



Contract Formation: The Theory, The Rules and their application to Construction Contracts

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INDEX

Page

1	The Theory, Promise or Agreement
2	Consideration
3	Offer and Acceptance
4	Invitation to Treat and Tenders
5	The Acceptance and Acceptance by Conduct
6	Essential Terms
13	Subject to Contract
14	Letters of Intent
16	The Battle of the Forms
17	Good Faith in Contract Formation Arena

The Theory

In the common law there are two main definitions of a contract:-

- A promise or set of promises which the law will enforce
- An agreement giving rise to obligations which are enforced or recognised by law

The notion of promise carries with it the concept of consideration, for without it the law will not enforce a gratuitous promise (save in the form of a Deed). Consideration is for the promise, not the agreement. Nevertheless the long hallowed principle of consideration is suffering erosion.

The 1999 contract (Rights of Third Parties) Act removed the requirement of consideration from the promisee, or the third party who benefits from the contract without being a party to it.

In the construction field the notion of consideration also took a knock in Lester Williams v. Roffey Brothers [1989] Court of Appeal 48 BLR 69.

In that case the main contractor promised its carpentry sub-contractor a bonus if it completed its work in refurbishing 27 flats on time, so as the main contractor could avoid the imposition of liquidated and ascertained damages for late completion.

It was clear on the evidence given at the Court at First Instance that the sub-contractor was in financial difficulty and expert evidence was adduced suggested that the agreed contract price was too low, for it to profitably complete its work.

In rendering the decision of the court, Glidewell LJ adopted the passage in the then 25 edition of Chitty which read:-

“The requirement that consideration must move from the promisee is most generally satisfied where some detriment is suffered by him, e.g. where he parts with money or goods, or renders services in exchange for the promise, but the requirement may equally well be satisfied where the promisee confers a benefit on the promisor without in fact suffering any detriment”.

There was no suggestion in that case of any fraud or duress, and therefore so long as those are absent, if on giving the promise to pay (extra) the paying party obviates a disbenefit, the promise will be legally binding.

The classification of a contract as an agreement has its own difficulties or exceptions:-

- A deed is enforceable although not predicated on any pre-existing agreement
- Public policy dictates that certain agreements are presumed not to be intended to create legal relations
- The actual agreement of the parties to conclude a contract is strictly speaking not required as English law takes an objective rather than a subjective view of the existence of the agreement

“Agreement is not a mental state but an act, and as an act it is a matter of inference from conduct, the parties are to be judged not by what is in their minds, but what they have said, written or done (Cheshire and Fifoot and Furmston Law of Contract 15th Edition, page 38)”

However, an element of subjectivity was introduced by Lord Hoffman in Carmichael v. National Power Plc [1999] 4 All ER 897, cited at length in Ove Arup & Partners International Limited and Anor v. Mirant Asia Pacific Construction Court of Appeal 2003 EWCA Civ 1729:-

“The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done. But when both parties are agreed about what they understood their mutual obligations (or lack of them) to be, it is a strong thing to exclude their evidence from consideration. Evidence of subsequent conduct, which would be inadmissible to construe a written contract ... may be relevant on similar grounds, namely that it shows what the parties thought they had agreed. It may of course also be admissible for the same purpose as it would be if the contract had been in writing, namely to support an argument that the terms had been varied or enlarged or to found an estoppel”.

Again, in the case of Brian Royale Maggs t/a B.M. Builders (a firm) v. Guy Anthony Stayner Mars and Marsh Jewellery Co. Limited [2006] EWCA Civ 1058 the Judge at first instance had excluded from consideration material that had come into being after the supposed date of the conclusion of the oral contract. Lady Justice Smith said:-

“The parties did not write down what they had agreed. No complete record was made. Accordingly, the only way to decide what had been agreed then was to hear evidence about it at the trial, 2 or 3 years later. The accuracy of the parties’ recollections was mutually disputed. In those circumstances it is plain to me, as a matter of general principle, that for the purposes of testing the accuracy of those recollections, it is highly relevant to hear evidence about what the parties had said and done about the disputed matter in the meantime”.

