

Construction Law Update

Deal or no deal? Court considers whether ‘subject to contract’ umbrella had ceased to have effect

In *Baltimore Wharf SLP v Ballymore Properties Limited & WSP UK Limited*, the Technology and Construction Court considered whether the parties to a construction dispute had made a legally binding agreement following settlement discussions commenced on a ‘subject to contract’ basis.

On the facts, the Court held there was no express or implied removal of the subject to contract reservation such that terms agreed in principle by email were not binding pending execution of a formal Settlement Agreement. As that Agreement was never executed by the Claimant, there had been no binding resolution and the Defendants’ applications to strike out the claim were denied.

Key takeaways:

- **Agreeing settlement terms in principle is not the same as reaching a legally binding settlement where negotiations remain ‘subject to contract.’**
- **Any party suggesting the ‘subject to contract’ reservation has been removed by implication needs to clear a high bar.**
- **Conduct suggesting the parties did not view the deal as final will weaken any argument that a binding settlement had already been reached.**

Background

A nursery roof at Baltimore Wharf in London collapsed in July 2023, following which Baltimore Wharf SLP (“**Baltimore**”) brought a claim against Ballymore Properties Limited (“**Ballymore**”) under a collateral warranty, seeking about £2million in

damages. Ballymore then joined WSP UK Limited (“**WSP**”) in the proceedings by making a Part 20 claim.

The parties entered into settlement discussions and the proceedings were temporarily stayed until 1 October 2024. During that stay, solicitors continued to negotiate, with their correspondence being marked ‘without prejudice save as to costs’ and ‘subject to contract’.

In August 2024, a draft settlement agreement was circulated. After further discussion and some amendments, Baltimore’s solicitors sent an email on 24 September 2024 (“**the September Email**”) saying that “*the Settlement Agreement with WSP’s amends is agreed*”. That email was marked ‘without prejudice save as to costs’ but was no longer expressly stated on its face to be ‘subject to contract’.

After that, bank details were exchanged and Ballymore and WSP signed the settlement agreement, but Baltimore did not. A Tomlin Order was later circulated in draft, referring to the parties having agreed terms of settlement.

Once the stay expired, Ballymore and WSP argued that Baltimore’s claim should be struck out because a binding settlement had already been reached. The Court therefore had to decide whether the September Email was enough to create a binding settlement, even though Baltimore had not signed the settlement agreement.

Outcome

The Court held that no binding settlement agreement had been reached and dismissed Ballymore and WSP’s application. The September Email was found to be an agreement on the terms only, not an agreement to create immediate and binding legal relations.

1. A high bar to remove “subject to contract” by implication

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The Judge acknowledged that the material settlement terms had been agreed, but said that accepting the terms of a 'subject to contract' agreement cannot, by itself, lead to a binding settlement agreement as established by *Joanne Properties Limited v Moneything Capital Limited* [2020] EWCA Civ 1541.

The real question, therefore, was whether the parties had also agreed, expressly or by necessary implication, to remove the 'subject to contract' protection, or 'umbrella' as it is sometimes known.

The Court held that they had not. Once negotiations begin on a subject-to-contract basis, that protection stays in place unless there is an express agreement to remove it, or unless the parties' conduct makes that intention unmistakably clear. The bar for proving that kind of implied waiver is a high one.

2. Conduct may undermine an argument that the settlement was already binding

Ballymore and WSP argued that the parties' conduct after the September Email, including dealing with procedural stays, showed that everyone thought the matter had been settled. The Court considered whether that later conduct was relevant to the question of whether the 'subject to contract' wording had been removed by implication.

Relying on *Newbury v Sun Microsystems*, the Court said later conduct is usually not a reliable guide where the issue is whether the documents exchanged at the time had already created a binding agreement. The focus should be on the wording used *before* and *on* 24 September 2024, not on what happened afterwards. So, the parties' post-24 September 2024 conduct should not be considered.

However, out of an abundance of caution, the Court did look at the later conduct in case that analysis was wrong.

On the facts, the Court found that neither the September Email nor the parties' later conduct was enough to remove the umbrella of 'subject to contract' by necessary implication, because:

- The draft settlement agreement circulated on 29 August and later revisions carried the 'subject to contract' wording on every page. That made it difficult to infer that the parties had silently abandoned the protection.
- The fact that Baltimore never signed the settlement agreement also pointed away from there being a legally binding settlement and suggested that Baltimore may have changed its mind.
- Later steps, such as sharing bank details and circulating a Tomlin Order, were still consistent with a deal that was being finalised, not one that had already become binding. The Court contrasted this with *Jirehouse Capital v Beller* EWHC 2536, where, on those particular facts, the parties had acted as though the deal was already done, including standing down counsel and congratulating each other on a "done deal".

Comment

This case is a good reminder that 'subject to contract' really does mean the deal is not finished yet. Even if everyone seems to have agreed the settlement terms, that protection will normally stay in place unless it is expressly removed or the parties' conduct makes it unmistakably clear, by necessary implication, that they intended to be bound before the settlement agreement was signed.

In everyday project terms, it is best to treat a draft settlement or a "done deal" email as non-binding unless the final paperwork says otherwise. The Court will usually respect the protection that 'subject to contract' gives.

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