Fenwick Elliott
The construction & energy law specialists

Issue 193 July 2016

Dispatch

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

Contract: variations-in-writing: part 2

MWB Business Exchange Centres Ltd v Rock Advertising Ltd
[2016] EWCA Civ 553

In June's Issue No. 192 of *Dispatch* we discussed the case of *Globe Motors v TRW Lucas*. Like London buses, you wait 15 years for a case on anti-oral variations and then two come along at once. The dispute here related to a claim against Rock for arrears of licence fees and other charges. Rock had issued a counterclaim relying upon an oral agreement. The Judge at first instance agreed that there was an oral agreement and that the individual who made that agreement had at least ostensible authority to commit MWB to such an agreement of this kind. However, MWB relied upon the express terms of the original written agreement. Clause 7.6 provided:

"This licence sets out all of the terms as agreed ... No other representations or terms shall apply or form part of this licence. All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."

The Judge at first instance agreed with MWB and held that this was a clear clause which precluded an oral renegotiation of a core term of the agreement. Rock appealed saying, amongst other things, that the Judge was wrong to hold that clause 7.6 precluded any variation of the contract other than one in writing in accordance with its terms. Rock said that it was open to the parties to vary the contract as a whole, including clause 7.6, orally or in any other way they chose. Perhaps unsurprisingly, the CA here agreed with their colleagues in the *Globe* case. MWB said that two parties who enter into a contract may agree what they like. Here, the parties agreed by clause 7.6 that any variation of the licence must be in writing and signed by both parties and there were good policy reasons for upholding that agreement. LJ Kitchen disagreed. The most powerful consideration was that of "*party autonomy*". LJ Kitchen went on to refer to the words of Cardozo J nearly 100 years ago in the New York Court of Appeals in *Alfred C Beatty v Guggenheim Exploration Company* (1919) 225 NY 380 where he said that:

"Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived … What is excluded by one act, is restored by another. You may put it out by the door, it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again…"

Adjudication: residential occupier & contract formation

Goldsworthy & Others v Harrison & Anr
[2016] EWHC 1589 (TCC)

This was an application to enforce an adjudication decision that the defendant homeowners, Harrison, pay the claimant builders £72k. Harrison was a residential occupier, therefore statutory adjudication did not apply. The primary issue was whether they had agreed contract terms containing an adjudication clause. As Deputy Judge Bartlett QC made clear, he could only decide the application in Goldsworthy's favour if Harrison had no real prospect of successfully defending the enforcement claim.

Goldsworthy said that the parties agreed, and proceeded on the basis that, the JCT Minor Works (MW) terms applied. These terms contain a provision for adjudication. Harrison said that although the parties expressed an intention that they would enter into a MW form of contract, the parties did not do so because they never reached final agreement on the terms of such a contract. Further, the parties' conduct was not consistent with a concluded agreement. As the Judge noted, the principal difficulty here was that the parties had proceeded with works without fully formalising the terms of their legal relationship, even though a Final Certificate had been issued. Thus the Court had to make the best sense possible of unclear expressions. The Judge referred to the Supreme Court case of *RTS Flexible Systems Ltd v Molkerei* (see Issue 118) which said that:

"i) It is possible that parties may agree to be contractually bound by agreed terms even though they defer other important matters to be agreed later.
ii) Contracts may come into existence, not as a result of offer and acceptance, but during and as a result of performance."

Further, the Judge noted that the provisions of the Minor Works form constitute a carefully designed package which, when properly filled in, sets an agreed balance of costs, liabilities and risks. He continued:

"This feature needs to be kept in mind when considering whether an incomplete Minor Works form constitutes a binding contract. When parties intend that they will contract on a Minor Works form, but fail to complete it, the Court needs to be wary of imposing on them a less complete contract, with a different balance of risks partly reflecting the Minor Works form and partly inconsistent with it: a contract which, if asked, they would not have agreed to."

Having considered the facts carefully, Deputy Judge Bartlett QC commented that it was ironic that:

"the defendants, who for most of the period from October 2012 onwards envisaged and desired that the full works would be done under a Minor Works contract, now contend that this intent was never contractually agreed or implemented, whereas the claimants, who resisted signing the Minor Works form when it was offered and did not revert with any altered version said to reflect the parties' agreement, now contend that the Minor Works terms were contractually agreed..."

