[COURT OF APPEAL]

*BLACKPOOL AND FYLDE AERO CLUB LTD. v. BLACKPOOL BOROUGH COUNCIL

1990 April 24, 25; May 25

Stocker, Bingham and Farquharson L.JJ.

Contract—Formation—Offer and acceptance—Local authority inviting competitive tenders—Printed form setting out deadline for submitting bids—Failure by local authority to consider timely, conforming tender—Whether contractually liable to tenderer for failure

The defendants, a local authority, which owned and managed the local airport, had since 1975 granted to the plaintiffs, a flying club, a concession to operate pleasure flights from there. In 1983 the grant of the concession came up for renewal and the defendants prepared invitations to tender that they sent to the plaintiffs and to six other parties. It was stated on the form of tender that the defendants "do not bind themselves to accept all or any part of any tender. No tender which is received after the last date and time specified shall be admitted for consideration." The plaintiffs' tender for the concession was posted by hand in the defendants' letter box before the expiry of the deadline. Because the town clerk's staff failed to empty the letter box when they should have the defendants received the plaintiffs' tender too late for their consideration. The defendants accepted a tender lower than that submitted by the plaintiffs. The plaintiffs claimed damages against the defendants for breach of contract and negligence. The judge, at a hearing to determine the issues of liability only, held that the express request for tenders by the defendants gave rise to an implied obligation on them to perform the service of considering tenders duly received. He concluded that the defendants were liable under both heads of claim.

On appeal by the defendants:—

Held, dismissing the appeal, that an invitation to tender was normally no more than an offer to receive bids, but circumstances could exist whereby it gave rise to binding contractual obligations; that although the defendants' form of tender did not explicitly state that they would consider timely and conforming tenders, and although contracts were not to be lightly implied, an examination of what the parties said and did established a clear intention to create a contractual obligation on the part of the defendants to consider the plaintiffs' tender in conjunction with all other conforming tenders or at least that the plaintiffs' tender would be considered if others were; and that, accordingly, the defendants' failure rendered them contractually liable to the plaintiffs (see post, pp. 1201B–C, F, 1202E–H, 1203A, F–G, 1204B–D, E–F).

Quaere. Whether, in the absence of any implied contractual obligations between the parties, the defendants would have owed the plaintiffs a duty to take reasonable care to consider a tender submitted before the expiry of the deadline (see post, pp. 1203A–B, 1204E).

Decision of Judge Jolly, sitting as a judge of the Queen's Bench Division, upheld.

The following cases are referred to in the judgments:

American Express International Banking Corporation. v. Hurley [1985] 3 All E.R. 564

C.B.S. Songs Ltd. v. Amstrad Consumer Electronics Plc. [1988] A.C. 1013; [1988] 2 W.L.R. 1191; [1988] 2 All E.R. 484, H.L.(E.)
Carlill v. Carbolic Smoke Ball Co. [1893] 1 Q.B. 256, C.A.
Caparo Industries Plc. v. Dickman [1990] 2 W.L.R. 358; [1990] 1 All E.R. 568, H.L.(E.)
Harris v. Nickerson (1873) L.R. 8 Q.B. 286
Heilbut, Symons & Co. v. Buckleton [1913] A.C. 30, H.L.(E.)
Hispanica de Petroleos S.A. v. Vencedora Oceanica Navegacion S.A. (No. 2) (Note) [1987] 2 Lloyd's Rep. 321, C.A.
Lavarack v. Woods of Colchester Ltd. [1967] 1 Q.B. 278; [1966] 3 W.L.R. 706; [1966] 3 All E.R. 683, C.A.
Liverpool City Council v. Irwin [1977] A.C. 239; [1976] 2 W.L.R. 562; [1976] 2 All E.R. 39, H.L.(E.)
Ministry of Housing and Local Government v. Sharp [1970] 2 Q.B. 223; [1970] 2 W.L.R. 802; [1970] 1 All E.R. 1009, C.A.
Ross v. Caunters [1980] Ch. 297; [1979] 3 W.L.R. 605; [1979] 3 All E.R. 580
Spencer v. Harding (1870) L.R. 5 C.P. 561
Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. [1986] A.C. 80; [1985] 3 W.L.R. 317; [1985] 2 All E.R. 947, P.C.
White and Carter (Councils) Ltd. v. McGregor [1962] A.C. 413; [1962] 2 W.L.R. 17; [1961] 3 All E.R. 1178, H.L.(Sc.)

