England and Wales High Court (Technology and Construction Court) Decisions

Neutral Citation Number: [2016] EWHC 2509 (TCC)
Case No: HT-2015-000013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL
25 October 2016

B e f o r e :

THE HON MR JUSTICE COULSON

Between:

Arcadis Consulting (UK) Limited (formerly called Hyder Consulting (UK) Limited)	**Claimant**
- and -	
AMEC (BSC) LIMITED (formerly called CV Buchan Limited)	**Defendant**

Mr Marcus Taverner QC and Mr Gideon Scott Holland
(instructed by Herbert Smith Freehills LLP) for the Claimant
Mr Simon Hughes QC and Mr Calum Lamont
(instructed by DAC Beachcroft LLP) for the Defendant
Hearing dates: 10, 11, and 12 October 2016

HTML VERSION OF JUDGMENT

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1. This is a relatively straightforward 'contract/no contract' case with something of a sting in its tail. The defendant, whom I shall call "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. They engaged the claimant, whom I shall call "Hyder", to carry out certain design works in connection with those projects in anticipation of a wider agreement between the parties that did not materialise. 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 but Buchan's claim, linked to a settlement with Kier, together with its own damages claim, is put at £40 million. Hyder deny liability for the defects. However if, contrary to their case, Hyder are liable for all or any of the defects, they argue that there was a simple contract in respect of their design works, pursuant to which their liability was capped in the sum of £610,515.

2. The dispute broadly turns on the court's interpretation and analysis of the contemporaneous documents. There are very few disputes of fact. Thus, although five separate witness statements were prepared, the scope of any relevant and admissible oral evidence was always going to be very limited, particularly in view of the fact that the relevant events occurred 15 years ago. Leading counsel on both sides ensured that the cross-examination was properly focussed.

3. I deal with the issues between the parties in this way. In **Section 2**, I set out the relevant facts/documents. In **Section 3**, I set out a brief overview of my conclusions on the critical issue as to the liability cap. In **Section 4,** I consider whether or not there was a binding contract between the parties. In **Section 5**, I go on to consider, if there was a contract, which documents comprised or evidenced that contract. In **Section 6**, I address the issue as to whether section M of Schedule 1, which was the document said to limit Hyder's liability to £610,515, was a term of any contract between the parties. In **Section 7**, on the assumption that Schedule 1(M) was a term of the contract, I consider shortly what it meant. There is a short summary of my conclusions at **Section 8** below.

2. THE RELEVANT FACTS/DOCUMENTS

4. The contemporaneous documents in the court bundle filled six lever arch files. But, as I noted at the outset of the hearing, no more than three dozen documents were of any relevance to the issues before me. I deal solely with those documents in this part of the Judgment.

5. In 2001, Buchan wanted to use Hyder's design services on more than one project involving concrete structures. 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.

6. 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."

7. 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 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. Schedule 3 dealt with fees.

8. 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…"

9. On 13 November 2001, Buchan replied acknowledging Hyder's letter of 9 November 2001, anticipating agreement on the Protocol 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."

10. 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".

11. 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…"

12. 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[1].

13. 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".

14. 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. 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."

15. Neither party now has on their files a copy of the documents that were sent with this letter. However, I can make two findings in relation to the documents that were sent. First, I find 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.

16. Secondly, I find 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 6-7 above). I can be relatively confident about that because, on 30 January 2002, Mr Shotliff emailed to Mr Tyler a copy of the letter of 29 January 2002 which, he said, was "in the post, together with updated Protocol, Terms and Schedules". He went on: "I believe that the changes made to these documents will provide some comfort in respect of the concerns you have expressed". That therefore expressly advertised that there were changes to all those documents which were designed to deal with the points of objection which had been made by Hyder on 12 December 2001.

17. Beyond finding that the January 2002 proposals made changes to the November 2001 proposals, it is not possible for the court to go. But I do find that, contrary to Hyder's submission, the changes were not limited to the simple inclusion of the £110,000 cap figure in the schedule. That is 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). I also reject 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 (paragraph 16); they were, and were intended to be, proposals only. It was for Hyder to say if they unequivocally accepted them. They did not.

18. During the closing submissions, my attention was 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'."

19. 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 7(c) above). But although it seems quite possible, I cannot say whether this suggested modification was in fact sent with the documents on 29 January 2002.

20. 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.

21. 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 me 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.

22. 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."

23. 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.

24. On 6 March 2002 Buchan sent two critical letters to Hyder. It appears that Buchan no longer have copies of those letters or any copies of the documents that were attached. Hyder have copies of both letters, although there is a dispute, which I have to decide on the balance of probabilities, as to what was sent with the second letter.

25. The first letter of 6 March 2002 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 (see paragraph 37 below), I was told that there may be some doubt about that. At all events, I consider that issue to be irrelevant to the dispute before me.

26. The second letter, also dated 6 March 2002 (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."

27. 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."[2]

28. 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'[3].

