Fenwick Elliott
The construction & energy law specialists

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Welcome to the June 2016 edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

This issue examines six recent court decisions all of which look at how we interpret contracts, and considers what can be learnt from them in practice.

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Contract practice points over the past nine months

The key to resolving most disputes often lies in establishing what the contract between the parties means. As a result there is a steady stream of cases which come before the courts. This month's *Insight* reviews six of the more interesting.

The incorporation of standard terms

Am I bound by another party's standard terms and conditions, even if they have not sent me a copy?

Quite possibly, yes. Provided the contract documents make reference to them being included.

Barrier Ltd v Redhall Marine Ltd [2016] EWHC 381 (QB)

It can sometimes happen that when parties are negotiating contracts (or maybe exchanging purchase orders which may or may not have standard terms printed on the back), a contract is formed where one party has not seen a copy of all the documents which are said to make up the contract in question. In those circumstances will the "*missing document*" form part of the contract terms?

This issue came before Judge Behrens QC in a case about the painting of submarines. The Purchase Order included the words:

"The terms overleaf must be read and strictly adhered to."

Those terms were Redhall's standard Terms and Conditions. The purchase order did not include the conditions overleaf. Redhall said that the conditions were part of a standard form contract which had been communicated to Barrier. Redhall further said that Barrier did not need to have read the conditions in order to be bound by them. It was sufficient that they had been drawn to Barrier's attention. Redhall made the following three points:[1]

(i) If the person receiving the document did not know that there was writing or printing on it, he is not bound;

(ii) If he knew that the writing or printing contained or referred to conditions, he is bound;

(iii) If the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them.

It was not necessary for the conditions to be set out in the document provided as the time of tender. They can be incorporated by reference, provided that reasonable notice of them has been given. HHJ Behrens agreed, noting that assuming that the purchase order sent to Barrier had no conditions on the back and that for some unexplained reason the wrong copy was sent or given to Barrier:

"a reasonable person reading clause 10 of the subcontract would have no doubt that CIL's standard terms were incorporated. The fact that they were not on the back of the purchase order does not affect this. ***It would, at all times have been open to Barrier to request a copy of the terms if they had wanted to."*** [emphasis added]

Practice point

During contract negotiations, where a document is clearly missing, the sensible course of action is to request a copy rather than find that you are bound by something you were unaware of when a dispute arises.

Agreeing your contract

Can email exchanges be sufficient to constitute a binding contract?

Yes.

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Mi-Space (UK) Ltd v Bridgewater Civil Engineering Ltd [2015] EWHC 3360 (TCC)

Sometimes parties to construction contracts are not very clear on what they have or have not agreed which can lead to a number of difficulties. Here, the parties, were in dispute over an interim payment which had led to the defendant suspending works. The Judge Mr Justice Edwards-Stuart identified the following events:

(i) Settlement discussions took place via email with Mi-Space making an offer to Bridgwater to make an interim payment if Bridgwater withdrew its claim relative to the interim application and restarted works;

(ii) The defendant agreed, payment was made and the works restarted;

(iii) Whilst the emails were marked "*without prejudice*", the tag was removed in the final email exchange, as Mi-Space put it "*to allow you to formally accept*";

(iv) Mi-Space sent a contract to Bridgwater to formalise the agreement they had reached by email but Bridgwater refused to sign, claiming that the agreement in the email chain was "*subject to contract*" and not binding on the parties;

(v) The dispute was referred to adjudication and the adjudicator held that as Mi-Space had failed to serve a payment notice in time, Bridgewater were entitled to be paid the amount claimed;

(vi) Mi-Space failed to pay the sum so Bridgwater started proceedings to enforce the adjudicator's decision. In response, Mi-Space filed an application for a declaration, again claiming the email exchange constituted settlement. The Judge agreed with Mi-Space on the basis that there was a *"clear and properly recorded"* offer and acceptance in the email chain.

