"Subject to Contract" Negotiations and the Formation of Binding Agreements

By Jonathan Morton | May 6, 2026

RELATED PRACTICES Shipping Dispute Resolution, Construction, Energy, Power and Natural Resources, Europe, Middle East and Africa, Offshore Oil and Gas Dispute Resolution, International

GMC Utilities Group Ltd v. Sumitomo Electric Industries Ltd [2026] EWHC 885 (TCC)

Introduction

Negotiations which are intended to be without prejudice and subject to contract can accidentally end up becoming binding if proper care is not taken. This can be a disaster for a party which finds itself bound without wishing to be. There is a particular danger of such a scenario where without prejudice and subject to contract wording is not maintained in headings to letters and emails throughout the process.

A recent English Court decision in this context will be of particular interest to parties operating in the currently volatile energy and infrastructure sector, where commercial pressures, conflict and disruption may demand rapid agreement of interim arrangements or complex, fast-moving negotiations to attempt to resolve disputes.

On 16 April 2026, the Technology and Construction Court handed down judgment in *GMC Utilities Group Ltd v. Sumitomo Electric Industries Ltd* [2026] EWHC 885 (TCC), a case arising from the construction of an undersea electricity interconnector between Pembrokeshire, Wales and Wexford, Ireland. The decision provides an important restatement and practical application of the principles governing when parties who commence negotiating on an express "subject to contract" basis may nonetheless be ultimately found to have concluded a binding agreement. It also provides a helpful reminder of what not to do.

Background

The defendant, Sumitomo Electric Industries Ltd ("**SEI**"), was the main contractor on the interconnector project. The claimant, GMC Utilities Group Ltd ("**GMC**"), was engaged as a subcontractor for the onshore direct cable works under a subcontract dated 8 August 2022. A dispute arose concerning delays to the works, which led SEI to make a demand under a performance bond in October 2024. The parties then entered negotiations to avoid payment of the bond, instead arranging for funds to be paid into escrow pending final resolution of the underlying dispute.

A letter dated 8 November 2024, sent by GMC's then solicitors (Michelmores LLP), to SEI's solicitors (Watson Farley & Williams LLP), set out the agreed terms of the escrow arrangement. A formal escrow agreement was subsequently concluded on 19 December 2024. The central question before the court was whether the letter of 8 November 2024 constituted a binding

© 2026 Haynes and Boone, LLP

agreement between the parties or was merely a step in "subject to contract" negotiations that only crystallised upon execution of the escrow agreement.

The "Subject to Contract" Issue

GMC's position

GMC claimed that no binding agreement was reached on 8 November 2024. It argued that the negotiations leading to the letter had commenced expressly "subject to contract", relying in particular on the fact that the counteroffer letter of 7 November 2024 was headed "*without prejudice save as to costs and subject to contract.*" GMC contended that this condition carried through the entire chain of correspondence and that the formal escrow agreement, concluded some six weeks later, was the first and only binding contract between the parties on this matter.

SEI's position

SEI submitted that the letter of 8 November 2024 contained all the core terms of a binding agreement, supported by consideration, under which GMC agreed to pay monies into escrow in return for SEI's agreement not to seek payment from the bond issuer.

The legal principles

The court reviewed the well-established principles governing "subject to contract" negotiations, drawing primarily upon several key English court decisions:

- Whether a binding contract exists depends on an objective assessment of what was communicated between the parties by words or conduct, and whether this leads to the conclusion that they intended to create legal relations (*RTS Flexible Systems Ltd v. Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14).
- The summary of principles in *Pagnan SPA v. Feed Products Ltd* [1987] 2 Lloyd's Rep 601, including that parties may intend to be bound even where further terms remain to be agreed, and that a "subject to contract" condition may be waived expressly or by necessary implication.
- A "subject to contract" agreement is "*no agreement at all*" and parties cannot be committed in law or equity unless and until a formal contract is made (*Generator Developments Ltd v. LIDL UK GmbH* [2018] EWCA Civ 396).
- Once negotiations begin "subject to contract", that condition is carried through the negotiations in the ordinary way, and parties can only rid themselves of it by express agreement or necessary implication (*Joanne Properties Ltd v. Moneything Capital Ltd* [2020] EWCA Civ 1541).

The court emphasised that it will not lightly hold that a "subject to contract" condition has been waived.

The court's findings

Applying these principles, the court nonetheless found that a binding agreement was concluded on 8 November 2024, and that the "subject to contract" condition had been removed. The key factors

© 2026 Haynes and Boone, LLP

supporting this conclusion included that: (i) the opening paragraph of the letter of 8 November 2024 expressly confirmed acceptance of GMC's offer, indicating that GMC itself considered a concluded agreement had been reached; (ii) the letter of 8 November 2024 bore no "subject to contract" heading. None of the correspondence passing between the parties after SEI purported to accept the counteroffer at 12:37 on 8 November 2024 contained such a heading; and (iii) the letter omitted the reservation of rights that had appeared at the conclusion of the earlier letter of 7 November 2024, which was consistent with the parties having reached a concluded agreement.

The relationship between the 8 November agreement and the escrow agreement

The court further held that the escrow agreement of 19 December 2024 did not supersede the earlier agreement. The entire agreement clause in the escrow agreement's standard conditions related only to the administration of the escrow account and did not extend to the substantive agreement reached in the letter of 8 November 2024. The escrow agreement itself expressly contemplated the existence of "Supplemental Agreements" between the parties, a definition that encompassed the 8 November letter.

Practical Implications for Those in the Energy Sector

This decision serves as a timely reminder of the following practical points for those involved in complex energy and infrastructure projects:

- The "subject to contract" label is not a permanent shield. Where the course of dealing between the parties, and in particular a clear acceptance of terms without re-stating the condition, demonstrates an objective intention to be bound, the court may find that the condition has been waived by implication.
- The absence of a "subject to contract" heading on a purported acceptance, particularly when combined with the removal of other reservations and immediate performance, will weigh heavily in favour of a binding agreement having been reached.
- In time-pressured commercial situations parties should be especially careful to maintain express "subject to contract" reservations at every stage of the correspondence if they do not intend to be bound until a formal agreement is executed.
- Careful attention should be paid to email and letter headings during any such negotiations, and proper reservation of rights wording should always be included. While the court was clear that the lack of such a heading will not, by itself, be determinative, it is clearly better to err on the safe side and include it.
- Finally, parties should not assume that a subsequent formal agreement will automatically supersede earlier binding interim arrangements. Clear supersession language addressing the earlier agreement, rather than merely the formal agreement's own scope, is advisable.

© 2026 Haynes and Boone, LLP