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The construction & energy law specialists

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

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Dispatch

Was there a binding contract?

Endcape Ltd v Musgrave Generators Ltd

[2022] EWHC 2972 (Ch)

Endcape made a claim for damages alleging breaches of contract and trespass. One of the issues was whether or not there were two complete or legally binding contracts. The Judge referred to the following three principles:

(1) If parties reach an agreement on essential matters of principle but leave important points unsettled so that their agreement is incomplete, it is not binding.
(2) Where parties have agreed simply to negotiate, that is not a binding contract because it is too uncertain.
(3) Where an agreement fails to satisfy the requirements of certainty, that defect cannot be cured by implying a term that the parties must continue to negotiate in good faith.

When assessing the witness evidence, the Judge noted that an honest witness can nonetheless be a mistaken witness. Here, one of the claimant's witnesses was described as an honest witness albeit one whose memory failed them on occasions. The Judge considered that the witness was plainly doing their best to recall all of the various matters in dispute; however, he accept that his memory was not accurate or consistent on all aspects of the claim. In addition, their recollection was supported by significant amounts of contemporaneous documentation.
A second of the claimant's witnesses was "plainly angry and irritated when giving" evidence about what had happened. They were, however, consistent in their recollection about events and acknowledged when they simply could not recall specific details.

On the other hand, the evidence of the key defence witness was not accepted, and the Judge said that it was: "not credible that [the witness was] as forgetful as he contends. Alternatively, if he is that forgetful, it is not credible that a businessman ... would not ensure that events concerning contracts and other important matters were recorded in writing at the time."

That all said, in relation to the first contract, the Judge held that there was not an agreement as alleged. The evidence of the Claimant was not adequate to establish, on the balance of probabilities, that there was a concluded agreement. The key witness did not contend for an agreement as was pleaded, either in their written evidence or oral evidence. The position expressed was inconsistent with the pleaded case. The result was an absence of any degree of consistency as to what the asserted the terms were.

However, with the second contract, the Judge did find that there was a valid agreement. It was a simple oral agreement but nonetheless one which was concluded and enforceable. All of the contemporaneous correspondence went to support the claims of the Claimant. There was "literally nothing" in that documentation to support the Defendant's position. As a final point, the Judge noted that, in pre-action correspondence, the existence of the agreement now denied by the Defendant was conceded by the Defendant's then solicitors.

Part 36 Offers to Settle

Coldunell Ltd v Hotel Management International Ltd I

[2022] EWHC 3084 (TCC)

The main issue here was whether or not there was a valid Claimant's Part 36 Offer to Settle and, if so, what the consequences would be.

HMI, the unsuccessful Defendant, said that the Offer was not valid because it did not sufficiently and clearly define the claim to be settled. The Judge noted that, if HMI had been in any doubt as to the scope of the Offer at the time, the Judge would expect it to have sought clarification. It did not. HMI also said that the Offer was not properly served, because it was served by email, when HMI's solicitors had not consented to documents being served by email. As the service was not valid, there was no valid Part 36 Offer. Coldunell accepted that the Offer had not been validly served.

However, it was suggested that the failure to comply with the rule as to service did not, of itself, invalidate the making of a Part 36 offer unless the Court so ordered having taken all the relevant circumstances into account. These circumstances included that the Offer was emailed to the solicitor with the conduct of HMI's case throughout these proceedings, including pre-action, and the person who corresponded with Coldunell's solicitor by email throughout and that the solicitor expressly rejected the offer in a conversation with Coldunell's solicitor. The Judge noted that:

"The key purpose of service of a Part 36 Offer is that the date from which time starts to run for acceptance of the offer, and the assessment of its consequences, should be fixed as well as the obvious need for the offer to have been brought to the offeree's attention. On the facts of the present case, there is no question that the ... Offer was communicated to the Defendant ... To that falls to be added that there is no question of the Defendant being prejudiced by the fact that the ... Offer was sent by email rather than by post ... to invalidate the ... Offer on the basis of defective service would be a "triumph of form over substance".

Finally, HMI said it would be unjust to give Coldunell the benefit of Part 36 for a number of reasons, including that it unreasonably refused a second mediation and that some 40% of the value of the claim abandoned shortly before trial.
The usual consequences of a successful Part 36 Offer to Settle is that, unless the Court considers that is unjust to do so, a Claimant is entitled to:

(i) Interest at up to 10% above base rate on the amount of money awarded (excluding interest) from the expiry of the "relevant period";
(ii) Indemnity costs from the end of the relevant period;
(iii) Interest on those costs at a rate not exceeding 10% above base rate; and
(iv) An additional amount capped at £75,000 being 10% of the first £500,000 awarded and (subject to the cap) 5% of any amount above that.

