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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.

Contract formation: acceptance by conduct

Reveille Independent LLC v Anotech International (UK) Ltd

[2015] EWHC 726 (Comm)

The question for HHJ Mackie QC was whether a binding contract had been formed. The key part of the Contract was this:

"This Merchandising Deal Memo shall not be binding on Reveille until executed by both [the Defendant] and Reveille."

The Judge did not consider that Reveille could prove that the Contract was signed by them. Reveille had apparently lost the original document and never sent a signed copy to Anotech. Therefore the question to be resolved was whether there had been acceptance by conduct. The Judge noted that Anotech would not be bound by the Contract until Reveille's acceptance of it was communicated. Here, this was not a "mere formality" given that the document in question contained Anotech's manuscript formulation of one of the key terms.

One reason for having a clause requiring that Reveille communicate acceptance by signing and returning the document was to remove the uncertainty which otherwise might arise and in fact had arisen here. For acceptance to have been validly communicated by conduct, the evidence must be clear and, when considered as a whole and in context, unequivocal.

The position of Anotech was that given the clear language in the Contract, it was difficult to see how anything done by Reveille could be seen as an unequivocal representation that the Contract had become binding. No conduct could "trump the fact" that the Contract had not been signed and returned.

It was correct to say that both parties had already taken a number of steps in anticipation of a deal being done because of time pressure generated by the start of filming. However, there was no suggestion by either party that a binding contract had been entered into as a result, despite the fact that a draft contract was then under discussion.

The first issue related to the integration of products (or product placement) supplied by Anotech into episodes of *MasterChef US*. Here Reveille gave detailed evidence that this was done and this was accepted by the Judge. The complaints raised in evidence during the case about the integration were not made at the time. In terms of licensing and marketing, Anotech was both given the right to use, and did/or attempted to use, Reveille's intellectual property.

The Judge thought that it was "overwhelmingly clear" that the work envisaged by the Contract was carried out by the parties. However the Judge also cautioned that that did not of itself mean that there was acceptance by conduct, albeit it went a long way to demonstrating it.

Reveille pointed to the fact that Anotech had agreed to arrange payment of its invoices. Why would it do so, if it did not consider itself bound by the Contract? The Judge noted that the parties did preparatory work before any contract could have come into effect because they judged that terms would in time be reached. They thus recognised that at least some work might be done without the parties entering into a contract. After Anotech signed the Contract, it must, in the view of the Judge, have recognised that the deal was there or almost so. The negotiation of a long form agreement was envisaged by the Contract in question. It does not follow that negotiation of those terms (which were, as it happened, never entered into) was a step inconsistent with acceptance by conduct of the Contract.

The Judge thought that it was "significant" that Anotech acknowledged the existence of a binding commitment by agreeing to pay invoices raised on the basis of the Contract. In the view of the Judge, Reveille communicated its acceptance by conduct and Anotech recognised this when acknowledging its obligation to pay. The Judge said:

"What more powerful evidence ... could there be?"

HHJ Mackie QC concluded his judgment by noting, that as he had found that there was a contract, it was not necessary to consider alternative remedies, such as quantum meruit. He noted that in fact, it seemed inevitable that had Reveille lacked a contractual remedy, it would have succeeded on one of these alternative grounds.

Insolvency, arbitration and adjudication

Philpott & Anr (as joint liquidators of WGL Realisations 2010 Ltd) v Lycee Francais Charles de Gaulle School

[2015] EWCA 1065 (Ch)

HHJ Purle had to consider an application for directions by liquidators of WGL, a company which was involved in a construction project for the School under a JCT Intermediate Building Contract (with Contractor's Design) 2005 as amended. A dispute had arisen as to who owed money to whom, and the court was asked to decide the correct forum for resolving that dispute. According to the liquidators, around £615k was due to WGL, and according to the School, £270k was due to them.

The School had formally put in a proof of debt for its £270k, which the liquidators had yet to accept or reject. There was a final certificate, which was under challenge but which was said to be very much in the School's favour. There was an arbitration clause in the contract and also provision for adjudication.

