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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Case update: contract formation

Reveille Independent LCC v Anotech International (UK) Ltd

[2016] EWCA Civ 443

We first reported on this case in Issue 179. The issue for HHJ Mackie QC at first instance had been whether or not a binding contract had been formed. He found that there had. Anotech appealed. The CA outlined the key question in this way: in what circumstances will a contract result when the written offer expressly states that it is not binding until signed by the offeree and the offeree does not sign but performs in the manner contemplated by its terms? Anotech said that the reason for the inclusion of words requiring that the contract was signed was to ensure certainty. HHJ Mackie QC had agreed that Reveille did not communicate their acceptance of the contract by signing and returning it. He then went on to consider the parties' conduct. He considered that whilst it was "*overwhelmingly clear*" that the parties had carried out the work envisaged by the contract, that did not of itself mean that there was acceptance by conduct, albeit it went "*a long way*" to proving that. However, this was a two-way process and Anotech had recognised this acceptance when they acknowledged their obligation to pay. Mr Justice Cranston noted that:

"if signature is the prescribed mode of acceptance an offeror will be bound by the contract if it waives that requirement and acquiesces in a different mode of acceptance. In my view it follows that where signature as the prescribed mode of acceptance is intended for the benefit of the offeree, and the offeree accepts in some other way, that should be treated as effective unless it can be shown that the failure to sign has prejudiced the offeror."

At the same time, the CA said that such a rule could only take place against the background of a number of established legal policies including the need for certainty in commercial contracts. The CA noted that by not signing the contract, Reveille as offeree was waiving the prescribed mode of acceptance, something which had been set out for its benefit. However, that waiver was only effective so long as there was no prejudice to Anotech. The only prejudice Anotech could point to was the commercial uncertainty as to whether it was bound by the contract. In the view of Mr Justice Cranston, that paled "*into insignificance*" in circumstances where Anotech was receiving all the benefit of Reveille's performance of the contract terms. Further, Anotech acted as if it were bound by the contract. For example, it worked and communicated with others on the basis that a deal was in place. This all led to the conclusion that there was a binding contract in place. Also it accorded squarely with another legal policy identified by the CA: in commercial dealings the reasonable expectations of honest, sensible business persons must be protected.

Practical completion: pre-certification inspections

Apcoa Parking (UK) Ltd v Crosslands Properties Ltd

[2016] EWHC 792 (TCC)

Following the failure of waterproof coating on the top deck of a car park, the owner of the car park, Crosslands, sought to recover the repair costs against the occupier, Apcoa. Under the agreement between the parties, Crosslands would appoint a main contractor and a professional team to carry out the works. Then following satisfactory completion, Apcoa would take a 25-year tenancy. The agreement contained provisions to ensure that the works were undertaken to an appropriate standard. The project manager had to carry out inspections before issuing the practical completion certificate and the certificate of making good of defects. Further, before the issue of the defects certificate, Crosslands had to give Apcoa at least 10 working days' notice that the project manager intended to carry out the final inspection of the works. Apcoa was also entitled to attend the final inspection on site and to make representations about any additional works to be carried out or any defective works to be remedied before the final certificate was properly issued. If either Crosslands or Apcoa contended that the final certificate had not been properly issued, it could refer the matter for determination by an independent chartered surveyor.

On 15 June 2012 Sweett issued the defects certificate. Apcoa said that there had been no final inspection meeting and it only saw the defects certificate for the first time after it raised proceedings in 2015. Crosslands said that Apcoa had received the collateral warranties and Sweett had issued the defects certificate. Thus, Crosslands had no further liability. While Apcoa and Crosslands had a voice in the certification process, Sweett had the primary role; the parties intended that it should act as the independent certifier and determine whether the works were satisfactory. Apcoa was not left without a remedy; it could pursue claims under the collateral warranties. Apcoa submitted that as there had been no final inspection and Apcoa had not received the defects certificate, the contractual scheme had not been followed.

Lord Woolman referred to the issue of the defects certificate as being a significant event in the contractual arrangements: it was the "*tipping point of liability*". Once issued, it had a decisive effect on the parties' relations. Apcoa could not make a new claim against Crosslands in respect of the works. However, it was clear that the parties' intention at the time of their bargain had been that Apcoa was supposed to have been given an opportunity to check the construction works, particularly at the stage of completion. Apcoa was entitled to participate in the certification process. If that was not done, there could be no valid defects certificate and no exclusion of Crosslands' liability. It was therefore entitled to raise an action against Crosslands in respect of the works.