Mr Justice Edwards-Stuart said that "*issues such as this are notoriously fact-specific*" and that whether or not parties will be bound by agreements reached during the course of informal negotiations will always be dependent on the relevant circumstantial evidence. The Judge cited the Court of Appeal decision in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH*,[2] where Lord Clarke had said:

"Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential…"

Importantly, the Judge readily dismissed the idea that a more "*formal*" method of agreement was required. Mr Justice Edwards-Stuart said that "*formal acceptance*" means "*an acceptance that it is clear and properly recorded*". In the present scenario, the Judge said there is:

"*no reason why a clear acceptance communicated by e-mail would not be sufficient because the existence of the e-mail would be a matter of record*".

Mr Justice Edwards-Stuart said that he:

"would not have had the slightest hesitation in holding that the e-mail from Mr Caddick … was an unequivocal and sufficiently formal acceptance of the offer made in Mr Acheson's e-mail …"

Practice points

Parties should be clear and precise on the exact terms of any settlement, otherwise they may find themselves bound by an agreement they never intended;

The Court will strive to give effect to a bargain freely entered into, especially in business-to-business relations;

Parties should be careful about the usage of *"without prejudice"* and "*subject to contract*" as such phrases will make a real difference, even if they are not always determinative as to whether the parties are bound.

Emails are now considered just as binding and effective legally as other forms of communication;

The Court will not permit parties to avoid liability merely because their agreement may have been communicated over email rather than through a supposedly more "*formal*" method of communication;

Parties should therefore take care to consider in what other ways they are communicating with those they work with. Text messages, LinkedIn, WhatsApp may be far less formal than email, but that may not stop binding agreements coming into being.

Who is your contract with?

Fairhurst Developments Ltd & Anor v Collins & Anor [2016] EWHC 199 (TCC)

Here, Mr Collins, the owner of a residential development site near Chester, entered into an oral agreement with Mr Fairhurst in the nature of a joint venture for the construction and sale of a new residential property (the "*Project*").

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When disputes arose, a central issue was whether Mr Collins had entered into a contract with Fairhurst Developments Ltd ("FDL") or Mr Fairhurst, who wholly owned and controlled FDL.

FDL was described as "*effectively a one-man company*", that man being Mark Fairhurst. Mr Fairhurst, the managing director and sole shareholder, ran the business but did not do the building; he delegated the building work to subcontractors. The question as to who the contract was between might seem a surprising one, as FDL carried out the works by ordering and paying for almost all of the plant and materials. FDL also obtained finance from Barclays Bank to pay for the works and reclaimed the VAT on the supplies. Further, Mr Collins made payments through his company by bank transfer and cheque, to FDL.

Despite this, Mr Collins argued that the development agreement was entered into with Mr Fairhurst personally and not with FDL. Mr Fairhurst did not conduct all of his development projects through FDL. For example, Mr Collins was aware of a further development undertaken by Mr Fairhurst himself and not through FDL. Davies J, in reaching his decision regarding the identity of the contracting party, referred to the comments of Jackson LJ in *Hamid v Francis Bradshaw Partnership*:[3]

(i) Private thoughts by the parties are irrelevant and inadmissible to the dispute;

(ii) An objective approach to the question of "*what a reasonable person, furnished with all the relevant information in the period leading up to the formation of the contract, would conclude*" was important; and

(iii) The individual who signed the contract is the contracting party unless it is made clear in the document or by extrinsic evidence that he is signing as officer of a company. Extrinsic evidence may be admitted to establish the correct identity of a party when the contract is written or part written.

Of course, here there was no written contract, but the fact that there was an oral agreement was no reason to depart from such an approach. The evidence showed that whilst Mr Collins was aware that Mr Fairhurst did have a limited company, there was no evidence that it was FDL. Further, although the Project was through a joint venture agreement between two men who knew each other reasonably well, Davies J considered that it did not seem to have been self-evident to Mr Collins that Mr Fairhurst could only have been entering into the transaction on behalf of his company.

