties. (Mr Hughes QC was unable to persuade me that there was any additional value in using the adjective "simple" in relation to this contract. Consequently, I will simply refer to the 6 March 2002 agreement as "the Contract" going forward).

62. The judge held this was a case where work was done and paid for on the basis of instructions from Buchan, which were accepted by Hyder. In his view, works were performed on the express understanding that, if the anticipated detailed contract did not eventuate, the correspondence between the parties would create a legal relationship between them and ensure that, amongst other things, Hyder would be

paid for the work they undertook. I found this analysis problematic and will address it later in this judgment.

2. If there was a contract, which documents comprised or evidenced that contract?

63. The judge held that, as at 12 February 2002, there was no agreement between the parties. However, Hyder's request for a letter of instruction was answered by way of Buchan's first letter of 6 March 2002, which was accepted by Hyder's letters of 8 March and/or 22 March 2002, although the judge found that the acceptance was best evidenced by Hyder's conduct in undertaking the work, rather than either of the two letters. In those circumstances, the judge accepted Hyder's submission that there was a contract between the parties.

64. The judge rejected Hyder's submission that the documents which comprised or evidenced the contract between the parties – in other words, the documents which they accepted in their letters or by conduct – included: (i) the proposed terms and conditions in their original November form (paragraphs 12 and 14 above); and (ii) Schedules 1-4, specifically relating to the Castlepoint contract, which were sent with the Second 6 March Letter and which included the proposed cap on liability of £610,515 (paragraphs 32-33 above).

(a) Were any terms and conditions incorporated into the Contract?

65. The judge held that no set of terms and conditions had been incorporated into the contract between the parties.

The November Terms

66. The judge rejected Hyder's submission that the terms and conditions referred to in the First 6 March Letter were the November Terms, including clause 2A in its original form. He concluded that the November Terms were never accepted by Hyder. Even if that analysis was wrong, the judge concluded that those terms had, in any event, been superseded.

67. He rejected what he regarded as Hyder's over-reliance on the reference in the First 6 March Letter to "the terms and conditions we are currently working under with yourselves" (which I shall refer to as "the relevant words"). The judge found this to have been a general reference to the terms which were still being negotiated. Consequently, he found no set of terms and conditions had been agreed by 6 March 2002 for either project, and that in fact they had never been agreed.

The January Terms

68. Further and in any event, the judge held that, at the time of the First 6 March Letter, the latest version of the terms and conditions were the January Terms (paragraph 20 above).

69. However, if, contrary to the judge's primary view, any terms and conditions were truly being "worked under" on 6 March 2002, his view was that it was that version. The judge found that, whilst he could be sure that those terms were different from the November Terms, he was not in a position to say precisely what those terms and conditions were. It is possible that one significant change was to the terms of clause 2A, as revealed in the internal Buchan memo (paragraph 25 above).

70. Consequently, the judge was satisfied that, whatever else may have happened, by 6 March 2002, the November Terms had been superseded and could not therefore be said to have been incorporated by reference into the Contract evidenced by the First 6 March Letter. The judge went on to find that the January Terms were not incorporated into the contract.

71. As a matter of law, the judge considered it is impossible to construe – at any stage - an unequivocal and binding agreement in respect of any one of the three competing versions of the terms and conditions.

72. He further held if there was no agreed set of terms and conditions, then there could not have been an agreed Schedule 1 either. That was because the latter was parasitic upon an agreed set of terms and conditions.

Third set of terms and conditions

73. The judge rejected Hyder's submission that, for the purposes of analysing what documents comprised or evidenced the contract, the two letters 6 March 2002 should be read together. That would have meant that the terms and conditions referred to in the First 6 March Letter would have been the terms and conditions actually enclosed with the Second 6 March Letter.

Final analysis on terms

74. The judge provided additional reasoning as to why he concluded that none of the terms and conditions (in any version) had been incorporated into the Contract. He found that no such terms were ever accepted by Hyder. The question in law is whether, on an objective assessment, there has been a final and unqualified expression of assent: see *Day Morris Associates v Voyce* [2003] EWCA Civ. 189. The judge held that Hyder had failed to accept those terms either clearly or unequivocally (see [71] and [72] of the judgment).