Contract: variations-in-writing

Glebe Motors Inc & Others v TRW Lucas Variety Electric Steering Ltd & Others

[2016] EWCA Civ 396

This was a dispute arising out of a car component purchase agreement. Article 6.3 provided that:

"Entire Agreement; Amendment: This Agreement, which includes the Appendices hereto, is the only agreement between the Parties relating to the subject matter hereof. It can only be amended by a written document which (i) specifically refers to the provision of this Agreement to be amended and (ii) is signed by both Parties."

One issue was whether or not a company known as Porto became a party to the Agreement, even though there had been no formal amendment as required by Article 6.3. The Judge at first instance decided that whilst it was possible for parties to agree to vary or waive a requirement such as that in Article 6.3, whether they have done so was fact-sensitive. To decide otherwise would be inconsistent with the principles of freedom of contract. Here the Judge held that the Agreement, including Article 6.3, had been varied or waived by the parties' conduct because in their dealings under the Agreement over a long period they had operated as if Porto was a party. This overrode the requirement that the Agreement could only be varied in writing. On the facts, it was "*overwhelmingly clear*" that TRW treated Porto as a contracting party.

Having found in favour of the appellants on other grounds, the CA did not strictly need to consider this issue. However, all three judges commented on the issue because there were two conflicting CA cases. In *United Bank Ltd v Asif* (2000) the CA had held that a contract containing an anti-oral variation clause could only be amended by a written document complying with that clause. Two years later, however, in *World Online Telecom Ltd v I-Way Ltd*, the CA had reached a different conclusion.

TRW stressed the policy benefits of "*anti-oral variation*" clauses. They promoted certainty and helped avoid "*false or frivolous claims*" of an oral agreement. TRW also suggested that such clauses would prevent a person in a large organisation producing a document which "*unwittingly and unintentionally*" was inconsistent with a provision in an existing contract.

LJ Beatson said that the general principle of the English law of contract is that parties have the freedom to agree whatever terms they choose, and can do so in a document, by word of mouth, or by conduct. The consequence in this context was that in principle the fact that the parties' contract contained a clause such as Article 6.3 did not prevent them from later making a new contract varying the contract by an oral agreement or by conduct. The CA noted that in an old Australian case, *Liebe v Molloy* (1906) 4 CLR 347, the High Court considered a building contract containing a clause that extra items should not be paid for unless ordered in writing. The court said that notwithstanding the clause, the conduct of the parties may mean that a contract to pay for the extra items is to be implied. It was all a question of fact. An oral agreement or the conduct of the parties to a contract containing such a clause may give rise to a separate and independent contract which has the effect of varying the written contract.

On the facts here, the CA agreed that the conduct of the parties was sufficient to mean that the Agreement had been varied by conduct. On the basis of "*open, obvious and consistent*" dealings over a long period, there was no other explanation but that the parties intended to add Porto as a party to the Agreement. Accordingly, Porto had a right of action against TRW.

This was not a decision the CA reached without some hesitation. LJ Underhill said that it seemed "*entirely legitimate*" that the parties to a formal written agreement should wish to insist that any subsequent variation should be agreed in writing (and perhaps also, as here, in some specific form), as a protection against the raising of subsequent, maybe ill-founded, allegations that its terms have been varied by oral agreement or by conduct. However, LJ Underhill continued that holding otherwise did not mean that clauses like the second sentence of Article 6.3 had no value at all. In many cases parties who want to rely on informal communications and/or a course of conduct to modify their obligations under a formally agreed contract will encounter difficulties in showing that both parties intended that what was said or done should alter their legal relations. There may also be problems about authority. Those difficulties may prove to be a significantly greater hurdle to overcome if they have agreed to a provision requiring formal variation.

LJ Moore-Bick agreed that the governing principle was that of party autonomy. The principle of freedom of contract entitles parties to agree whatever terms they choose, subject to certain limits imposed by public policy. This meant that:

"The parties are therefore free to include terms regulating the manner in which the contract can be varied, but just as they can create obligations at will, so also can they discharge or vary them, at any rate where to do so would not affect the rights of third parties."

LJ Moore-Bick continued that one of the benefits of a clause such as Article 6.3 was that it was likely to bring to the forefront the question of whether the parties who were said to have varied the contract otherwise than in the prescribed manner really intended to do so. However, as a matter of principle, he did not think that parties can effectively tie their hands so as to remove from themselves the power to vary the contract informally. The Judge did not see that this was a matter of concern, given that nothing could be done without the agreement of both parties.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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