Mr Fairhurst never made it clear that he was acting on behalf of any limited company at all, let alone on behalf of FDL. It was quite possible that Mr Fairhurst was entering into the agreement personally (and obtaining the profit personally) but planning to subcontract the building works to his limited company and so reclaim the VAT that way. Thus, the real contracting parties were Mr Collins and Mr Fairhurst.

Practice point

When dealing with an individual, unless it is made clear prior to contract execution and/or formation that that individual is acting as officer of a company, then your contract will be with the individual whose words and actions resulted in the contract being formed.

Using deleted words to resolve an ambiguity in your contract

Narandas-Girdhar v Bradstock [2016] EWCA Civ 88

Generally, the court cannot refer to words that have been deleted from a contract when interpreting that contract, unless the fact of deletion shows what the parties had agreed they did not agree, and there is ambiguity in the words that remain.

The issue of the use of deleted provisions as an aid to the construction of ambiguous language recently came before the Court of Appeal in the *Narandas-Girdhar* case. The Claimant/Appellant, a debtor, had agreed to enter into an individual voluntary arrangement ("*IVA*") conditional on the approval of a similar IVA for his wife. Prior to the creditors' meeting, however, modifications were made to the IVA, including the deletion of that condition precedent. The modified IVA was accepted by the creditors, and when the Claimant's wife sought to enter into an IVA, her proposal was rejected by her creditors.

The modified IVA later failed, and the Claimant sought to have it set aside on a number of grounds, including that it had always been conditional on the acceptance of his wife's IVA. At first instance, the High Court held that it was entitled to pay regard to the words deleted from the original IVA in order to establish the purpose of the modification, and determined that the modified IVA was not conditional on an IVA for the Claimant's wife being approved by her creditors. The application was therefore refused.

The Claimant appealed, arguing that once parties to a contractual negotiation agreed to remove and replace certain provisions of a draft contract, those deleted provisions cannot be taken into account by the

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court for the purposes of interpretation of the contract. The Judge at first instance had, it was said by the now Appellant, proceeded on the incorrect assumption that he was entitled to have regard to what was removed by the modification in arriving at a conclusion about its purpose.

In approving the judgment in the case of *Mopani Copper Mines plc v Millennium Underwriting Ltd*,[4] the Court of Appeal dismissed the appeal. As had been stated in *Mopani*:

"the deletion of words in a contractual document may be taken into account, for what (if anything) it is worth, if the fact of deletion shows what it is the parties agreed that they did not agree and there is ambiguity in the words that remain." [5]

Practice point

When negotiating the terms of a contract, it should always be borne in mind that provisions which are deleted by the parties may later be taken into account by the court when interpreting ambiguities in the remaining words in the contract.

Acceptance by conduct: an unsigned contract can still bind the parties

Reveille Independent LLC v Anotech International UK Ltd [2016] EWCA Civ 443

Here, the Court of Appeal considered whether a contract containing a requirement for signature by both parties, had nevertheless come into being without having been signed by both parties. The claimant television company Reveille entered into negotiations with a distributor of cookware, Anotech, with the aim of licensing the MasterChef US brand and promoting Anotech's products in three episodes of the television series *MasterChef*.

Reveille sent a "*Deal Memo*" to Anotech which expressly stated that it would not be binding on Reveille until Reveille signed. The term was as follows:

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

Anotech signed a version of the Deal Memorandum with a handwritten amendment "*Branding Conflict with Gordon Ramsay to be concluded*" and other "*minor amendments*". The Deal Memorandum was intended to eventually be replaced by detailed long-form agreements, which the parties were to negotiate. Anotech showed its products at the Chicago homeware show using the *MasterChef* brand and Reveille swapped Anotech's products into the production of the television episodes of *MasterChef US*. Reveille sent invoices to Anotech's managing director who accepted by email that the amounts were due.

Anotech subsequently refused to make the payments specified in the Deal Memorandum and Reveille sued for the debt. The Court had to decide whether the parties had by their conduct signified their acceptance of the amended Deal Memo so as to waive the requirement for signatures, and to give rise to a binding agreement.