75. He placed considerable emphasis on the fact that Hyder did not use the word 'accept' at all. Further, he considered that there was doubt about which version of the terms and conditions might have been referred to by Buchan in the letter and there was evidence that Hyder did not accept any version of the proposed terms.

(b) Incorporation of schedules 1-4

76. The judge held that Schedules 1-4 could not have formed part of any contract made in March 2002. He concluded that, if there were no agreed set of terms and conditions, there could have been no agreed Schedule 1 either, since the latter was "parasitic" upon the former.

Alternative analysis

77. If, contrary to his primary analysis, the two letters of 6 March 2002 had to be read together, and the terms and conditions referred to in the First 6 March Letter were the subject of a binding agreement, then the judge held that the only sensible candidate was the terms and conditions sent on 6 March 2002. On that basis, the limit of £610,515 related only to clause 2A(c). This did not arise from the ordinary breach of Hyder's obligation to exercise reasonable skill and care. It was not a limit on the principal kind of liability that was likely to arise if Hyder were in breach of contract,

namely a liability for the costs of repair and the like, which was identified under clause 2A(b) and which was not the subject of an express financial cap.

3. Was schedule 1(M) a term of any contract between the parties?

78. The judge held that it followed, for all the reasons set out above, that schedule 1(M) was not a term of any contract between the parties as it was parasitic upon the limitation of liability provision in clause 2A which Hyder did not accept.

79. The judge then dealt with Buchan's letter of 6 August 2002. He rejected Hyder's argument that it demonstrated that Buchan thought there was an agreement along the same lines as the contract for which Hyder now contended. He held the letter was written out of frustration on the part of Buchan because, having sat on the documents for so long, Hyder were now seeking to make extensive changes to the proposed terms. He accepted that it was an error for Buchan to refer to the original version of clause 2A because it was common ground that, at least by 13 May 2002, clause 2A had been amended (see [95] – [98] of the judgment).

4. ***What did schedule 1(M) mean?***

80. On the judge's primary analysis, this issue did not arise. Nonetheless, Hyder submitted that Schedule 1(M) related back to the original clause 2A, that it was agreed, that the meaning was clear and that there was a complete cap of £610,515. The judge accepted the submission that the words after the hyphen were purely descriptive and did not affect the operation of the term.

81. The judge held that, if Hyder had been able to get over all of the hurdles in its path, he would have accepted the construction that the liability cap in its original form (paragraph 13(c) above) indicated that Hyder's liability would be for the direct costs of repair etc or the sums stated in Schedule 1, whichever was the lesser. On this analysis, Schedule 1 stated the sum of £610,515. That was therefore the relevant sum, and if the costs of repairs were more than that, then that would be the cap on liability.

The issues on the appeal

82. In light of the arguments presented by counsel on the hearing of the appeal, the central issue in this appeal is whether the November Terms were incorporated by reference into the Contract which was held to exist by the judge.

83. This raises a number of sub-issues:

i) *Offer and acceptance:* Whether the judge erred in his analysis as to the terms in the First 6 March Letter which Hyder accepted?

ii) *Distinction:* Whether the judge erred in failing to distinguish between the "interim contract" (the Contract) and the Final Contract?

iii) *Construction:* Whether the judge's conclusion depended on a mistaken construction of the relevant documents that evidenced the agreement?

The appellant's submissions before this court

84. The arguments advanced in the written and oral submissions by Mr Taverner QC and Mr Scott Holland on behalf of the appellants may be summarised as follows.

i) *Offer and acceptance*: As a matter of construction, the First 6 March Letter was a request to do work on terms set out in that letter. It was an offer of a contract, which related to a fixed contractual fee, under which Hyder would carry out the work that was not capable of being accepted in part. Hyder accepted the offer (in full) in its letter dated 8 March 2002. The letter of 22 March 2002 constituted confirmation of that acceptance. The carrying out of the work was performance of the contract rather than acceptance.

a) The judge correctly found that Hyder accepted the offer made in the First 6 March Letter. He believed that this was 'best evidenced'[1] by conduct rather than the letters of 8 and 22 March 2002.

b) However, having done so, the judge wrongly concluded that Hyder's acceptance only related to part of the offer made in the First 6 March Letter and/or that it somehow excluded the terms and conditions to which it referred[2]. In the absence of a rejection of those terms or a counter-offer (of which there was no evidence and no finding), there is no basis in law or fact for acceptance by conduct somehow to distinguish between the terms of the offer being accepted.