The common law also regulates what is capable of constituting offer and acceptance.

Silence of its own cannot be treated as acceptance.

A posted acceptance of offer is said to conclude a contract when posted, not when it is received even when it never arrives.

Again, the party posting its acceptance may then change its mind and send a further letter revoking the offer, but in the meantime if the other party has posted its acceptance a contract will have arisen even though it is clear that when that occurred the parties were not “ad idem”.

The posting rule does not however apply to instantaneous modes of communication, such as telephone, text or email as the acceptor (of the offer) will know that his attempt to communicate was unsuccessful and therefore has the opportunity to make proper communication.

It must follow therefore that when there is evidence of delivery of say an email accepting an offer that is fairly conclusive proof that the contract has been concluded.

Offer and Acceptance

Offer

Consideration of this topic when first introduced to the student often commenced with a distinction to be drawn between offer and an invitation to treat and one is regaled with the case of Harvey v. Facey [1893] AC 552 “Bumper Hall Pen”.

The claimants telegraphed “will sell you Bumper Hall Pen telegraph lowest cash price”. The response was “lowest cash price for Bumper Hall Pen £900”.

The claimants then telegraphed “we agree to buy Bumper Hall Pen for £900 asked by you”.

It was held by the Judicial Committee of the Privy Council that that was not an offer, but merely a statement of the price that they might be prepared to sell for.

In the field of Construction Law (as defined by the Construction Act) the above situation may well arise in cases of supply and installation of equipment.

Tenders at Common Law

An invitation to tender for the supply of goods and services is generally not an offer, the offer comes from the person submitting the tender. However the tender itself may alter that presumption by stating that buyer intends to accept the lowest offer, in which case the tender itself can constitute an offer, or alternatively an invitation to treat coupled with an obligation to accept the (lowest) offer.

If the tender itself offers options, as was the case in Peter Lind & Co. Limited v. Mersey Docks and Harbour Board [1972] 2 LLR 234, between a fixed price and an alternative costs plus price, the purported acceptance of “your tender” would not in those circumstances constitute a contract.

In the case of Blackpool & Fylde Aeroclub v. Blackpool Borough Council [1990] 1 WLR 25, the tender stipulated a deadline beyond which tenders would not be considered. It was held that the authority was obliged to consider tenders submitted up to that cut off date.

Lapse and Withdrawal of Offers

Where the offer is specified to last for a specific period of time, it cannot be accepted after that period has elapsed. Where no time for acceptance is given, the offer lapses after a reasonable period of time, dependent upon all the circumstances (see Ramsgate Victoria Hotel Company Limited v. Montefiori [1865] LR 1 EX.

The general rule is that an offer may be withdrawn at any time before it is accepted even if there has been a promise to keep the offer open for a specified period of time, as such a promise is not supported by consideration and therefore is not binding.

Withdrawal of the offer must however be communicated to the offeree usually, but not necessary by the offeror. In Dickinson v. Dodds [1876] 2 CHD 463, it was held that once it was known that the offeror had decided to sell its land to a third party, the original offer could not be accepted.

The Acceptance

An unqualified assent to the terms of the offer. Acknowledgement of receipt does not constitute acceptance.

Acceptance by Conduct

An offer can be accepted by conduct, for example by supplying goods that have been ordered. The difficulty arises in ascertaining the precise terms of the agreement. This may constitute insurmountable difficulties such as the court will conclude that in fact no contract at all has been concluded (see Capital Finance Company Limited v. Brain [1964] 1 WLR).

In Picardi v. Mr and Mrs Cuniberti [2002] EWHC 2933 (QB) the claimant architect argued that a contract had been concluded on the RIBA standard terms, one of his arguments being that his invoices over a period of 18 months had been paid without demur, and this constituted an acceptance of the original offer to enter into a contract on the RIBA standard terms.

The defendants were consumers and benefitted from the Unfair Contract Terms in Consumer Contract Regulations 1999, although this did not have a direct bearing on whether a contract was entered into or not.

The judge found that Mr and Mrs Cuniberti failed to sign the form of acceptance entirely deliberately and that subsequent payments were made on account referable not to the draft contract, but to a future contract to be entered into.