The School said that the arbitration clause was binding and continued to apply after an administration and liquidation. As this was a voluntary liquidation arbitration proceedings could be commenced, though they would be vulnerable to an application for a stay under Section 9 of the 1996 Arbitration Act.

The liquidators said that they could not decide whether to accept or reject the proof until the account referred to in Rule 4.90 of the Insolvency Rules had taken place. Put another way, the account referred to in Rule 4.90 cannot take place until the underlying dispute has been resolved. The issue before the Judge was how that dispute should be resolved. Rule 4.90 is silent as to what procedure is to be adopted for the purpose of the taking of the account.

The Judge noted that an adjudication, which was one of the suggested ways forward, was an "available process". However, he said that the decision as to whether or not to pursue the adjudication was one of "commercial judgment". In particular the Judge had in mind the fact that it would only be, at most, of temporary effect, and so would not determine the account which is contemplated under Rule 4.90.

That left section 9 of the 1996 Arbitration Act. Sub-clause 4 notes that the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

The School submitted that whichever form of court proceedings the liquidators choose (outside of arbitration proceedings) to establish the balance of the account between the parties, those proceedings must be stayed.

The Judge noted that:

"I wish I could share the optimism that arbitration is as speedy as … experience suggests. It is certainly not cheap, as figures showing the estimated cost of arbitration proceedings demonstrate in this case. However, if the resolution of the underlying dispute is to be left to the taking of an account under directions given in the context of an appeal from the rejection of a proof of debt, that also could potentially be an expensive process, and I cannot believe it would be any speedier than arbitration."

However, the real issue was whether, if the liquidators wished to adopt alternative and, they say, more economical procedures, the Arbitration Act 1996 "trumped" the taking of an account under the court's directions, as envisaged by the Insolvency Rules. The Judge ruled that it did. Parliament had chosen to strengthen the impact of arbitration clauses, and the facts of this case did not come within any of the limited statutory exceptions. Therefore, any legal proceedings which the liquidators wished to take in order to ascertain the net balance would come up against the obstacle of section 9, which, if invoked by the School, as it had indicated it would, would have to be enforced.

Public procurement: bringing a claim within 30 days

ROL Testing Ltd v Northern Ireland Water

[2015] NIQB 10

Under the public contracts regulations, proceedings must be started within 30 days of the date when the economic operator or tenderer first knew or ought to have known that grounds for starting them had arisen. Whilst most procurement cases involve challenges made after the decision to award the contract is made and so after the tenderer has been informed of the reasons why its bid has not been selected, sometimes claims must be brought whilst the tender procedure is ongoing.

Horner J said that in the circumstances, ROL acted prudently to protect its position in bringing the challenge while the tendering process was ongoing. He also considered that in looking at the constructive knowledge that ROL should have possessed, a court must approach the subject on the basis of the knowledge of a "reasonably well-informed and normally diligent tenderer". The issue here was that it was said that the ITN (or intention to negotiate) process was flawed in that tenderers (and especially those who were not incumbents) could not price their tenders accurately.

The ITN documents were sent out on 30 May 2014; the claim form was issued on 4 July 2014. The Judge thought that it would have been reasonable to study the documents over the weekend. He also, noting in particular the difficulty both parties had had explaining why the ITN was either flawed or not defective, had no hesitation in concluding that it was reasonable for ROL to bring in outside expert assistance to help it in understanding how the tender should work and with its completion. The Judge thought it reasonable to give the expert accountants until 4 June to consider all the tender documents and to organise a meeting. He thought it reasonable to give the accountants two days to consider the ITN and inform ROL of their conclusions. They actually did so on 9 June 2014.

On balance, therefore, the Judge thought that the well-informed and diligent tenderer would have acquired the necessary knowledge from its accountants which would have allowed it to conclude that there was clear indication of an infringement between 4 and 6 June. The Claim was accordingly just issued in time.

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Edited by Jeremy Glover, Partner, Fenwick Elliott LLP
jglover@fenwickelliott.com
Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN

www.fenwickelliott.com