However, he said that the fact that the use of the MW form was envisaged for the full works did not amount to a finding that there was a contractual agreement by the parties at that stage to use the MW form and bind themselves to the MW terms. Goldsworthy's case on offer and acceptance was that the relevant offer was their quotation in February 2013 and the contractual acceptance was an instruction to commence works in its email of 28 March 2013. But that offer was made against the invitation in the email of 4 January 2013, which expressly referred to the need to fill in a MW contract. However, as the Judge made clear, without knowing what was said between the parties in March 2013, and this was only a summary judgment application, he could not make a definitive finding that the email of 28 March 2013 concluded a contract for the carrying out of the full works on MW terms. Neither the fact that the certificates referred to the "*correct*" MW clauses, nor that the parties agreed terms of payment inconsistent with the MW terms and that they made no agreement on completion date and liquidated damages, established conclusively that the MW terms did not apply. The position was simply not clear.

The problem for the Judge was that in all the circumstances, without fuller evidence from both sides, in particular of the discussions lying behind the emails, he found it impossible to say whether the parties did or did not reach a stage where they agreed with contractual effect to the application of the Minor Works terms, with gaps where particular options were not filled in or agreed. Given that it could not be confidently decided without the full evidential picture, he was not in a position to grant summary judgment to the claimants for enforcement of the adjudicator's decision. However, the Judge concluded:

"I reach this conclusion with a degree of regret. So far as the present evidence goes, the reasons given by the defendants for not paying the claimants' invoices do not appear to justify particularly large reductions, and it is common ground that there is an outstanding balance due to the claimants in respect of the works. In theory the next step would be to proceed to a full trial of the issue of whether the parties' contract included the adjudication clause. Such a trial would determine only the enforceability of the adjudicator's decision. It would not finally determine how much money is owing from the defendants to the claimants in respect of the works. The parties may take the view that a better course, to avoid the risk of legal costs escalating on both sides in a manner disproportionate to the amount truly in dispute, would be to sit down and arrive at a fair figure for payment to resolve all their differences."

Costs: conduct, refusal to engage in settlement talks

Kupeli & Others v Kibris Turk Hava Yollari and Anr
[2016] EWHC 1478 (QB)

There were two issues before Mrs Justice Whipple: who was the successful party and should the successful party's costs be discounted or reduced in some way to reflect their conduct? In terms of who won, the Judge adopted the approach of looking at who had to write the cheque at the end of the case. Here, it was the defendants ("*Atlasjet*") who had to pay money to the claimants. So the starting point for the Judge's decision on costs was that Atlasjet should pay the costs. However, the claimants had lost a number of issues. The Judge then turned to conduct. Atlasjet had resisted all early attempts at discussion or negotiation in this case. The Judge said that this was a case "*crying out for some sensible attempt at negotiation before costs racked up and the parties' attitudes hardened*".

However, Atlasjet did not answer the claimants' pre-action protocol letter, giving the claimants no option but to serve proceedings. The claimants sent a Calderbank offer, which turned out to be too high, but was at least "*some attempt at settlement*". Atlasjet refused the offer and made no counter-offer. The Judge said that even if the case could not be settled, an early meeting would "*surely have focussed the minds of those involved, and is likely to have led at least to some narrowing of issues, which would in the end have saved costs*". Mrs Justice Whipple continued:

"there is a world of difference between a case which comes to trial after reasonable efforts at settlement have been made but settlement has proved impossible, and a case where one party has simply refused to engage, preferring to take the view that it will see its opponents in Court. This is the latter type of case. That attitude inevitably gets weighed in the balance when it comes to costs, if that party fails."

The Judge decided to award the claimants a percentage (33%) of their costs. This avoided the prospect of continuing disputes over costs which might go on for months or years. The Judge also wanted to try and avoid "*the spectre*" of what she considered to be an "*undesirable and unfair outcome*", namely of the claimants' overall win being eradicated (in effect) by the defendants' costs attributable to particular issues. It was better to determine the end position on costs now, once and for all.

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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