Alternatively, an agreement may be concluded even though all its details have not been worked out. A failure to agree the price may not be fatal. Section 15(1) of the Sale of Goods &

Services Act 1982, provides that a reasonable sum is to be paid where a contract for the supply of services fails to fix the remuneration.

That statutory provision assumes that a contract has been concluded, despite the absence of agreement on price. In Hatmet Limited v. Herbert (trading as LMS Lift Consultants) [2005] EWHC 3529, summary judgment of an Adjudicator's decision was resisted on the basis that there was no agreement in writing and therefore no construction contract.

Hatmet had been required to do some work for LMS Lifts and a price had been agreed orally. LMS had then sent Hatmet a purchase order specifying the work and the price they would pay.

However, the main contractor changed its mind about the specification. Hatmet informed LMS in a letter of its increased price for the new specification. Hatmet completed the work and invoiced LMS. A dispute then arose which was referred to adjudication.

The judge found that although LMS had not expressly approved the price increase, the Sale of Goods 1992 Section 15 implied a term into the contract.

If however there is no contract, then the statutory provision does not apply, and the party doing the work is entitled to a reasonable sum which is classified as a claim for restitution (see British Steel Corporation v. Cleveland Bridge & Engineering Company Limited [1984] 1 All ER 504 at 511, confirmed in the House of Lords case of Yeomans Row Management Limited v. Cobb [2008] UK HL55).

The importance of the distinction contract/no contract, is that in a claim for restitution or quantum meruit, the payment is not subject to any contractual defences such as late delivery.

Essential Terms

In a typical construction contract, matters such as the scope of work, price and the time for completion need to be finalised to make the contract work, but there is absolutely no prescription as to what those essential terms are, it is for the parties between them to decide.

As is frequently the case with construction contracts, negotiations may continue over a period of time, even after a contract has allegedly come into being.

If there is a provision which the parties have been discussing since the outset, which has not been concluded by the time of the alleged contract, that will lead to the inference that the parties never intended to bind themselves (see Lloyd LJ in Pagnan SpA v. Feed Products Limited [1987] C of A LLR Volume 2, 601 at page 611:-

“There will be some cases where continued negotiations after a contract has allegedly been made, will lead to the inference that the parties never in truth intended to bind themselves as in Hussey v. Horne-Payne [1879] LR 4 APP CAS 311. This will the more obviously be so where a term raised by one or other party early in the negotiations had not been the subject of agreement at the time of the alleged contract.

Love & Stewart Limited v. S. Instone & Co. Limited [1973] TLR 47 is an example of such a case. There, although the parties had agreed that there should be a strike and lock out clause, they had never agreed what the terms of the clause were to be. Where the parties have not reached on terms which they regard as essential to a binding agreement, it naturally follows that there can be no binding agreement until they do agree on those terms: Rossiter v. Miller [1878] 3 APP.CA.1124 at p. 1151 per Lord Blackburn.

But just as it opens to parties by their words and conduct to make clear that they do not intend to be bound until certain terms are agreed, even if those terms (objectively viewed) are of relatively minor significance, the converse is also true. The parties may by their words and conduct make it clear that they do intend to be bound, even though there are other terms yet to be agreed, even terms which may often of usually be agreed before a binding contract is made (see Love v. Stewart, SUP, per Lord Loreburn LC at page 476) (Love & Stewart)”.

He continues by quoting from the observations of Lord Denning MR in Port Sudan Cotton Co. v. Chettiar [1977] 2 Lloyds Reports 5 at p. 10:-

“In considering this question, I do not much like the analysis in the text books of enquiring whether there was an offer and acceptance, or a counter offer, and so forth. I prefer to examine the whole of the documents in the case and decide from them whether the parties did reach an agreement on all material terms in such circumstances that the proper inference is that they agreed to be bound by those terms from that time onwards. That is, I think, the result of Brogden v. Metropolitan Railway Company Limited [1877] APP.CA.666).