The following additional cases were cited in argument:

Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd. [1990] 2 W.L.R. 547; [1989] 3 All E.R. 628, C.A.
Chaplin v. Hicks [1911] 2 K.B. 786
Courtney & Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd. [1975] 1 W.L.R. 297; [1975] 1 All E.R. 716, C.A.
Curran v. Northern Ireland Co-ownership Housing Association Ltd. [1987] A.C. 718; [1987] 2 W.L.R. 1043; [1987] 2 All E.R. 13, H.L.(N.I.)
Esso Petroleum Co. Ltd. v. Mardon [1976] Q.B. 801; [1976] 2 W.L.R. 583; [1976] 2 All E.R. 5, C.A.
Lacey (William) (Hounslow) Ltd. v. Davis [1957] 1 W.L.R. 932; [1957] 2 All E.R. 712
Muirhead v. Industrial Tank Specialities Ltd. [1986] Q.B. 507; [1985] 3 W.L.R. 993; [1985] 3 All E.R. 705, C.A.

APPEAL from Judge Jolly, sitting as a judge of the Queen's Bench Division at Manchester District Registry.

The plaintiffs, Blackpool and Fylde Aero Club Ltd., claimed damages against the defendants, Blackpool Borough Council, for breach of a warranty that if a tender for the concession to operate pleasure flights from Blackpool Airport was returned to the Town Hall, Blackpool, before noon on Thursday, 17 March 1983, it would be considered with other tenders duly returned when the decision to grant the concession was made. The plaintiffs further, or in the alternative, claimed that the defendants owed to them a duty of care to take all reasonable care to see to it that their tender would be considered with the other tenders when the decision to grant the concession was made. On 17 April 1989 Judge Jolly directed that judgment be entered for the plaintiffs for liability both in contract and tort.

By a notice of appeal dated 12 May 1989 the defendants appealed on the grounds that (1) the judge erred in law in holding that the defendants' invitation to tender was not only an invitation to treat, but was also an implied offer to enter into a separate contract to consider the plaintiffs' tender, which offer the plaintiffs accepted by the submission

of their tender. The judge ought to have held that the defendants' invitation to tender was an invitation to treat simpliciter, and as such was not intended to create legal relations between the parties, nor did it contain any implied offer or warranty on the part of the defendants; (2) unless the alleged obligation of the defendants was not merely to consider the plaintiffs' tender but to make a fair selection based on the merits of the various tenders received, the defendants' omission to consider the plaintiffs' tender could not of itself give rise to any claim in damages. It was not the plaintiffs' case that the defendants were under a duty to make a fair selection based on the merits of the tenders received, and such an implied obligation would have been inconsistent with the express words of the invitation to tender, and (3) the judge erred in law in holding that the defendants owed to the plaintiffs a duty of care in tort not by their careless omission to cause the plaintiffs pure economic loss, i.e. the loss of the benefit of the contract for which they had tendered.

The facts are set out in the judgment of Bingham L.J.

Roger Toulson Q.C. and *Hugh Davies* for the defendants.
Michael Shorrock Q.C. and *M.P. Sylvester* for the plaintiffs.

Cur. adv. vult.

25 May. The following judgments were handed down.

BINGHAM L.J. In this action the plaintiffs ("the club") sued the defendants ("the council") for damages for breach of contract and common law negligence. It was in issue between the parties whether there was any contract between them and whether the council owed the club any duty of care in tort. These issues of liability came before Judge Jolly sitting as a judge of the Queen's Bench Division and he decided them both in favour of the club, all questions of quantum being deferred. The council appeal, contending that the judge was wrong on each point.

The council own and manage Blackpool Airport. For purposes of raising revenue they have made it a practice to grant a concession to an air operator to operate pleasure flights from the airport, no doubt largely for the entertainment of holiday-makers. The club, one of whose directors was and is a Mr. Bateson, tendered for and were granted this concession in 1975 and again in 1978 and again in 1980. In 1983 the most recently granted concession was due to expire. The council accordingly prepared an invitation to tender. This was sent to the club and to six other parties, all of them in one way or another connected with the airport. This document was headed and began as follows:

"Blackpool Borough Council
Blackpool airport
Pleasure Flying Concession
Instructions to Tenderers

"The council do not bind themselves to accept all or any part of any tender. No tender which is received after the last date and time specified shall be admitted for consideration.