c) Similarly, having found that there was acceptance by conduct, the judge was wrong in law to say that Hyder had to "indicate that they accepted every element of the offer"[3] in the First 6 March Letter and/or that they had expressly to mention the terms and conditions or Schedules 1-4. Either all of the terms of the First 6 March Letter were accepted by conduct or none of them were.

d) If, contrary to the judge's primary finding, the offer contained in the First 6 March Letter was also accepted by Hyder's letters of 8 or 22 March 2002 – as Hyder contends – the judge was in any event wrong to construe those letters as giving only qualified acceptance or a rejection of the terms and conditions proposed[4].

e) The judge placed undue weight on the fact that Hyder's letters did not expressly use the word "accept"[5]. The words used were sufficient to convey acceptance and there was no basis for construing them as an acceptance of some part of the letter, but not others, or as a rejection or counter-offer of the terms and conditions referred to in the First 6 March Letter.

f) The judge erred in his finding that there was uncertainty and too much that was not agreed for the court to conclude, on any objective analysis of the correspondence, that the parties intended to be bound by a limit on liability in the way alleged by Hyder[6].

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[1] [58] of the judgment

[2] [71] of the judgment

[3] [71] of the judgment

[4] See [72] of the judgment

[5] See [55] – [57] and [72] of the judgment

[6] See [48] of the judgment

ii) *Distinction:* The judge wrongly conflated the lack of agreement between the parties on the terms and conditions which were to apply to all projects (and would supersede any interim arrangements on the Wellcome and Castlepoint Projects) with agreement on terms and conditions which the parties were prepared to agree would apply to the Contract, pending such final agreement.

iii) *Construction*: The judge's conclusion that no terms and conditions had been agreed as at 6 March 2002 depended on a mistaken construction of the relevant documents: specifically Buchan's letters of 8 and 13 November 2001 and Hyder's letter of 12 December 2001. On a proper construction, they evidenced agreement of the November Terms on the parallel Wellcome Building. In view of the judge's decision that there was a contract based on the First 6 March Letter, the judge should have determined that it incorporated the November Terms (and specifically Clause 2A(a) thereof).

a) The parties had reached agreement that the November Terms would apply to their work on the Wellcome Building pending resolution of their continuing negotiations towards the Final Contract that would apply to all projects between the parties.

b) Both the letters of 13 November (Buchan) and 12 December (Hyder) acknowledged the fact that there remained matters of difference between the parties on the terms and conditions, but these were considered relatively minor and did not prevent them being prepared to sign up to the current version of the terms pending final agreement on the overarching Protocol Agreement.

c) If and when the parties reached agreement on the finalised terms for the overarching Protocol Agreement, they would supersede the terms that the parties had agreed would apply in the interim.

d) The phrase "currently working under" in the First 6 March Letter incorporated by reference the November Terms.

The respondent's submissions before this court

85. The arguments developed by the respondents, in written submissions and by Mr Hughes QC in oral submissions, in relation to the above issues may be summarised as follows.

i) *Offer and acceptance*: The judge concluded that the First 6 March Letter, taken with Hyder's responses dated 8 March 2002 and 22 March 2002 – and the fact that Hyder undertook design work – was sufficient to give rise to the Contract. That contract was for work which Hyder had already started, on the back of a quotation which expressly stated that terms and conditions were to be agreed. There was no basis for the judge's approach, whether in law or in fact, to be disturbed on appeal.

a) The terms of the contract were that Hyder would carry out and complete the work in accordance with instructions given to it by Buchan.

b) There was no express agreement as to price but the consideration moving from Buchan was that Hyder would be paid a reasonable sum

on a quantum meruit basis for completed work. There was a cap as to the price but this was capable of being revisited.

c) The terms and conditions were too imprecise at the point the Contract was made and it is unreasonable to attribute to the parties an intention to contract on the basis of them.

ii) *Distinction:* The judge made no error in his conclusion that the witnesses and the correspondence showed there was no distinction that meant that Hyder was rejecting the terms generally for the purpose of the Final Contract while not rejecting them on the basis that they were currently being worked under[7].