29. It was suggested by Hyder that Schedules 1-4 may not have in fact been sent with this second letter (even though that is how they filed them) but may have instead been sent with the first letter of 6 March 2002. That is because, so it is said, it was the first letter which dealt specifically with the Castlepoint Car Park, whereas the second letter was dealing with the Protocol agreement as a whole. I do not accept that submission. There was nothing on the face of the first letter of 6 March 2002 which made any reference to contract-specific schedules for Castlepoint. Moreover, the second letter of 6 March 2002 did expressly refer to contract schedules being enclosed. That supports the conclusion that the Castlepoint schedules were sent with that second letter of 6 March 2002.

30. That gives rise to a wider and potentially more important dispute about what else (if anything) was sent with the second letter of 6 March 2002. It is apparent from the face of the letter that extensive contractual documents were – or should have been – attached to the letter. Neither party is in a position to say for sure whether or not those documents were attached. However, on the balance of probabilities, I find that they were. There are a number of general reasons for this.

31. First, Mr Shotliff believed that they were attached to the second letter. I found him to be an honest witness and I accept his evidence on that point. Secondly, the correspondence in this case contains a large number of letters from one party (usually Buchan) to the other attaching documents, and there is no reason to believe that this process did not happen on this particular occasion. Thirdly, at no time did Hyder respond to the second letter of 6 March 2002 to suggest that the documents had not in fact been enclosed. Accordingly, on the balance of probabilities, I find that the documents referred to in the second paragraph of the letter were attached to it. Moreover, that conclusion is confirmed by the analysis in the next paragraphs.

32. If the parties have no records, is the court in a position to say, even on the balance of probabilities, what precise documents made up the attachments? In this instance, it can, because Buchan's letter of

13 May 2002 expressly referred back to the second letter of 6 March 2002 and, amongst other things, asked Hyder to "sign and return our Protocol Agreement, as sent previously". In order to avoid any doubt about it, Buchan enclosed "a further copy for you to complete and return". Accordingly, on the face of the letter of 13 May, all the documents that were sent with the second letter of 6 March 2002 were re-sent. This is important because the parties are agreed about which documents were sent on 13 May 2002.

33. Amongst those agreed documents, which I find 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."

34. 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 provides a further specific reason for concluding that those amended terms and conditions were sent with the second letter of 6 March 2002. As noted at paragraph 26 above, the second letter expressly referred to the amendments to the limitation of liability clause which were to be found in the documents which were being enclosed with that letter. Of course, Hyder are entitled to argue that those were hardly minor amendments (which is what Buchan called them in the second letter), but the fact that Buchan were expressly referring in that letter to the limitation of liability clause as something which "in particular" had been amended, is entirely consistent with the fact that the terms and conditions being sent with that letter were those (including the amendments to clause 2A) which were then re-sent on 13 May 2002. Thus on any fair reading of the correspondence, I find that the second letter of 6 March 2002 was enclosing the documents which it said it was, including the amended limitation of liability clause at clause 2A.

35. 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.

36. 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."

37. 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 letter of that date. I note that the reference to the Design Scope and Deliverables schedule handed over at the meeting is said to be "the schedule attached to your letter". Although, as I have said, Hyder now suggest that there is some doubt about that, it is at least clear that the letter to which they are referring is the first letter of 6 March 2002, and confirms my finding, noted at paragraph 25 above, that the Design Scope and Deliverables schedule was sent with the first letter of 6 March 2002, and not the second.

38. 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.

39. 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 letter (paragraph 28), because that envisaged monthly applications up to a lump sum of £285,000.

40. As already noted at paragraph 32, on 13 May 2002, Buchan sent Hyder a chasing letter in respect of the proposed Design Agreement and resent 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.

41. 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[4]. 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.

42. 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 I note 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.

43. On 6 August 2002, Mr Shotliff replied. He told me 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. In view of the reliance that Mr Taverner QC, on behalf of Hyder, was to place on this letter, it is appropriate to set it out in full.

> "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 this further.
>
> This is clearly unsatisfactory and must be brought to a speedy resolution.
>
> Yours faithfully
>
> DL Shotliff
>
> Commercial Director
>
> Enc"

44. 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.

45. 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 letter of 6 March 2002. Thus, on 1 October 2002 Buchan increased the limit to £220,000 and, on 26 November 2002, they increased it again to £270,000.

46. For the purposes of the issues in this case, both parties sought to rely on documents as late as November and December 2002. Hyder pointed to a Buchan internal email of 15 November 2002 which showed a revision to the original clause 2A, but I find that no weight can be attached to that because the author of the email had not been involved in the detail and freely accepted that "my memory may not have served me well". In similar vein, Buchan sought to rely on Hyder internal emails of December 2002 which showed that further work was still being done on the contract-specific schedules because, at that stage, they were neither "complete nor acceptable". In my view those emails, too, have no bearing on the issue as to whether or not the parties agreed a contract in March 2002 which included a cap on liability.

3. OVERVIEW

47. In **Sections 4-7** below I address the particular issues raised in this trial. It will be noted that, on some issues, I accept Buchan's case; on some issues, I accept Hyder's case; and on some issues I accept neither party's case, and instead produce my own analysis.