I think further more that the court must bear constantly in mind the subject matter with which it is dealing. The relevant principals of the law of contract are, no doubt, of universal application, but the proper inference to draw may differ widely according to the facts of the particular case. One case may concern a protracted negotiation, perhaps conducted in writing through lawyers, between parties who have no dealings of any kind before. Another may concern a series of quick fire exchanges between professionals, both of them practitioners of the same trade, both having had many previous dealings, and with a wide measure of common experience, knowledge, language and understanding between them.

One could not sensibly approach these cases in the same way. Inferences which it would be appropriate to draw in one case might be quite inappropriate in the other. The court's task remains essentially the same: to discern and give effect to the objective intentions of the parties".

In Mitsui Babcock Energy Limited v. John Brown Engineering Limited 51 Construction Law Reports at p. 129, John Brown sent to Mitsui a post form of contract which was to be subject to the General Terms & Conditions MF/1. The critical issue was Clause 35 of the General Conditions which was headed 'Performance Tests'.

The parties could not agree on these performance tests and as a result that Clause was struck out with the marginal annotation "to be discussed and agreed". That document was signed in the expectation that both parties would reach an agreement about performance tests and damages for failure to achieve the requisite levels. In reality no such agreement was reached.

It was held that the failure to agree on these performance tests did not prevent a contract nevertheless come into being, nor did the failure to agree on these performance tests render the contract unworkable or void for uncertainty.

The parties had operated virtually to the point of completion on the basis that there was a binding contract and Mitsui had taken advantage of the contract terms in order to obtain payment from John Brown in circumstances which they would not have been entitled to had there been no contract. This had given rise additionally to the possibility of an estoppel. His Honour Esyr Lewis QC quoted from Gibson J in Hamel Smith v. Pycroft and Jetsave Limited [5 February 1987]:-

“Thus the court is no so rigid and inflexible as to insist on the parties being held to an assumed and incorrect state of fact or law when there is no injustice in allowing a party to resile therefrom I do not propose to say a definition of estoppel by convention. It is sufficient for the purposes of this case to say that it applies where:

- (i) The parties have established by their construction of their agreement or their apprehension of its legal effect on a conventional basis.*
- (ii) On that basis they have regulated their subsequent dealings to which I would add.*
- (iii) It would be unjust or unconscionable if one of the parties resiled from that convention.*

The above principals were applied in the case of VHE Construction Limited v. Alfred McAlpine Construction Limited TCC 14 April 1997.

In this case Judge Bowsher ruled on a preliminary issue that a contract had been formed between the parties.

The judge found that the continuing discussions of the parties were not about agreeing contractual terms, rather those discussions were a disagreement as to the construction or effect of what had already been agreed.

Equally, a distinction sometimes has to be drawn between continuing in negotiations of an unconcluded contract and the situation where what is being stated is not a counter offer, but a proposal not intended to vary the terms of the offer, but to add new terms, that do not in the event vitiate the acceptance.

In Percy Trentham Limited v. Archital Luxfer Limited [1993] 1 Lloyds Report 25, Steyn LJ stated:-

“It is important to consider briefly the approach to be adopted to the issue of contract formation in this case. It seems to be that the four matters are of importance. The first is the fact that English law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criteria is the reasonable expectations of honest men, and in the present case that means the yardstick is the reasonable expectation of

sensible businessmen. Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance (see Brogden v. Metropolitan Railway [1877] 2 AC 666 and also Gibson v. Manchester City Council [1979] 1 WLR 294.

The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels (see British Bank for Foreign Trade Limited v. Novinex [1949] 1 KB 628 at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or alternatively it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions.

Fourthly, if a contract only comes into existence during and as result of performance of the transaction, it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance (see Trollope & Colls Limited v. Atomic Power Construction Limited [1963] 1 WLR 333”.

In Drake & Scull Engineering Limited v. Higgs & Hill Northern Limited [1995] 11 Const LJ 214 (TCC) the parties had agreed all the terms for a binding sub-contract save for the day work rate.

Both parties regarded the day work rate as an essential matter, which was clear as in the absence of an agreement on that issue Drake & Scull had not been able to recover any payments for the day work that they had done.