a) Hyder placed emphasis upon the 'interim' nature of the Contract. The judge was correct to reject this; there was going to be nothing 'interim' about any 'cap' on liability established by Hyder[8].

b) In any event, there was no difference in principle as to whether the contract was 'interim' or 'final' or 'overarching'. The November Terms were either incorporated by reference, or they were not to be incorporated.

c) The phrase "working under" should be construed as "working on" as in that the terms were "under negotiation"[9]. Paragraph 3 of the First 6 March Letter simply identified the state of the negotiations.

d) The evidence showed that, as at 6 March 2002, the November Terms had been superseded. It was unrealistic to conclude that the parties were contracting on the basis of a series of terms and conditions which were 3 or 4 months old and were no longer operating.

e) On the central question of whether the November Terms were incorporated by reference into the Contract in relation to the Castlepoint Car Park, the evidence in relation to the Wellcome Building did not assist.

iii) *Construction:* There was no basis, when the relevant words were considered against the background of the negotiations, and the position reached by 6 March 2002, for a conclusion that the November Terms were intended, and were incorporated by reference into the Contract[10]. The first letter of 6 March 2002 had to be construed within the context of the judge's finding.

a) The judge was correct to hold that the November Terms were insufficient in themselves[11] to be incorporated by reference into any agreement. The parties had failed to objectively agree upon terms with the requisite preciseness.

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[7] [49] and [82] of the judgment

[8] [49] of the judgment

[9] [82] of the judgment

[10] See [67] of the judgment

[11] See [73] of the judgment

b) The November Terms were very substantially incomplete in relation to cross references to all of the Schedules as at 2001. It was unrealistic and wrong, when considering the First 6 March Letter, to find that the parties had an intention to contract on those incomplete and inchoate terms.

c) Hyder's case was not supported by the evidence as to the agreement of terms and conditions that were currently being worked under.

d) The judge concluded on the facts that the Second 6 March Letter included revised proposed terms[12]. Accordingly, it was unrealistic to conclude that the effect of the First 6 March Letter was to incorporate November Terms that were entirely incomplete and had a different cap from that letter.

e) The relevant words called for an [objective] assessment of what they meant, and which, if any, versions of the draft terms and conditions, were 'called up' by the language used, in the context of negotiations as at 6 March 2002. Any suggestion that the judge was somehow bound to choose one set of terms and conditions for incorporation had no basis in law and certainly had no basis in the facts found by the judge.

f) There was ample support for the judge's factual conclusion that, by 6 March 2002, Hyder and Buchan were not "working under" the November Terms.

Discussion and determination

86. Broadly speaking, Mr Taverner QC and Mr Scott Holland supported their grounds in oral submissions. Mr Simon Hughes QC and Mr Lamont supported the conclusions of the judge. The basis of the latter's submission was that The First 6 March Letter contained the words: "…Terms and Conditions associated that we are currently working under with yourselves …". Based on the judge's analysis of the facts in relation to the progress of negotiations, this language was not apt to incorporate the November Terms by reference.

87. On a preliminary point, I agree with Mr Taverner's submission that if, and insofar as, the issues on this appeal touch on questions of fact, the judge's so-called relevant findings of fact turn on his consideration of the language of a small number of documents, rather than the evidence of witnesses. In any event, the latter, being largely evidence of intention, would not be admissible as an aid to construction of the relevant correspondence. Thus the Court of Appeal is in as good a position as the judge to decide the relevant points of construction.

Sub-issue (i) – offer and acceptance

88. In my judgment the appellant's arguments in relation to this issue are to be preferred and the judge was wrong to decide otherwise.

[12] [31] – [33] of the judgment

The Contract

89. As a matter of construction, the First 6 March Letter was a request to start work on all of the terms as set out in that letter of intent. It was an offer of an "if" contract as described by Goff J (as he then was) at p.119 of *British Steel Corp* supra. That is because, in the letter, Buchan requested Hyder to carry out a certain performance and promised Hyder that, if it did so, the latter would receive a certain performance in return. I was not persuaded by Mr Hughes' submission that the offer did not include an express term about price and the consideration was simply that Hyder would be paid on a quantum meruit basis. In my view, paragraph 5 of the First 6 March Letter established a fixed fee of £56,000, which was capable of being revisited (paragraph 31 above). Consistent with Goff J's analysis, the First 6 March Letter was a standing offer, which if acted on before it lapsed or was lawfully withdrawn, would result in a binding contract.