"The concession will be for a period of three years commencing on 1 April 1983. Tenderers should note that the concession is NOT to

be a sole concession and the council may accept all or any tenders submitted in respect of each class of aircraft.

"Tenderers may tender for both classes of aircraft or one only.

"Successful tenderers will be required to execute an agreement prepared by the town clerk for the time being of the council. A specimen form of agreement may be examined on application to the airport director and it will be assumed that tenderers are aware of the covenants and conditions contained therein.

"Form of tender

"I/We the undersigned hereby make the following offers for the privilege of operating pleasure flights from Blackpool Airport for a period of three years from 1 April 1983."

There then followed provision, with blank spaces to be filled in by the tenderer, for alternative offers for different sizes of aircraft and for the naming of willing sureties. The invitation then continued:

"This form of tender, fully completed and enclosed in the envelope provided endorsed 'Tender for pleasure flying concession' and not bearing any name or mark indicating the identity of the sender, is to be received by

THE TOWN CLERK
P.O. Box 11
Town Hall
Blackpool FY1 1NS

not later than 12 o'clock noon on Thursday 17th March 1983.

"Please note the attached notice in red"

"The attached notice in red" was an extract from the council's standing orders in these terms:

"Important Notice

"The council's standing orders with respect to contracts include the following provisions: 1. Tenders shall be submitted in a plain, sealed envelope bearing the words 'Tender . . . (followed by the subject to which it relates) . . . .' and shall not bear any name or mark indicating the identity of the sender, and 2. No tender which is received after the last date and time specified shall be admitted for consideration. STRICT COMPLIANCE WITH THESE STANDING ORDERS IS REQUESTED

[Signature]

Town Clerk."

The envelope provided to the selected tenderers was printed and addressed to the town clerk at the post office box number given in the invitation. The envelopes also bore the printed words "tender for" and "due in" to which the council's employees had added in manuscript "Pleasure Flying Concession" and "12 noon Thursday 17 March 1983."

Only three of the selected tenderers responded to the council's invitation. One put in a low bid for the lighter size of aircraft only. The second, Red Rose Helicopters Ltd., submitted a larger bid, also for the lighter size of aircraft. Mr. Bateson for the club filled in the form of tender, submitting a bid substantially larger, on its face, than the others' for the lighter size of aircraft, and also submitting a bid for the heavier

size. He put it in the envelope provided by the council, took it to the town hall and posted it in the town hall letter box at about 11 a.m. on Thursday 17 March. This was about an hour before the advertised deadline expired. The town clerk's staff were supposed to empty the letter box each day at 12 o'clock. They failed to do so. The club's tender accordingly remained in the letter box until the next morning, 18 March, when the letter box was next opened. The envelope was then taken out and date-stamped 18 March 1983 by the town clerk's department. At some time thereafter the word "late" was written on the envelope, because that is what the club's tender was mistakenly thought to be.

On 29 March 1983 the chairman of the council's relevant committee considered which tender to accept. The club's tender had been recorded as being late, and was in accordance with the council's standing orders excluded from consideration when the chairman made his decision. He accordingly made his choice between the two tenders believed to be in time, recommending acceptance of Red Rose Helicopters' tender, no doubt because it was bigger.

An indication that its tender was accepted was given to Red Rose Helicopters. The town clerk wrote to the club to say that their tender was not received until 18 March and was therefore received too late for consideration. Mr. Bateson replied that the club's tender had been delivered to the town hall before the deadline. "You will appreciate," he wrote, "that this matter is of some considerable importance to our company." The council evidently made inquiries and established that the club's tender had been received in time.

On 30 March the airport director accordingly wrote to Mr. Bateson saying:

> "Due to an error in the administration of the terms of tender for the above concession I regret to inform you that the tenders recently received have been declared invalid."

Amended tender documents were accordingly sent for a re-scheduled tendering procedure. In a letter of 31 March the town clerk wrote to the club—and, I infer, to other potential tenderers—outlining the facts summarised above and concluding:

> "I trust that you will appreciate that the only course of action open to us is to go through the formalities of seeking tenders for a second time."