The Judge noted that they were mindful of the fact that there was reason to believe that HMI was aware at the time that the Offer had not been properly served and was keeping that fact "up its sleeve" (so to speak). The Judge said that, if HMI believed that the Offer was defective: "it ought, in the spirit of co-operation which would enable Parties to settle their disputes and taking into account that the purpose of Part 36 is to promote settlement, to have raised that with the Claimant at the time rather than merely not admitting the validity of the offer as a Part 36 Offer."

Further, the Judge did not consider that it was unreasonable to have declined a second mediation. There had been an earlier mediation a matter of months earlier which had failed. The possibility of a second mediation was apparently raised by HMI's solicitors without instructions. It was also clear from the three offers made by Coldunell that it was doing everything it could to settle its claim at substantially less than it appeared to be worth at the time. It was difficult to see what more could have been achieved through a second mediation that could not be achieved through these offers.

However, Coldunell abandoned £400k of its pleaded claim shortly before trial. HMI said that, had these concessions been made earlier, as they ought to have been, costs would not have been wasted in preparing to meet the abandoned claims. The Judge agreed that there was force in that submission, which went to the question of the extent to which Coldunell was entitled to the full extent of the consequences of a successful Part 36 Offer to Settle.

The Judge noted that it was "well settled" that the purpose of the Part 36 regime was to encourage settlement and reduce costs. An order applying the consequences of failing to beat a Part 36 Offer to Settle was not intended to be purely compensatory. The Court rules provide for interest at a rate "not exceeding" 10%. Coldunell suggested 10%; HMI 2-4%. The Judge referred to guidance as to determining the applicable rate provided by Sir Geoffrey Vos in the case of OMV Petrom SA:

"In my judgment, the use of the word 'penal' to describe the award of enhanced interest under CPR r 36.14(3)(a) is probably unhelpful. The court undoubtedly has a discretion to include a non-compensatory element to the award ..., but the level of interest awarded must be proportionate to the circumstances of the case. I accept that those circumstances may include, for example, (a) the length of time that elapsed between the deadline for accepting the offer and judgment, (b) whether the defendant took entirely bad points or whether it had behaved reasonably in continuing the litigation, despite the offer, to pursue its defence, and (c) what general level of disruption can be seen, without a detailed inquiry, to have been caused to the claimant as a result of the refusal to negotiate or to accept the Part 36 offer."

Here, one factor the Judge took into account was the fact that HMI's expert quantity surveyor's evidence was so partisan and so poor that the Judge was unable to rely on any of it. As a result, HMI made several bad points at trial. This "misguided approach" was likely to have significantly contributed to the costs that were incurred by both parties and HMI's failure to properly assess the merits of its defence. (See *Dispatch 265* for further details.)

Further, HMI did not engage "constructively in the settlement process", refusing to accept the validity of the Part 36 Offers without explanation and withdrawing its own offers of settlement. On the other hand, HMI will have incurred some costs in defending aspects of the case that were abandoned shortly before trial. Applying an interest rate of 10% is clearly the maximum and not the starting point. Finally, it was also relevant to keep in mind that interest rates were low during the relevant period.

This led the Judge to conclude that an enhanced rate of interest was appropriate, and that rate should be 5% per annum to be paid by HMI on the judgment sum. The same rate would apply to Coldunell's costs. Further, it was appropriate for HMI to pay costs on an indemnity basis as a consequence of not having accepted the Offer.

This left the payment of an additional sum. The maximum figure here was £54,856 on the basis of the judgment sum of £597,117. Coldunell accepted, and the Judge agreed, that the amount of the additional sum was discretionary. As this was not a case of fraud of where the defence was dishonestly maintained, this was not a case which would justify an award of the maximum additional sum.

However, an award of an additional sum was appropriate since HMI ought plainly to have accepted the Offer. The Judge took into account the expert quantity surveying evidence and that almost everything was denied by HMI.

Furthermore, Coldunell's Offer was "heavily beaten" in the sense that judgment was obtained in the sum of £597,117 against an offer of £495,000 and an even lower subsequent offer of £380,000. Both offers were made prior to proceedings being commenced that, had either of them been accepted, "as they ought to have been", would have saved the parties considerable time and money. Taking everything into account, the Judge made an award of 60% of the maximum amount, an additional sum of £32,914.

Finally, Coldunell was awarded its costs of the hearing about the validity and consequences of their offer.

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