90. I do not consider it necessary to disturb the judge's finding on the evidence that constituted acceptance. In my view, Hyder accepted Buchan's offer in its 8 March 2002 letter, although this was not the clearest evidence of that acceptance. If I am wrong on this, the offer was accepted in Hyder's letter of 22 March 2002. In any event, the best evidence that Hyder had indeed accepted was its conduct in undertaking the work. The judge was correct to find this created a binding contract.

The Terms

91. It was common ground that, in order to determine the terms of the Contract, the court has to consider what was communicated between the parties by words or conduct and decide whether that leads objectively to the conclusion that they had agreed upon all the terms: per Lord Clarke in *RTS* at [45].

92. While *Day Morris Associates* makes it clear that the law requires, on an objective assessment, that there has been a final and unqualified expression of assent, I consider the judge placed too much emphasis on the fact that Hyder did not use the word "accept" in either of its letters. Similarly, I agree with Mr Taverner that the judge was wrong in law to claim that Hyder had expressly to mention specific parts of the terms in its acceptance in order to indicate it accepted every element of the First 6 March Letter.

93. The law simply requires the assent to be final and unqualified. In this case, there is no evidence of a rejection of any of the terms or a counter-offer, and consequently, once the judge had found there was acceptance by conduct, it follows that Hyder unequivocally accepted all of the terms in that letter.

94. Accordingly, contrary to the judge's conclusion, I am of the view that the Contract included the term in paragraph 3 of the First 6 March Letter that the work was "to be carried out in accordance to…the Terms and Conditions associated that [the parties] are currently working under." In my judgment, the court was then bound to determine what, if any, terms and conditions had been incorporated.

Sub-issue (ii) – distinction

95. At this point, I should deal with the nature of the Contract prior to discussing the construction of the relevant term. In my judgment, one of the major problems with the judge's analysis is that he failed to distinguish between the interim contract under which the parties were currently working (the Contract) and the Final Contract, the

terms of which would supersede the Contract once agreed. As such, I consider Mr Taverner's submissions in relation to this issue are to be preferred.

96. On the evidence, Buchan instructed Hyder to commence work on the Wellcome project in its letter dated 13 November 2001. The letter included the following words:

> "Your work done under this instruction **is to be on the basis** of our instructions from Wates and the conditions and terms detailed in the Protocol Agreement, Design 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 any work done retrospectively.
>
> [emphasis added]."

97. In my analysis under sub-issue (iii) below, I explain why I consider this letter as evidence that the November Terms had been accepted by Hyder and were currently being worked under. For present purposes, the words above support the appellant's submission that there was indeed a distinction between an interim agreement and the final agreement. To use the words of the judge below, I consider the parties had chosen "to stop the music" in relation to the terms that applied in the interim in relation to the Contract but not in relation to the Final Contract. But it was clear that once the final terms had been agreed, they were to supersede the interim terms for the purpose of all of the projects.

98. I reject Mr Hughes' submission that the correspondence in relation to the Wellcome Building does not assist when considering the question as to whether the November Terms were incorporated by reference into the Contract in relation to the Castlepoint Car Park. Although the 13 November 2001 letter was an instruction in relation to the Wellcome Building, I conclude that, on its true construction, this interim agreement applied to all projects, including Castlepoint, prior to finalisation of the terms.

99. In my judgment, the judge came to a mistaken conclusion that the works were performed on the express understanding that, if the anticipated detailed contract did not eventuate, the correspondence between the parties would create a legal relationship between them[13] and ensure, amongst other things, that Hyder would be paid for the work they undertook. The judge 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), before the correspondence between the parties could create a legal relationship between them. The legal relationship arose as soon as Hyder accepted Buchan's offer for consideration in the form of the interim contract.

Sub issue (iii) – construction

100. Having concluded that there was indeed a contract and that there was a distinction between the agreement of the terms for the Contract (in the interim) and the Final Contract, I now turn to determine the final sub-issue, namely the construction of the

[13] [56] of the judgment

words: the "Terms and Conditions associated that we are currently working under with yourselves."