It seems that as a result of this second invitation further tenders were submitted. At this stage, however, Red Rose Helicopters, having taken legal advice, contended that its earlier tender had been accepted and that the council were contractually bound to proceed on that basis. Proceedings were threatened. The council then decided to disregard the tenders received in response to their second invitation and to honour the contract made with Red Rose Helicopters.

The contractual argument hinges on paragraph 4 of the club's amended statement of claim in which it was alleged that the council

> "warranted that if a tender was returned to the town hall, Blackpool before noon on Thursday 17 March 1983 the same would be considered along with other tenders duly returned when the decision to grant the concession was made."

Mr. Shorrock for the club declined to put the contractual term contended for in any other way, save that he accepted that "when" might with

advantage be read as "when or if." It was for breach of this warranty that damages in contract were claimed.

Mr. Bateson was the only witness called. His examination in chief included this passage:

> "(Q) . . . when you submitted your tenders before noon on 17 March, did you believe or not that the tender would be considered along with others that had been submitted? (A) We were under no doubt that it would be considered as other tenders had been considered in previous years.
> "(Q) If you had known or thought that a tender submitted by you would not have been considered, would you have bothered to tender in the first place? (A) It would have been very questionable whether to bother to tender, but we would probably have pursued the matter beforehand."

Mr. Bateson was not cross-examined.

The judge resolved the contractual issue in favour of the club, holding that an express request for a tender might in appropriate circumstances give rise to an implied obligation to perform the service of considering that tender. Here, the council's stipulation that tenders received after the deadline would not be admitted for consideration gave rise to a contractual obligation, on acceptance by submission of a timely tender, that such tenders would be admitted for consideration.

In attacking the judge's conclusion on this issue Mr. Toulson for the council made four main submissions. First, he submitted that an invitation to tender in this form was well established to be no more than a proclamation of willingness to receive offers. Even without the first sentence of the council's invitation to tender in this case, the council would not have been bound to accept the highest or any tender. An invitation to tender in this form was an invitation to treat, and no contract of any kind would come into existence unless or until, if ever, the council chose to accept any tender or other offer. For these propositions reliance was placed on *Spencer v. Harding* (1870) L.R. 5 C.P. 561 and *Harris v. Nickerson* (1873) L.R. 8 Q.B. 286.

Second, Mr. Toulson submitted that on a reasonable reading of this invitation to tender the council could not be understood to be undertaking to consider all timely tenders submitted. The statement that later tenders would not be considered did not mean that timely tenders would. If the council had meant that they could have said it. There was, although Mr. Toulson did not put it in these words, no maxim exclusio unius, expressio alterius.

Third, the court should be no less rigorous when asked to imply a contract than when asked to imply a term in an existing contract or to find a collateral contract. A term would not be implied simply because it was reasonable to do so: *Liverpool City Council v. Irwin* [1977] A.C. 239, 253H. In order to establish collateral contracts, "Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shewn:" *Heilbut, Symons & Co. v. Buckleton* [1913] A.C. 30, 47. No lower standard was applicable here and the standard was not satisfied.

Fourth, Mr. Toulson submitted that the warranty contended for by the club was simply a proposition "tailor-made to produce the desired result" (*per* Lord Templeman in *C.B.S. Songs Ltd. v. Amstrad Consumer Electronics Plc.* [1988] A.C. 1013, 1059F) on the facts of this particular

A case. There was a vital distinction between expectations, however reasonable, and contractual obligations: see *per* Diplock L.J. in *Lavarack v. Woods of Colchester Ltd.* [1967] 1 Q.B. 278, 294. The club here expected its tender to be considered. The council fully intended that it should be. It was in both parties' interests that the club's tender should be considered. There was thus no need for them to contract. The court should not subvert well-understood contractual principles by adopting a B woolly pragmatic solution designed to remedy a perceived injustice on the unique facts of this particular case.

In defending the judge's decision Mr. Shorrock for the club accepted that an invitation to tender was normally no more than an offer to receive tenders. But it could, he submitted, in certain circumstances give rise to binding contractual obligations on the part of the invitor, either C from the express words of the tender or from the circumstances surrounding the sending out of the invitation to tender or, as here, from both. The circumstances relied on here were that the council approached the club and the other invitees, all of them connected with the airport; that the club had held the concession for eight years, having successfully tendered on three previous occasions; that the council as a local authority was obliged to comply with its standing orders and owed a D fiduciary duty to ratepayers to act with reasonable prudence in managing its financial affairs; and that there was a clear intention on the part of both parties that all timely tenders would be considered. If in these circumstances one asked of this invitation to tender the question posed by Bowen L.J. in *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256, 266, "How would an ordinary person reading this document construe E it?", the answer in Mr. Shorrock's submission was clear: the council might or might not accept any particular tender; it might accept no tender; it might decide not to award the concession at all; it would not consider any tender received after the advertised deadline; but if it did consider any tender received before the deadline and conforming with the advertised conditions it would consider all such tenders.