48. However, on the critical issue, I have found that, in the absence of any agreement of the overarching Protocol and its terms and conditions, the parties cannot be taken to have agreed that Hyder's liability in respect of the Castlepoint Car Park was to be capped at £610,515. 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. Whilst the court should always strive to find a concluded contract in circumstances where work has been performed (and in the present case I do so find), the court is 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.

49. Throughout his submissions, Mr Taverner repeatedly drew a distinction between what he called the 'interim' contract, and the 'final' contract which, in this case, never eventuated. Although he accepted

that there was no final contract, he argued that the liability cap was a term of the interim contract. The inherent difficulty with that submission is that, as Mr Hughes QC pointed out on behalf of Buchan, there is nothing interim about the cap for which Hyder contend: it is, on their case, a once-and-for-all cap which, at worst, could limit Hyder's liability to 1.5% of the potential value of the claim against them. For the reasons explained in detail below, I do not consider that, in this case, the parties reached a binding agreement to that effect.

4. WAS THERE A CONTRACT BETWEEN THE PARTIES?

1. The Applicable Principles

50. The principles determining whether or not there is a binding contract between the parties, and, if so, what the terms of such a contract might be, were summarised by Lord Clarke in ***RTS Limited v Molkerei Alois Müller GmbH*** [2010] 1 WLR 753:

> "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."

51. In circumstances where works have been carried out, it will usually be implausible to argue that there was no contract. In ***G Percy Trentham v Archital Luxfer Limited*** [1993] 1 Lloyd's Rep 25, Steyn LJ said:

> "One must not lose sight of the commercial character of the transaction. It involved the carrying out of work on one side in return for payment by the other side, the performance by both sides being subject to agreed qualifying stipulations. In the negotiations and during the performance of phase 1 of the work all obstacles to the formation of a contract were removed. It is not a case where there was a continuing stipulation that a contract would only come into existence if a written agreement was concluded. Plainly the parties intended to enter into binding contractual relations. The only question is whether they succeeded in doing so…The judge analysed the matter in terms of offer and acceptance. I agree with his conclusion. But I am, in any event, satisfied that in this fully executed transaction a contract came into existence during performance even if it cannot be precisely analysed in terms of offer and acceptance. And it does not matter that a contract came into existence after part of the work had been carried out and paid for."

This case was cited with approval by Lord Clarke ***RTS***, who noted 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 and difficult to submit that the contract is void for vagueness or uncertainty."

52. There is some debate in the present case as to whether the first letter of 6 March 2002 was a letter of intent, namely an instruction to carry out work up to a certain value on an interim basis, pending the agreement of a formal contract. In my view the letter does have all the hallmarks of a letter of intent, a device commonly used (sometimes without adequate care and attention) in the construction industry. The courts have repeatedly said that, in normal circumstances, arrangements evidenced by letters of intent are a form of simple contract: see ***Turriff Construction Limited v Regalia Knitting Mills Limited*** [1971] 9 BLR 20 and ***ERDC Group Limited v Brunel University*** [2006] EWHC 687 (TCC). Indeed, a number of such cases arose under the unamended provisions of the ***Housing Grants (Construction and Regeneration) Act 1996*** where, in order to enforce an adjudicator's award, the claiming party needed to prove the existence of a contract in writing. Decisions such as ***Harris Calnan Construction Co Limited v Ridgewood (Kensington) Limited*** [2007] EWHC 2738 (TCC) and ***PT Building Services Limited v ROK Build Limited*** [2008] EWHC 3434 (TCC) also demonstrated that letters of intent could amount to written contracts. In ***Diamond Build Limited v Clapham Park Homes Limited*** [2008] EWHC 1439 (TCC) Akenhead J said that it was not particularly difficult for the court

to find a contract "in the circumstances at the very least of a letter of intent which was not only signed but also acted upon by both parties." This is so, even if the parties intended ultimately to conclude a detailed contract: see ***Bryen and Langley Limited v Boston*** [2005] EWCA Civ 973; [2005] BLR 508.

53. The principal way in which the parties can indicate that they do not intend to enter into legal relations until the final contract is signed and agreed is by marking their pre-contract correspondence "subject to contract". As Rimer LJ noted in ***Bryen and Langley***, "if the parties negotiate on a 'subject to contract' basis, the conclusion that the parties have committed themselves prior to agreeing the contract will be precluded." That follows the line of earlier cases culminating in ***Regalian Properties Limited v London Dockland Development Corporation*** [1995] 1 WLR 212.

54. I now turn to apply those principles to the facts of this case, in order first to determine whether or not there was a contract between the parties.

2. **Buchan's Case**

55. Buchan contend that there was no contract between the parties. The argument appears to be that, because the correspondence between the parties envisaged a formal Protocol agreement with detailed terms and conditions, the absence of a final Protocol agreement precluded the existence of any contractual relationship between the parties.