101. Mr Hughes submitted that the background of the negotiations and the position reached by 6 March 2002 prevented the incorporation of any terms by reference into the Contract. I disagree. In my judgement, Mr Taverner's submission is correct that, in view of the judge's determination that there was indeed a contract based on the First 6 March Letter, he should have found that it incorporated the November Terms. I will take my analysis in three stages.

102. First, I reject Mr Hughes' argument that that the words "currently working *under*" should be construed as "currently working *on*" as in "under negotiation." This is contrary to the natural and ordinary meaning of the language. In my judgment, it is quite clear that this phrase is a reference to the "Terms and Conditions" that the parties had previously exchanged and agreed to work under. I do not accept the judge's conclusion that it is a reference to the state of the negotiations.

Identifying the Terms and Conditions

103. Second, it is necessary to identify the "Terms and Conditions" to which this term refers. In my judgment, Mr Taverner is correct that, on a proper construction, this is a reference to the November Terms, which were agreed on the parallel Wellcome Project. I am persuaded that the judge's conclusion that no terms and conditions had been agreed as at 6 March 2002 was based on the judge's mistaken construction of the relevant documents.

104. On the evidence, Buchan sent Hyder an email with an attached draft protocol agreement, terms and conditions and Schedules ("the documents") in respect of the Wellcome Project on 8 November 2001 (paragraph 12 above). In the body of the email, Buchan stated, **"[w]e intend to use the documents** for the Wellcome Building works subject to your agreement and we will be providing more details shortly" [emphasis added]. In my judgment, this email was an offer of the November Terms.

105. Hyder either accepted the November Terms by its conduct in starting the work shortly after 13 November 2001 or via its response letter on 12 December 2001 in relation to the protocol agreement, the terms and conditions and Buchan's letter of 13 November (paragraph 19 above). In the 12 December 2001 letter, Hyder made it clear to Buchan that "**work continues apace** on the Wellcome project **under the instruction of your letter** of 13 November 2001 [emphasis added]."

106. Buchan's letter of 13 November 2001 is the letter of instruction in relation to the Wellcome Project described above, which provided evidence of the distinction between the interim agreement and the final agreement.

107. When the 13 November 2001 and 12 December 2001 letters are read together, the former makes it clear that it is the November Terms which had been accepted by Hyder in the latter and were being worked under. For these reasons, I reject the judge's conclusion that the November Terms were never agreed and conclude that it was those terms that were being referred to in paragraph 3 of the First 6 March Letter.

The case to the contrary

108. Mr Hughes relied on the fact that parts of the November Terms were incomplete in order to support his submission that it was wrong to conclude that the parties had an

intention to contract on incomplete and inchoate terms. In my view, while this argument has some force, it does not reflect the reality of the situation on Hyder's pleaded case in this court. Condition 2A(a) of the November Terms (paragraph 13(c) above) is a clear limit of liability that is certain and complete. As Hyder is no longer relying on Schedule 1(M) for its declaration, I consider this submission to be of limited value to Buchan.

109. Additionally, the judge's conclusion that the January Terms or the third set of terms sent out with the Second 6 March Letter superseded the November Terms poses a problem for this analysis. However, contrary to the judge's conclusion, I am of the view that the January Terms could not supersede the November Terms in relation to the Contract, despite them being the latest terms in Hyder's possession as at the date of the First 6 March Letter. On my analysis, these terms were never agreed and were merely changes to the terms proposed in relation to the overarching Protocol Agreement.

110. On the evidence, on 29 January 2001, Buchan sent Hyder a covering email enclosing an updated letter of intent on the Wellcome Building (paragraph 20 above). It said that the letter was following in the post "together with updated Protocol, Terms and Schedules," although copies were never found. In that email, Buchan wrote:

> "In the meantime, you are to **continue with work on the basis of the foregoing and our instructions from Wates**. Pending finalisation of the Agreement, we will pay you for work done under this and our previous instruction to £40,000 [emphasis added]."

111. In my judgment, this all turns on the construction of the word "foregoing," which I consider meant the 'preceding' "Protocol, Terms and Schedules" – a reference to the November Terms - rather than the just mentioned or stated and newly attached "Protocol, Terms and Schedules."