I found great force in the submissions made by Mr. Toulson and F agree with much of what he said. Indeed, for much of the hearing I was of opinion that the judge's decision, although fully in accord with the merits as I see them, could not be sustained in principle. But I am in the end persuaded that Mr. Toulson's argument proves too much. During the hearing the questions were raised: what if, in a situation such as the present, the council had opened and thereupon accepted the first tender G received, even though the deadline had not expired and other invitees had not yet responded? Or if the council had considered and accepted a tender admittedly received well after the deadline? Mr. Toulson answered that although by so acting the council might breach its own standing orders, and might fairly be accused of discreditable conduct, it would not be in breach of any legal obligation because at that stage there would be none to breach. This is a conclusion I cannot accept. And if it H were accepted there would in my view be an unacceptable discrepancy between the law of contract and the confident assumptions of commercial parties, both tenderers (as reflected in the evidence of Mr. Bateson) and invitors (as reflected in the immediate reaction of the council when the mishap came to light).

A tendering procedure of this kind is, in many respects, heavily weighted in favour of the invitor. He can invite tenders from as many or as few parties as he chooses. He need not tell any of them who else, or

how many others, he has invited. The invitee may often, although not here, be put to considerable labour and expense in preparing a tender, ordinarily without recompense if he is unsuccessful. The invitation to tender may itself, in a complex case, although again not here, involve time and expense to prepare, but the invitor does not commit himself to proceed with the project, whatever it is; he need not accept the highest tender; he need not accept any tender; he need not give reasons to justify his acceptance or rejection of any tender received. The risk to which the tenderer is exposed does not end with the risk that his tender may not be the highest or, as the case may be, lowest. But where, as here, tenders are solicited from selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure—draft contract conditions available for inspection and plainly not open to negotiation, a prescribed common form of tender, the supply of envelopes designed to preserve the absolute anonymity of tenderers and clearly to identify the tender in question, and an absolute deadline—the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are. Had the club, before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with others, I feel quite sure that the answer would have been "of course." The law would, I think, be defective if it did not give effect to that.

It is of course true that the invitation to tender does not explicitly state that the council will consider timely and conforming tenders. That is why one is concerned with implication. But the council do not either say that they do not bind themselves to do so, and in the context a reasonable invitee would understand the invitation to be saying, quite clearly, that if he submitted a timely and conforming tender it would be considered, at least if any other such tender were considered.

I readily accept that contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for. It must also, in most cases, be able to answer the question posed by Mustill L.J. in *Hispanica de Petroleos S.A. v. Vencedora Oceanica Navegacion S.A. (No. 2) (Note)* [1987] 2 Lloyd's Rep. 321, 331: "What was the mechanism for offer and acceptance?" In all the circumstances of this case, and I say nothing about any other, I have no doubt that the parties did intend to create contractual relations to the limited extent contended for. Since it has never been the law that a person is only entitled to enforce his contractual rights in a reasonable way (*White and Carter (Councils) Ltd. v. McGregor* [1962] A.C. 413, 430A, *per* Lord Reid), Mr. Shorrock was in my view right to contend for no more than a contractual duty to consider. I think it plain that the council's invitation to tender was, to this limited extent, an offer, and the club's submission of a timely and conforming tender an acceptance.

Mr. Toulson's fourth submission is a salutary warning, but it is not a free-standing argument: if, as I hold, his first three submissions are to be rejected, no subversion of principle is involved. I am, however, pleased

A that what seems to me the right legal answer also accords with the merits as I see them.

I accordingly agree with the judge's conclusion on the contractual issue, essentially for the reasons which he more briefly gave.

This conclusion makes it unnecessary to consider at length the club's alternative argument, which the judge also accepted, that if there was no contract at all between the parties the council nonetheless owed the club
B a duty to take reasonable care to see to it that if the club submitted a tender by the deadline it would be considered along with other tenders duly returned when the decision to grant the concession was made.