56. I reject that submission. It is contrary to the principles noted in paragraphs 50-53 above. This is a case where work was done and paid for on the basis of instructions from Buchan, which were accepted by Hyder. It is not a case in which any of the relevant correspondence was marked 'subject to contract'. Instead, works were performed on the express understanding that, if the anticipated detail contract did not eventuate, the correspondence between the parties would create a legal relationship between the parties and ensure that, amongst other things, Hyder would be paid for the work they undertook.

57. A subsidiary point raised by Buchan was to note that the letters of 8 and 22 March 2002 from Hyder thanked Buchan for the letter of instruction, but did not expressly say that they accepted the instruction. I initially thought that this argument was a little contrived, particularly since Hyder were, on any view, getting on with the work. But it is striking that Hyder were very careful *not* to say that they accepted the instruction, let alone the terms on which that instruction may have been issued. In my view, the terms of Hyder's letters of 8 and 22 March 2002 do not affect the conclusion that a simple contract came into existence, but they are relevant to a consideration of the terms of that contract.

3. **Hyder's Case**

58. It is Hyder's case that the correspondence, and in particular the letter of instruction, being the first letter of 6 March 2002, and the replies of 8 and 22 March 2002, taken together with the fact that Hyder carried out the design work pursuant to that instruction, evidenced a contract between the parties. I agree with that analysis, although with the same caveat as before, namely that the acceptance of the instruction was best evidenced by Hyder's conduct in undertaking the work, rather than their letters of 8 and 22 March. I consider that this conclusion is fully in accordance with the principles which I have summarised at paragraphs 50-53 above.

59. I therefore find that there was a binding, simple contract between the parties.

5. IF THERE WAS A CONTRACT, WHICH DOCUMENTS COMPRISED OR EVIDENCED THAT CONTRACT?

1. **The Applicable Principles**

60. The principles set out in ***RTS*** are again relevant. Also of relevance is the judgment of Rix LJ in ***Tradigrain SA v King Diamond Shipping SA*** [2000] 2 Lloyd's Rep 319 when he said:

> "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."

2. **Buchan's Case**

61. It is Buchan's case that, if there was a contract, it was comprised in or evidenced by Hyder's original quotation of 28 November 2001; the Scope document provided at the kick-off meeting on 7 February 2002; the instruction to start work given at that meeting; and Hyder's acceptance of that instruction, by starting work on 8 February.

62. I reject that case which, so it seems to me, was designed solely to draw the relevant line in the sand *before* the Buchan letters of 6 March 2002, presumably in order to avoid any difficulties or complications which might arise from those letters. It seems to me that this version of events places undue reliance on the kick-off meeting on 7 February 2002, which is a meeting about which I have no evidence and in respect of which there are no minutes. Moreover, any case that the relevant instruction was given, and the acceptance provided, at the meeting of 7 February 2002, or the start of work on 8 February 2002, is negated by Hyder's letter of 12 February 2002 (paragraph 22) which expressly sought "a formal letter of instruction and limitation of expenditure subject to preparation and signature of the services agreement in due course." There was therefore no contract until that condition was fulfilled.

63. Thus, as at 12 February 2002, there was no agreement between the parties. But Hyder's request for a letter of instruction was answered by way of Buchan's first letter of 6 March 2002. Thus, Buchan's case as to the documents which comprise the contract is erroneous, because it ignores the documents which came into existence after 12 February 2002.

3. **Hyder's Case**

64. Hyder's case in outline is that the instruction was in the first letter of 6 March 2002 which was accepted by their letters of 8 March and/or 22 March 2002, although they also say that the instruction was accepted by conduct. They maintain that in those circumstances, there was a simple contract between the parties. I agree with that outline, as far as it goes, with the same caveat noted in paragraphs 57 and 58 above.

65. However, Hyder go on to say that the documents which comprised or evidenced the simple contract between the parties – in other words, the documents that they accepted in their letters or by conduct – included: (i) the proposed terms and conditions in their original November form (paragraphs 6 and 7 above); and (ii) Schedules 1-4, specifically relating to the Castlepoint contract, which were sent with the second letter of 6 March 2002 and which included the proposed cap on liability of £610,515 (paragraphs 27-29 above). I reject both elements of that submission.

(a) ***Were Any Terms and Conditions Incorporated Into The Simple Contract?***

66. In my view, for the reasons set out below, no set of terms and conditions was incorporated into the simple contract between the parties, much less the terms and conditions originally proposed by Buchan on 8 November 2001.

67. Hyder's case is that the terms and conditions referred to in the first letter of 6 March 2002 were the terms and conditions sent out on 8 November 2001, including clause 2A in its original form. I reject that submission. It ignores the fact that the documents sent on 8 November 2001 were never accepted by Hyder. It ignores the fact that those documents were, albeit in relatively mild terms, the subject of express objection by Hyder (paragraph 13), a stance consistent with the view of their own in-house advisor that Hyder should not contract on such terms (paragraph 12). It also ignores the fact that, as I have found at paragraph 16, the November terms and conditions were changed and new proposals sent to Hyder on 29 January 2002 (paragraph 16). Thus, even if one discounts completely the third set of proposed terms sent with the second letter of 6 March 2002, it would be quite impossible to construe the reference in the first letter of 6 March 2002 as being to the November 2001 conditions. They had, on any view, been superseded.