112. Even if I am wrong on this analysis, these January Terms were different from the November Terms and were a completely new proposal. In order to supersede the November Terms, they would have had to have been agreed, which would have required Hyder to accept them unequivocally. The judge never identified this point of agreement in his judgment. In my view, he would have been unable to have done so because Hyder never accepted them. I find support in this conclusion from Buchan's internal memo of 28 January 2002, in which the unidentified author continues to propose alterations to the limitation clause. The judge found these terms were a "radical departure" from the November Terms. This is all further evidence that there was never any agreement on the January terms.

113. In my judgment, the same problem arises in relation to the third set of terms and conditions, which were sent with the Second 6 March Letter. These terms came after the First 6 March Letter and thus could never have been agreed in relation to that letter, if one accepts the judge's analysis that the Contract arose from it.

114. A further issue is that the 13 November 2001 and 12 December 2001 letters explicitly acknowledged the fact that there were outstanding matters of difference between the parties on the terms and conditions. In my judgment, however, it is clear from the language in those letters that these were not considered to be major differences and they did not prevent the parties from agreeing to the terms in their current form for the purpose of the interim agreement pending final agreement on the Protocol Agreement.

115. This view also aligns with commercial common sense. It would not make commercial sense that, while work was ongoing and the Final Contract was being negotiated, every new version of the terms and conditions sent between the parties would automatically supersede the original November Terms being worked under, unless the parties explicitly stated the same.

116. Consequently, I am of the view that it is the November Terms being referred to in paragraph 3.

Were the November Terms incorporated into the Contract?

117. Third, contrary to the judge's view, having determined that the November Terms were agreed and that they were terms referred to in the First 6 March Letter, I conclude that they were indeed incorporated by reference into the Contract, as found by the judge: Rix LJ in *Tradigrain* at [78].

118. I find support in this conclusion from the correspondence; specifically Buchan's 6 August 2002 response letter to Hyder's 2 August 2002 letter regarding the terms and conditions of the Design Agreement, which enclosed copies of various documents sent previously. In that letter, Buchan wrote:

> "Hyder letter of 12th December 2001 recognises that the Wellcome Building will be **done to the terms and conditions and instruction provided to you on l3 November 2001**, although at that time you suggested that the Agreement be specific to the Wellcome Building pending finalisation of some minor details" [emphasis added].

119. The judge found these words were written out of frustration and that it was an error for Buchan to refer to the November Terms. I do not accept this analysis. In my judgment, the words confirm the position that Buchan understood that the November Terms were indeed the terms which were being worked under in relation to the Wellcome Building. Given my analysis above, I conclude that it was these terms that were being referred to in the First 6 March Letter in relation to Castlepoint.

120. Accordingly, I accept Mr Taverner's submission the judge was wrong to find that, on an objective analysis of the correspondence, the court could not conclude that the parties had an intention of being bound by a term that limited Hyder's liability.

121. In his final paragraph, the judge correctly recognised that his analysis rendered a particularly harsh result for Hyder as the consequence was that Hyder assumed unlimited liability, despite the fact that every set of proposed terms and conditions included some sort of provision that limited its liability (albeit in radically different terms). Nonetheless, the judge made the declaration in the way he did.

122. In my judgment, the harshness of the result is another reason why the judge should have reached a different conclusion. This aligns with Goff J's analysis in *British Steel Corp* at p.119 that, if parties are in a stage of negotiation and one party asks the other to begin work "pending" the parties entering into a formal contract, it cannot be inferred from the other party acting on that request that he is assuming any responsibility for his performance, except such responsibility as will be assumed under the terms of the contract that both parties are confident will be shortly finalised.

123. The judge's conclusion is what Goff J called an "extraordinary result," in that the former concluded that, by acting on Buchan's request in such circumstances, Hyder assumed an unlimited liability for its contractual performance, when it never would have assumed such liability under any contract which it entered into. In my judgment, that is even more extraordinary in the current context, where the parties had specifically agreed that limit of liability in relation to the interim contract. Consequently, I consider the judge erred in concluding otherwise.

Disposition

124. For the reasons set out above, I would allow this appeal and hold that any liability of Hyder to Buchan is subject to condition 2A (a) of the November Terms.

Lord Justice Holroyde:

125. I agree.

Lord Justice Underhill:

126. I also agree.