Judge Mackie QC at first instance had held that by March 2011 the parties were performing their obligations under the Deal Memo, such that terms of the Deal Memo had been accepted by conduct, despite the fact that Reveille had never signed them. The Court of Appeal agreed and in dismissing the appeal listed the following six propositions:

(i) acceptance can be by conduct provided that, viewed objectively, it is intended to constitute acceptance;

(ii) acceptance can be of an offer on the terms set out in a draft agreement but never signed;

(iii) if a party has a right to sign a contract before being bound, it is open to it by clear and unequivocal words or conduct to waive the requirement and to conclude the contract without insisting on signature;

(iv) if signature is the prescribed mode of acceptance, the offeror will be bound if it waives that requirement and acquiesces in a different mode of acceptance;

(v) a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly; and

(vi) the subsequent conduct of the parties is admissible to prove the existence of a contract and its terms, although not as an aid to interpretation.

Practice points

The case is a reminder of the importance of ensuring all parties have signed the contract before any substantive work is commenced; anything less is a recipe for uncertainty.

The more substantial and long-running the work is, the harder it will be to resist the conclusion that the parties are bound.

The conduct of the parties may result in a binding contract, even where the contract sets out formal requirements

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to be complied with, such as signature of both parties.

Anti-oral variation clauses

If my contract says that any amendment must be signed before it can come into effect, can I be bound by an amendment which is only oral?

Potentially, yes.

Globe Motors Inc and others v TRW Lucas Variety Electric Steering Ltd and another [2016] EWCA Civ 936

Anti-oral variation clauses are traditionally inserted into construction contracts to stop the parties agreeing to changes orally, instead forcing them to make any binding change in writing. This prevents alterations occurring without consideration of the consequences by both parties and creates certainty within the contract. In the Globe case, the Court of Appeal considered the precise effect of such a clause.

The anti-variation clause in question stated:

"[The Contract] 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."

TRW Lucas argued that the Contract had been unlawfully varied to include Porto (Globe's subsidiary) without adhering to the above clause and the need to formally vary through writing. Globe, on the other hand, argued that it had been orally varied and impliedly agreed through the conduct of the parties.

Beatson LJ considered the conflicting case law of *United Bank v Asif*[6] and *World Online Telecom v I-Way*.[7] United Bank held that an oral amendment which was not a written and signed agreement was void and unenforceable, whereas *World Online* held that changes can be made by oral variation and through the conduct of the parties. He came to the conclusion that *World Online* was the preferred approach to take, stating that it:

"recognised in principle a contract containing a clause that any variation of it can be varied by oral agreement or conduct".[8]

In reaching this decision, albeit obiter, the Court of Appeal held that the autonomy of the parties to vary the contract was the most important principle and, despite the desirability of all changes to be made in writing, there was no *"doctrinally satisfactory way"* of obtaining this aim.

Parties should be aware, however, that this case does not make anti-oral variation clauses redundant.

This type of clause will be considered in the context of any changes that are alleged. The party relying on the oral variation has to prove its case and this can be quite challenging, all the more so when there is an anti-oral variation clause.

Practice point

Anti-variation clauses should continue to be used in contracts where the parties wish to avoid oral amendments. They are an important aid to contractual certainty. Should such a change occur (either orally or through conduct) it would be prudent to obtain some sort of agreement in writing to avoid any disputes at a later date.

Footnotes

1. Taken from Chitty on Contracts, 32nd edn, at 13-013
2. [2010] 1 WLR 753
3. [2013] EWCA Civ 470
4. [2008] EWHC 1331
5. [2008] EWHC 1331 at para. 120.
6. (Unreported, 2000)
7. [2002] EWCA Civ 413
8. Globe Motors Inc v TRW Lucas Variety Electric Steering Limited [2002] para [113]

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Jeremy Glover.
jglover@fenwickelliott.com.
Tel +44 (0) 207 421 1986

Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN
www.fenwickelliott.com