
Clause in unfinished contract made binding by letter of intent

You agree to work on a project for another business in accordance with a 'letter of intent' sent by the other business. This letter outlines how the work will be done and the parties' responsibilities. You start working whilst negotiating the final contract. Amongst other things, the letter says that your responsibility, if something goes wrong, will be limited to £610,000. Something does go wrong; in fact, damages could be £40m.

Is your liability limited to £610,000?

Quite possibly. It will depend on all the facts, but that's what the Court of Appeal decided in a recent case.

The dispute was between a concrete specialist (the 'instructor') that instructed a design firm (the 'designer') to work on a project. The legal issue was whether the agreement, in other words the 'contract', included the limitation of liability term. Even though the written agreement hadn't been finalised, a contract of sorts was in place. The design firm had agreed to do the project in return for payment and under certain conditions, which made it a contract.

The parties disagreed on the terms of the agreement. The instructor argued that, without the finalised contract, the designer worked under a 'simple contract', which mostly just included the price. The judge in the High Court had accepted that analysis and found for the instructor – meaning that damages could have been £40m.

The Court of Appeal disagreed. It differentiated between the intended final contract and the 'interim contract' that the parties were working under in the meantime. Here, the letter of intent was a request to start work under those terms. So until another contract was finalised, the letter of intent contained the terms of the contract – in effect, the draft contract was the contract. As well as the price, the fact that three drafts of the intended contract included the limitation of liability term showed that the parties had intended that cap to apply.

The Court of Appeal said the opposite result would have meant that the designer was working under terms that it never would have agreed to.

What this means for you

The Court of Appeal's judgment fits with commercial practice – sometimes businesses have to start working before a contract's finalised. However, it's always best to be clear about the terms you're working under. As you can see, with the High Court and the Court of Appeal disagreeing, it's difficult to predict what terms will govern a project if a formal contract isn't finalised.

To highlight this point, it's worth contrasting this with two other recent cases:

- In July, we wrote about a dispute about football boots worn by Marouane Fellaini. In that case, a contract had expired and a further contract hadn't been finalised and signed. The court said that in the commercial context, especially with big business with legal representation, a signed contract was expected. Accordingly, there was no contract and the manufacturer didn't need to keep making payments (but they did have to make a payment reflecting the entire period of time that the boots had been worn).
- In another recent case, an employee hadn't signed variations to her employment contract that imposed restrictive covenants. That was one reason (among others) why the courts

ruled that the restrictive covenants were not effective.

How we can help

We have numerous contracts to help you finalise your business agreements, including our **Employment agreement** and **Consultancy agreement**.

Christmas parties: know your responsibilities

As the festive season approaches, perhaps you're planning your staff Christmas party. You hope everyone will have fun, but you could be responsible for wrongdoing by staff. What if the fun continues at an after-party – you can relax then, can't you? Your responsibility ends when the official party ends, doesn't it?

Not necessarily. A recent High Court judgment shows that responsibility might continue even at the after-party.

In this case, impromptu drinks at a nearby hotel followed the Christmas party. The managing director had overseen the party and saw its smooth running as his responsibility. He also paid for the taxis to the nearby hotel, though that had not been planned in advance.

During the after-party the discussion turned to business and someone commented on differences in salary. Evidently the managing director felt strongly about the matter, or at least about the challenge to his authority. He became incensed and hit an employee – with tragic results.

The issue was whether the business was 'vicariously liable', in other words legally responsible, for the director's actions.

The general rule is that a business is liable if there's a sufficiently strong connection between the position in which the person is employed and the wrongful conduct. This is a difficult test to apply – first, normally when an employee misbehaves they're going beyond their duties: it was certainly not the director's job to punch people he disagreed with; secondly, it's not always obvious whether someone is at work, especially if they work around the clock or the incident happens outside of the office.

The judge at first decided that this managing director was off duty at the unofficial after-party. The High Court disagreed. For the High Court, it was particularly important that the managing director saw himself as the 'directing mind and will' of the business and was in a dominant position that enabled him to assert authority over the staff present – indeed, the employee who was assaulted had been outside, but had come inside when beckoned. Further, the punch itself had been an exercise in laying down his authority.

What this means for you

Every case will be different - as one of the judges in the Court of Appeal stressed, these were extreme and unlikely circumstances. This doesn't mean you should cancel all parties and forbid all merriment. But it does mean you should be careful.

Vicarious liability does not necessarily imply that the business is at fault – the rationale is that: (1) injured persons should be compensated; (2) businesses might be insured; and (3) the possibility of vicarious liability encourages higher standards.

It applies to 'common law' wrongs, such as assault or negligence, as well as to statutory wrongs, such as discrimination. That means that if one of your employees harasses a colleague, the business may have to pay compensation. However, in discrimination cases you have a defence if you show that you did everything reasonable to prevent the discrimination – so, having good

policies may be a defence to vicarious liability, but only if you regularly tell your staff about the policies and make sure they follow them.

How we can help

We have an **Employee handbook**, which could assist in motivating good behaviour and avoiding vicarious liability. Relevant policies include *Conduct on business and hospitality events* and *Harassment*.

Suing individuals behind a company – are they protected?

You work on a project for a company, but they go bust while owing you money. You know that the two individuals who controlled the company could afford to pay you. Are you able to sue them directly?

Sometimes you can, and a recent case provides an example.

First, there was no contractual case against the individuals: two brothers who were sole director and funder of the company. However, they were sued for wrongs of their own, rather than as responsible for the company's wrongs.

What had they done wrong? They'd withheld money from the company that could have paid off two debts owed to a building contractor. The company went into liquidation and, in breach of contract, defaulted on those debts. The money was instead set aside for its successor company which completed the project – the brother who provided funding was the director of that successor company.

The contractor therefore brought claims against the brothers. The decision to bring the company into liquidation induced the breach of contract and was unlawful because it wasn't in the company's commercial interest and money was available. In general, withholding money in that way wouldn't be unlawful. This was different because the money wasn't just withheld, but diverted to another company doing exactly the same thing – that wasn't a reflection of the company's separate legal entity, but an abuse of it.

In addition, this was 'unlawful means conspiracy' because the brothers planned to benefit from the contractor's work whilst using their company as a shield against potential claims. They did that by voluntarily liquidating the company – for that reason, the liquidation was unlawful.

What this means for you

If you're a director, this is one reason not to abuse the shield created by the company. If you're on the other side, it shows a route that might be available if a corporate customer can't afford your bills. It also shows why you should check the financial state of companies that you do business with or consider seeking personal guarantees from directors.