Despite this, the judge accepted that if the failure to agree day work rate was the only matter which might have prevented the coming into being of a contract, that lacuna would be made good by the implication of a term that Drake & Scull should be paid a reasonable sum.

In Haden Young Limited v. Laing O'Rourke Midland Limited [2008] EWHC 1016, there was a finding that no sub-contract had come into being as an agreement, as no agreement had been reached on one of the essential terms, namely the sub-contractor's limit of liability, both under

the sub-contract and the warranties it was expected to give. An attempt to argue estoppel was rejected.

An estoppel by convention as per Denning MR in Amalgamated Property Co v. Texas Bank [1982] Q:-

“When the parties to a transaction proceed on the basis of an underlying assumption, either of fact or of law, whether due to misrepresentation or mistake makes no difference, on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so”.

Mr Justice Ramsay continued:-

“I consider that the application of the principles of estoppel to a case such as this raises considerable difficulties. The general principles of contract mean that the parties are free to negotiate and agree on the terms of the contract by which they are to be bound. If parties negotiate but do not agree upon all the terms which are essential for a contract to come into existence between them, then the general principles of contract formation would be negated, if despite this they are bound by the terms of the contract they did not agree to make. This too would mean that the estoppel created rights and obligations or acted as a sword, when an estoppel can only act as a shield to preclude a party from asserting a particular set of facts or state of affairs.

He then quoted from Dyson J and Stent Foundations Limited v. Carillion Construction Contracts Limited:-

“All of the conduct relied on is explicable on the basis that the parties were acting in anticipation that they would conclude a binding sub-contract that would operate retrospectively. I do not consider that the conduct is clearly and unequivocally consistent with there being in place a concluded binding sub-contract.

In Diamond Build Limited v. Clapham Park Homes Limited the claimant sought a declaration that the letter of intent had been replaced by the terms of the standard form contract. The letter of intent read:-

“Refurbishment works to 16 NR houses and 51 NR flats at Clapham Park Estate, London SW4.

We confirm that it is our intention to enter into a contract with you on the basis of a JCT Intermediate Form of Contract, 2005 edition with further amendments as specified in the Specification upon which your tender of 2 April 2007 was based.

Clapham Park Homes Limited wish that you now commit the appropriate resources to permit you to take possession by no later than 28 calendar days from the date of this letter and to regularly and diligently proceed with the refurbishment works to achieve an overall completion within 36 weeks from the date of possession.

The contract sum will be £2,489,302 as set out in your tender.

Should it not be possible for us to execute a formal contract with you in place of this letter, we undertake to reimburse your reasonable costs up to and including the date on which you are notified that the contract will not proceed provided that the Supervising Officer is satisfied that those costs are appropriate and that in any event total costs will not exceed the sum of £250,000.

Clapham Park Homes do not undertake to reimburse any anticipated profits for the work as a whole, nor actual costs or theoretically incurred general or specific overheads arising after the date of notification that no further work is to be carried out.

It is hereby confirmed that the undertakings given in this letter will be wholly extinguished upon the execution of the formal contract”.

In reaching his decision, Akenhead J quoted from British Steel Corporation v. Cleveland Bridge [1981] 24 BLR 94:-

“Now the question of whether in a case such as the present any contract has come into existence must depend on the true construction of the relevant communications which have passed between the parties and the effect (if any) of their action pursuant to those communications. There can be no hard and fast answer to the question of whether the letter of intent will give rise to a binding agreement; everything must depend on the circumstances of the particular case. In most cases where work is done pursuant to a request containing a letter of intent, it will not matter whether a contract did or did not come into existence; because if the party who has acted on the request is simply claiming payment, his claim will usually be based on a quantum meruit, and it will make no difference whether the claim is contractual or quasi

contractual. Of course, a quantum meruit claim (like the old actions for money not received and for money paid) straddles boundaries of what we call contract and restitution, so the mere framing of a claim as a quantum meruit claim, or a claim for a reasonable sum, does not assist in classifying the claim as contractual or quasi contractual, but where as here one party is seeking to claim damages for breach of contract, the question of whether any contract came into existence is of crucial importance.