68. During his cross-examination of Mr Shotliff, it became apparent that, on behalf of Hyder, Mr Taverner placed great reliance on the reference in the first letter of 6 March 2002 to "the terms and conditions *we are currently working under*". I think that he overstated the significance of those words. No set of terms and conditions had been agreed by 6 March 2002 for either project, and in fact they never were agreed. Further and in any event, at the time of the first letter of 6 March 2002, the latest version of the terms and conditions were those which had been produced and sent to Hyder on 29 January 2002 (paragraphs 16-19). If, contrary to my primary view, any terms and conditions were truly being "worked under" on 6 March, it was that version. But whilst I can be sure that those terms were different to the terms and conditions proposed on 8 November 2001, I am 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 memo (paragraphs 18-19).

69. So I can be satisfied that, whatever else may have happened, by 6 March 2002 the original terms and conditions proposed on 8 November 2001 had been superseded and could not therefore be said to have been incorporated by reference into the contract evidenced by the first letter of 6 March. I am unable to say that the terms and conditions of 29 January 2002 were incorporated into the contract, in part because no copies of those terms and conditions can be found. Moreover, they were proposed on the Wellcome Building, not the Castlepoint Car Park contract.

70. What of the third set of terms and conditions? In his closing submissions Mr Taverner argued that, for the purposes of analysing what documents comprised or evidenced the contract, the two letters 6 March 2002 should be read together. If, for present proposes only, I accept that submission, then the terms and conditions referred to in the first letter would not be the terms and conditions of November 2001, nor those proposed for the Wellcome Building at the end of January 2002 (which no-one now has). They would instead be the terms and conditions actually enclosed with the second letter of 6 March 2002. The limitation of liability clause at clause 2A proposed in that version of the terms and conditions was not only different to any that had been suggested before, but it provided a much more limited cap on Hyder's liability (paragraphs 33-34). It was that version that, unsurprisingly, Mr Brand said was 'worthless' from Hyder's point of view (paragraph 41).

71. There is another, rather different reason why I cannot find that the terms and conditions (in any version) were incorporated into the simple contract. That is because I do not consider that any such terms were ever accepted by Hyder. What is required 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. I have already noted that Hyder were very careful to say – twice – in writing that they thanked Buchan for the instruction, but not to say that they accepted it. They did not indicate that they accepted every element of the offer in the first letter of 6 March, and they made no mention of the terms and conditions. ccepted it. They dio not say that they accept the offer in all its terms Mr Taverner said that this was an unrealistic and artificial analysis, because no acceptance is or should be required to be so fulsome. Is that right?

72. I do not think that it is artificial on the facts of this case. Hyder did not use the word 'accept' at all; twice they could have done, and twice they did not do so. Since on any view there was doubt about which version of the terms and conditions might have been referred to by Buchan in the letter, and since there is evidence that Hyder did not accept any version of the proposed terms, I consider that, if they were in fact accepting one or other set (or even some part of a set), they needed to say so clearly and unequivocally. They wholly failed to do so.

73. For all these reasons, I cannot be satisfied that any of the three competing versions of the terms and conditions (one of which is not even capable of being identified) was incorporated into this simple contract. In one sense, that is an unsurprising conclusion, given that these terms and conditions were continually being amended and were never ultimately agreed. As a matter of law, I consider that it is impossible to stop the music at any stage and construe an unequivocal and binding agreement in respect of any one of the three competing versions of the terms and conditions.

74. If there was no agreed set of terms and conditions, then there can have been no agreed Schedule 1 either. The latter was parasitic upon an agreed set of terms and conditions. This point is further developed in paragraphs 77 and 78 below.

(b) ***Incorporation of Schedules 1-4***

75. Hyder say that, as a matter of commercial common sense, Schedules 1-4 must have been documents incorporated into the simple contract, because they were received on the same day as the letter of instruction and related expressly to the Castlepoint Car Park contract. There are, however, formidable obstacles in the path of such a submission.

76. First, it must be remembered that, as the documents show and Mr Tyler reiterated in his oral evidence, as at 6 March 2002 "the Schedules were not agreed and complete…there was still work to be done [on them]". In those circumstances, it cannot be said that the Schedules as a whole, let alone one part of one Schedule (Schedule 1(M)), were expressly agreed.

77. Secondly, Schedules 1-4 are a creature of the terms and conditions. They are referred to in the terms and conditions as setting out project specific information. It was not possible for Schedules 1-4 to have been agreed in circumstances where the terms and conditions which gave rise to them had themselves not been agreed.

78. The evidence made clear, as one might expect, that the parties intended to agree the terms and conditions first, and then to agree what were called the 'plug-in' schedules for each separate contract thereafter. That makes it very unlikely that, in March 2002, the parties agreed the opposite course or, to put the same point in another way, it means that the court must be careful to ensure that any alleged agreement that was contrary to their general intention was clear and unequivocal. There is no evidence here of any such agreement.