Mr. Shorrock sought to sustain this argument in particular by reliance on *Ministry of Housing and Local Government v. Sharp* [1970] 2 Q.B. 223, *Ross v. Caunters* [1980] Ch. 297 and *American Express International*
C *Banking Corporation v. Hurley* [1985] 3 All E.R. 564, none of which, he submitted, was inconsistent with the principles laid down in the House of Lords' recent decision in *Caparo Industries Plc. v. Dickman* [1990] 2 W.L.R. 358.

Mr. Toulson urged that the court should not introduce a common law duty of care into an area of pre-contractual negotiations where the parties could, if they wished, have introduced such a duty by agreement
D but had not done so: *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] A.C. 80. Although a duty to take reasonable care not to cause pure economic loss could be held to exist, such cases were rare and confined to limited classes of case which did not include the present case and with which the present case had no analogy. The club's task was even harder where, as Mr. Toulson argued was the case here, his
E complaint was of a mere omission. Mr. Toulson argued, if it was necessary to do so, that *Ross v. Caunters* [1980] Ch. 297 was wrongly decided.

I am reluctant to venture into this somewhat unvirginal territory when it is unnecessary to do so for the purpose of deciding this case. Having heard the argument, I am tentatively of opinion that Mr. Toulson's objections are correct and that the club cannot succeed on this
F point if they fail on the other. But I do not think it necessary or desirable to express a final conclusion.

I would accordingly dismiss the appeal. The practical consequences of deciding the contractual issue on liability in the club's favour must, if necessary, be decided hereafter.

G STOCKER L.J. I agree. I have had the advantage of reading in draft the judgment of Bingham L.J. and add short observations of my own solely in deference to the lucid and interesting arguments of counsel put before the court.

The format of the invitation to tender document itself suggests, in my view, that a legal obligation to consider a tender submitted before any award of a concession was made to any other operator was to be
H implied in the case of any operator of aircraft to whom the invitation was directed who complied with its terms and conditions. The fact that the invitation to tender was limited to a very small class of operators is itself of significance. The circumstances surrounding the issue of the invitation to tender and the formal requirements imposed by it support the conclusion. Of particular significance, in my view, was the requirement that tenders be submitted in the official envelope supplied and endorsed, as described by Bingham L.J., by the council. The

the conclusion. Of particular significance, in my view, was the requirement that tenders be submitted in the official envelope supplied and endorsed, as described by Bingham L.J., by the council. The purpose of this requirement must surely have been to preserve the anonymity of the tenderer and, in conjunction with the council's standing orders, to prevent any premature leak of the nature and amount of such tender to other interested or potentially interested parties. Such a requirement, as a condition of the validity of the tender submitted, seems pointless unless all tenders submitted in time and in accordance with the requirements are to be considered before any award of the concession is made. There can be no doubt that this was the intention of both parties, as exemplified by the council's actions when their error with regard to the time of receipt of the club's tender was appreciated. Such a common intention can, of course, exist without giving rise to any contractual obligations, but the circumstances of this case indicate to me that this is one of the fairly rare exceptions to the general rule expounded in the leading cases of *Spencer v. Harding* (1870) L.R. 5 C.P. 561 and *Harris v. Nickerson* (1873) L.R. 8 Q.B. 286. I therefore agree that in all the circumstances of this case there was an intention to create binding legal obligations if and when a tender was submitted in accordance with the terms of the invitation to tender, and that a binding contractual obligation arose that the club's tender would be before the officer or committee by whom the decision was to be taken for consideration before a decision was made or any tender accepted. This would not preclude or inhibit the council from deciding not to accept any tender or to award the concession, provided the decision was bona fide and honest, to any tenderer. The obligation was that the club's tender would be before the deciding body for consideration before any award was made. Accordingly, in my view, the conclusion of the judge and his reasons were correct.

I agree that in the light of this conclusion no useful purpose can be served by consideration of the difficult questions which arise on the claim formulated in tort.

Accordingly I agree with the conclusions reached by Bingham L.J., and with the detailed reasoning contained in his judgment and agree that this appeal should be dismissed.

FARQUHARSON L.J. I agree.

Appeal dismissed with costs.
Leave to appeal refused.

Solicitors: Sharpe Pritchard for Solicitor, Blackpool Borough Council; Berg & Co., Manchester.

H. D.