The judge's decision was that the construction of the letter of intention gave rise to a simple contract in itself, the first paragraph confirms the intention to enter into a contract, the second asks DB to proceed with the works, followed by an undertaking pending the execution of a formal contract to pay for DB's reasonable costs up to a specific sum.

More pertinently he went on "the fact in the penultimate paragraph that the undertakings given in the letter are to be wholly extinguished" upon the execution of the formal contract point very strongly to those undertakings having legal and enforceable effect until the execution of the formal contract".

Subject to Contract

Is the contract to be considered as concluded only when the formal document has been signed?

Where the negotiations are expressly stated to be "subject to execution of a formal document", then generally there will not be a concluded contract (see Lex Air Limited (in administrative receivership) v. Edgar W. Taylor [1993] 65 BLR 90).

However, agreements subject simply to more formal documentation being executed in the future, create apparently a low obstacle to an agreement coming into being despite the absence of a formally signed contract.

In Harvey Shopfitters v. ADI Limited [2003] EWCA Civ 1757 Latham LJ referring to the decision of Dyson J in Stent Foundations Limited v. Carillion [2000] 78 CLR 188 said:-

"The mere fact that the letter giving instructions to proceed envisages the execution of further documentation, does not preclude the court from concluding that binding contract was nevertheless entered into, provided all the necessary ingredients of a valid contract are present".

Equally, in Bryen & Langley Limited v. Martin Boston [2005] EWCA Civ 973 the Court of Appeal was concerned with an appeal against a refusal to enforce an adjudicator's decision by Richard Seymour QC in the TCC. Mr Justice Rimer in allowing the appeal stated:-

“The point that particularly impressed the judge, namely that the 12 of June letter envisaged a formal contract being signed in the future, being a formal contract that would incorporate the JCT form, and so it was inconsistent to regard the contract created by the letter and its acceptance as itself incorporating that Form. That is a view with which it is perhaps quite easy to have instinctive sympathy, but it is one with which, on the facts of the present case, I respectfully disagree. The mere fact the two parties propose that their agreement should be contained in a formal contract to be drawn and signed in the future, does not preclude the conclusion that they have already informally contractually committed themselves on exactly the same terms. Of course, if they negotiate on a “subject to contract basis” such a conclusion will be precluded, but otherwise it will not or at least may not”.

Letters of Intent

The above cited case of Harvey Shopfitters concerned the use of a letter of intent. In its classic formulation such a letter will incorporate an expression of intention to enter into a contract at some time in the future, together with a request that work should be commenced forthwith.

The effect of a letter of intent will be a matter of construction and it could either:-

- (a) Not create any contract at all (see British Steel v. Cleveland Bridge).
- (b) May constitute itself a binding, but preliminary contract (see Turris Construction and Regalian [1971] 9 BLR 20).

Similarly in the case of RTS Flexible Systems Limited v. Molkerei Alois Müller GmbH & Co. KG [2009] EWCA Civ 26, the Court of Appeal ultimately found that there was no contract between the parties following the termination of the Letter of Intent.

At first instance it had been decided that a contract had been formed on the basis of Müller's Terms & Conditions MF/1 which had been cited in their original Letter of Intent,. That particular clause read:-

"That the full contractual terms will be based on Müller's amended form of MF/1 contract and the full terms and the relevant technical specifications will be finalised, agreed and then signed within 4 weeks of the date of this letter. Prior to agreement on the full contractual terms, only Müller shall have the right to terminate the supply project and contract. However, should Müller terminate, Müller undertakes to reimburse RTS for the reasonable demonstrable out of pocket expenses incurred by RTS up to the date of termination Those general conditions contained a provision which read:-

"This contract may be executed in any number of counterparts provided that it shall not become effective until each party has executed a counterpart and exchanged it with the other".

At first instance it had been found that a contract had been formed on the basis of MF/1.