79. Thirdly, I have found that Schedules 1-4 were not sent with the first letter of 6 March 2002. Accordingly, they formed no part of the letter of instruction. This matters, because at no time were the Schedules referred to, let alone expressly or impliedly accepted by Hyder, in the subsequent correspondence. There is no mention of the second letter of 6 March 2002, or the Schedules themselves, in Hyder's letters of 8 or 22 March 2002. Both those letters expressly referred to the instruction in the first letter of 6 March 2002, but nothing else. There is no evidence which, when viewed objectively, could allow the court to conclude that Schedules 1-4 (or some parts of them) were ever accepted by Hyder in the form in which they were sent out on 6 March 2002. On that analysis, Schedules 1-4 were the subject of neither offer nor acceptance.

80. Although it is unnecessary for me to do so in any detail, I should also note two further reasons for my conclusion that Schedules 1-4 could not have formed part of any simple contract made in March 2002.

    a) Although Schedule 3 purported to set out the scope of services to be performed by Hyder, in reality it did no such thing. It was setting out the scope of Buchan's work for Kier under their sub-contract, which was entirely different. Thus the incorporation of Schedule 3 into the simple contract would be at odds with the workscope agreed between Buchan and Hyder (which I thought was likely to have been the Scope document sent with the first letter of 6 March, but which may be debated: see paragraph 37).

    b) Schedules 1-4 were largely incomplete because documents or terms were yet to be agreed, again suggesting that, at that time, the Schedules would have been too vague and unclear to form part of even a simple contract between the parties. Whilst the principles of construction noted in the 6th edition of ***The Interpretation of Contracts (Lewison)*** suggest that a blank or a 'TBA' in a contract document is simply to be ignored, it becomes progressively more unreal for the court to adopt that approach when it means, as here, ignoring the majority of a document, in circumstances where the blanks or uncertainties existed because the relevant terms were still being negotiated.

81. For all those reasons, therefore, I reject Hyder's case as to the documents which form the basis of the contract between themselves and Buchan.

4. **Analysis**

82. I consider the correct analysis to be this. The first letter of 6 March 2002 was a formal instruction to carry out design work at Castlepoint Car Park which Hyder had sought. That letter was in conventional form, anticipating that a more detailed contract would be agreed in the future, but expressly limiting Hyder's expenditure in the first instance, under the more straightforward arrangement, to £56,000. That instruction did not include or make any reference to Schedules 1-4. And although it referred to the terms and conditions that Hyder were 'working under', I consider that to have been a general reference to the terms which were still being negotiated. For the reasons set out above, it was not and could not be a specific reference to any of the three competing versions of the terms and conditions, let alone a clear reference to the first of those versions which, on any view, had been superseded by the proposals sent with the letter of 29 January.

83. When Hyder thanked Buchan for the instruction, in their letters of 8 and 22 March 2002, they too made no reference to any terms and conditions, nor to Schedules 1-4. They certainly did not say that they accepted all or any part of those documents, which were still being negotiated. For their purposes at the time, those documents were irrelevant to the simple contract which they had obtained.

84. On my primary analysis, therefore, neither the terms and conditions (in whichever version) nor Schedules 1-4 were incorporated into the simple contract evidenced by the first letter of 6 March and Hyder's conduct in getting on with the work. I find that the two replies of 8 and 22 March 2002 may be said to be consistent with their general acceptance of the instruction, but not acceptance of any particular set of terms and conditions or any part of the incomplete Schedules 1-4. The simple contract did not incorporate any version of the terms and conditions, because the first was superseded, the second has never been identified, and the third was never agreed. The simple contract did not incorporate Schedules 1-4 because they were incomplete and parasitic on the agreement of the terms and conditions. Furthermore, no terms and conditions and no versions of Schedules 1-4 were ever expressly or impliedly accepted by Hyder.

85. If I am wrong about that, my alternative analysis would also lead to a result unfavourable to Hyder, and although it is one that may be better than no cap at all, it forms no part of Hyder's pleaded claim.

86. I have expressly found (paragraphs 26-34 above) that Schedules 1-4 were not sent with the second letter of 6 March 2002 on their own. They were sent as part of the revamped terms and conditions. These new proposals included amendments to clause 2A, which were expressly drawn to Hyder's attention on the face of the second letter of 6 March 2002.

87. On that basis, of course, it might be said that Buchan were proposing a limit of £610,515 which was referable to the new clause 2A(c) only, and not parts (a) and (b), which involved no financial cap at all. Thus, on the face of the documents sent with the second letter of 6 March 2002, as I have found them to have been, this was a proposed financial limit on just one possible kind of liability (clause 2A(c)), which 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.

88. Thus it follows from my findings of fact that the version of Schedule 1 that was sent with the second letter of 6 March 2002 was identifying a very different, and much less significant, financial cap. So if, contrary to my primary analysis, the two letters of 6 March 2002 have to be read together, and the terms and conditions referred to in the first letter were the subject of a binding agreement, then the only sensible candidate were the terms and conditions sent on 6 March 2002. On that basis, the limit of £610,515 related only to clause 2A(c).

6. WAS SCHEDULE 1(M) A TERM OF ANY CONTRACT BETWEEN THE PARTIES?

89. It follows that, for all the reasons set out above, the answer to this question is "No".

90. Schedule 1(M) could only have related to the amended version of clause 2A which was sent with the second letter of 6 March 2002 as part of a series of proposals which were not accepted by Hyder and which, in August 2002, they said they rejected (paragraph 42). Schedule 1(M) made no sense on its

own: it was parasitic upon the limitation of liability provision in clause 2A which Hyder did not accept.

91. I should add that there is an additional reason why Schedule 1(M) (and the cap of £610,515) related only to the amended version of clause 2A sent on 6 March 2002. The original blank version of Schedule 1(M) (paragraph 7(e) above) proposed a cap on Hyder's liability for "defects in the design". Under the amended version of clause 2A sent in March 2002, Hyder's liability for defects was covered by clause 2A(a) and (b). That was not relevant to the financial cap, which only arose under clause 2A(c), and so was aimed at liabilities other than for defective design. That is reflected in the change to paragraph M of Schedule 1 which, in the version sent on 6 March, deleted the words "liability for defective work" altogether.

92. Just standing back from the dispute for a moment, I consider that it would be artificial to allow Hyder to rely on this one part of Schedule 1 in circumstances where the Schedule was a creature of a series of terms and conditions which the parties never agreed. In my view, in order for the court to conclude that, despite this difficulty, there was a binding agreement between the parties in respect of the version of Schedule 1(M) sent on 6 March 2002, and the particular limitation of liability clause to which it related, there would have had to have been an express and clear agreement to that effect. It is not something which the court should be prepared to construe out of documents which, on their face, did not record any such agreement. The principle of construction that "the parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect", recently restated by Briggs LJ in ***Nobahar-Cookson v The Hut Group*** [2016] EWCA Civ 128, is also applicable and leads to the same result.

93. Of course, Hyder are entitled to make much of the fact that Schedule 1(M) emerged from Buchan, so as to say that Hyder are not seeking to take advantage of a document which they themselves promulgated, but are merely relying on something which came from Buchan. I understand that this may put Hyder in a stronger position on the merits than is often the case in these sorts of disputes. But the fact remains that this was a document which, on my primary findings, was produced for the amended clause 2A (which was never agreed) and produced as part and parcel of wider terms and conditions (which were also never agreed). In those circumstances, the fact that the document emanated from Buchan does not in my view amount to a reason to modify the conclusions I have reached.

94. Moreover, when considering the overall merits, it is impossible to ignore the fact that, at least on Buchan's side, the question of capping Hyder's liability appears to have been connected to uninsured losses, as opposed to losses for which insurance was available. That is apparent from early on: see paragraph 5. Of course, the original clause 2A made no distinction between insured and uninsured losses and so, on its face, was giving Hyder much wider protection. But it is a relevant element of the background (if nothing else) that "uninsured losses" were referred to in the version of Schedule 1(M) sent on 6 March. This suggests that Buchan may have been endeavouring to differentiate between the two, even if their attempt to do so was inept.

95. Finally on the topic of Schedule 1(M), it is sensible to deal with Buchan's letter of 6 August 2002. Mr Taverner placed extensive reliance on this document during the course of his submissions. Amongst other things, he pointed to the fact that the third and fourth paragraphs of the letter referred to the Wellcome Building and the production of a contract specific schedule, and that the fifth paragraph made the point that the instruction to proceed on the Castlepoint contract took place "on the same basis". He also identified the reference in that letter to Buchan's letter of 29 January 2002, which referred to "the specific project documents for the Wellcome Building". Finally, he noted that the contract documents which were referred to and enclosed with the letter of 6 August 2002 were the original proposed terms and conditions, and therefore the original version of clause 2A. In essence, he argued that the letter of 6 August demonstrated that Buchan thought that there was an agreement along the same lines as the contract for which Hyder now contend. He said that in those circumstances this letter was the best evidence that, at the very least, there was an agreement to Schedule 1 by reference to the original clause 2A.

96. Attractively though that argument was put, I do not accept it. It is quite clear that this 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. I accept that it was an error for them to refer to the original version of clause 2A because it is common ground that, at least by 13 May 2002 (and, on my findings, on 6 March 2002), Buchan had sent Hyder the revised contract documents with the amended clause 2A. The fact that they erroneously re-sent the original terms and conditions so many months after the simple contract was made is, in my view, nothing to the point.

97. Furthermore, that obvious error aside, I do not regard the letter of 6 August 2002 as being inconsistent with the case that Buchan now advance. The fact that there was a reference to the sending of "the specific project documents for the Wellcome Building" is actually a point against Hyder, because there was no reference to the sending of any "specific project documents" for the Castlepoint Centre. It may be that this was because, as the letter of 13 May 2002 envisaged, the schedule had not been completed.