The Court of Appeal in reversing this decision relied heavily on the judgment of Robert Gough J in British Steel, which they considered had not been given proper weight and thus distinguished the case from that of Percy Trentham Limited v. Archital Luxfer Limited [1993]:-

"As per R Gough J – Accordingly when in such cases 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, e.g. defective works or late delivery, if a formal contract shall 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 seller 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 seller were to assume an unlimited liability for his contractual performance, when he would never assume such liability under any contract which he entered into".

- (c) In fact constitute a full contract as on a true construction the parties have agreed all the terms, all that remains is the formality of signing a formal contract (see Bryen v. Langley above).

In Skanska Rasleigh Weatherfoil v. Somerfield Stores Limited [2006] EWHC 947 (TCC), Skanska successfully tendered for a maintenance contract relating to Somerfield's stores.

After the successful tender, Somerfield sent a subject to contract letter of intent on the basis that both parties would continue their negotiations on the contract in good faith and meanwhile Skanska would provide its services under the draft FMA Agreement for a specified period.

That period was twice extended. After the second extension, Skanska carried on working despite there being no further extension.

Somerfield became dissatisfied with Skanska's performance and applied some of the provisions in the draft FMA and claimed that Skanska had agreed to this. The court had to determine what was meant by the services being provided under the terms of the draft FMA. The judge concluded that the terms were only incorporated to the extent necessary to define Skanska's services. Further, despite not having agreed to a formal extension they had not thereby agreed to incorporate one of the contentious terms of the FMA which had been under discussion.

In Jarvis Interiors Limited v. Galliard Homes Limited [2000] BLR at p. 33 Court of Appeal, the Court of Appeal confirmed the first instance decision that there was no contract between the parties, nor was there any agreement to arbitrate.

Work had been commenced under a letter of intent found to be a simple contract, but the judge had found that there had been no "meeting of minds" principally because of a difference between the parties, one seeking a guaranteed maximum price, the other a lump sum subject to variations, hence there was no conclusion to the principal contract.

Interestingly, the editor of the BLR suggests that it would have been possible to argue (which was not put forward in that way) that the simple contract might have incorporated a provision to arbitrate.

The Battle of the Forms

The above terms apply to a situation where there is an offer on one party's standard terms followed by a counter offer on the other party's standard terms.

The conflict may often be resolved in favour of the party who put forward the latest terms and conditions, if they are not in turn objected to.

Such a battle of the forms was played out in Chichester Joinery Limited v. John Mowlem & Co. Plc 42 BLR 100.

This case also illustrates how acceptance can occur through conduct, in this case the acceptance by Mowlem of joinery delivered by Chichester.

Chichester initially quoted and in doing so incorporated its own terms and conditions. These terms and conditions were countermanded by a purchase order from Mowlem which incorporated its own terms and conditions.

In turn, Chichester acknowledged the purchase order in an acknowledgement which contained its own terms and conditions and then proceeded to deliver the joinery which Mowlem accepted. This was held to be an acceptance of those terms by conduct.

Good Faith in Contract Formation Arena

English law does not recognise a general duty of good faith, however in the growing body of partnering and similar agreements, many include expressions in joining the parties to deal with each other on the basis of “good faith”.

In Birse Construction Limited v. St. Davids [1999] 194, the parties had entered into a charter which began *to produce an exceptional quality development within the agreed timeframe, at least cost, enhancing our reputations through mutual cooperation and trust..* Under as further sub-heading of ‘relationships’ it read: *to promote an environment of trust, integrity, honesty and openness.*

A dispute arose as to whether the contract had been entered into on the JCT 1980 private without quantity form.

As part of his decision that there was a contract, His Honour Humphrey Lloyd QC said:-

“In addition, it is necessary to recall that the parties had attended the ‘team building seminar’ a few days earlier at which the partnership Charter was signed. The terms of that document, although not clearly legally binding, are important for they were clearly intended to provide the standards by which the parties were to conduct themselves and against which their conducts and attitudes were to be measured. If Mr Heath had thought that Mr Gough had agreed to something that he ought not to have accepted Mr Heath would have said so, for that would be consistent with an expression of ‘mutual cooperation and trust’ and a relationship which was intended ‘to promote an environment of trust , integrity, honesty and openness’.

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