98. Finally in respect of the letter of 6 August 2002, it is no coincidence that again there is an express reference to both insurance matters (see paragraph 94 above) and the limitation of liability clause that had been incorporated into the sub-contract from Kier. Therefore, these were issues that were still being discussed and which were never agreed. In those circumstances, of course, it would be impossible to find that there was a binding agreement in March 2002 that rendered this ongoing debate meaningless, particularly when that agreement was entirely unstated and unheralded.

7. WHAT DID SCHEDULE 1(M) MEAN?

99. On my primary analysis, this issue does not arise. Hyder's case is that Schedule 1(M) related back to the original version of clause 2A and, as a matter of construction, operated to set a complete cap of £610,515 on Hyder's liability under the simple contract. I have rejected the case that Schedule 1(M) can be related back to the original clause 2A, or that there was any binding agreement to that effect. So it is only if my findings of fact and my contractual analysis are both wrong that the issue of construction becomes relevant.

100. Mr Taverner said that, if Schedule 1(M) related back to the original clause 2A, and was agreed, the meaning was clear and there was a complete cap of £610,515. He said the words after the hyphen were purely descriptive and did not affect the operation of the term. I agree with that.

101. That is because the liability cap in its original form (paragraph 7(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 states the sum of £610,515. That is therefore the relevant sum, and if the costs of repairs are more than that, then that would be the cap on liability.

102. On this basis, the words after the hyphen ("10% of sub-contract package for uninsured losses") are simply descriptive. They cannot be utilised, as Buchan seek to do, to rewrite the original version of clause 2A, where there is no reference to insured or uninsured losses, and no distinction drawn between them. Similarly, the fact that there are other references to the need for PI insurance at £5 million does not affect the operation of the clear words of the original clause 2A. Buchan may well have wanted the limit on Hyder's liability to relate to uninsured losses only but if, contrary to my analysis, there was a simple contract incorporating the original clause 2A and the £610,515 figure, the words, objectively construed, do not achieve that object.

103. Mr Hughes pointed out that the words in Schedule 1(M), which limited liability for defects, were different to the words in the original blank version of the Schedule sent out in November 2001. I agree: that is one of many reasons why, in my view, the Schedule sent on 6 March cannot be read with the original clause 2A (paragraph 91). But if I am wrong and they must be read together, then the provision of a single figure, by reference to the original clause 2A, must be taken to be an indication of the total liability cap.

104. For those reasons, I accept that, if Mr Taverner had been able to get over all the other formidable hurdles in his path, then his construction was self-evidently right. In those circumstances it is unnecessary to consider the detailed principles set out by Lord Neuberger in ***Arnold v Britton*** [2015] UKSC 36, neatly summarised recently by Beatson LJ in ***Evangelou v McNichol*** [2016] EWCA Civ

817, or issues such as the correct legal approach to ambiguity and the proper application of the *contra proferentem* principle.

8. CONCLUSIONS

105. For the reasons set out above:

(a) I find that there was a simple contract between the parties pursuant to which Hyder would carry out design work and would be paid for that work by Buchan.

(b) I find that that contract did not include any of the three different sets of proposed terms and conditions and did not include Schedule 1 (or any part of it) sent with the second letter of 6 March 2002.

(c) I find that there was no term of the simple contract that Hyder's liability would be limited to £610,515.

106. At paragraph 42 of the Particulars of Claim, Hyder sought a declaration which married together the original version of clause 2A and the £610,515. In the circumstances noted above, I refuse declaratory relief in those terms. Hyder seek no alternative declaration.

107. Buchan seek a declaration that there was no limit on Hyder's liability to Buchan for defective design. For the reasons set out above, I grant a declaration to that effect. Their alternative case, based on the original version of clause 2A, does not arise.

108. Finally, I should say this. I am conscious that, on my analysis, there is no limitation of Hyder's liability, despite the fact that every set of proposed terms and conditions included some sort of provision to that effect (albeit in radically different terms). Superficially, therefore, this might be regarded as a harsh result for Hyder. But on a proper analysis, I am bound to conclude that this was the inevitable consequence of Hyder's dilatory and often unco-operative approach to the proposed Protocol agreement and the negotiation of the terms and conditions. This case starkly demonstrates the commercial truism that it is usually better for a party to reach a full agreement (which in this case would almost certainly have included some sort of cap on their liability) through a process of negotiation and give-and-take, rather than to delay and then fail to reach any detailed agreement at all.

Note 1 Hyder can properly be criticised throughout this process for failing to respond promptly to Buchan's various proposals, and for never being clear about what they accepted and what they rejected, and why. [Back]

Note 2 The £610,515 figure seems to be 10% of the value of Buchan's sub-contract with Kier. Hyder did not know that at the time and would therefore have had no way of working out how this figure had been arrived at. [Back]

Note 3 One version of these Schedules, from the Hyder files, had a number of manuscript annotations. Mr Hughes QC relied on them. Mr Taverner QC said they were inadmissible for the purposes of identifying and construing the contract. I agree with Mr Taverner: such notes, which were not shared with the other side, cannot form part of the objective analysis which the court has to undertake. [Back]

Note 4 See my comment at footnote 1 [Back]