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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: battle of the forms

Trebor Bassett Holdings Ltd & Anr v ADT Fire & Security
[2011] EWHC 193 (TCC)

This case arose out of a fire which destroyed a large confectionery factory. ADT had been engaged to provide the fire protection system. Many different issues arose, the first of which was on whose terms and conditions the parties had contracted. This "battle of the forms" is fairly common, albeit here the stakes were rather high. ADT's conditions purported to limit liability to just under £14,000 as opposed to Trebor's claim for approximately £110million. In these circumstances, the approach of the court will typically be this:

(i) the test is objective, albeit that the court must take into account the factual matrix – i.e. what actually happened;
(ii) Usually, a contract is formed once the last set of forms is sent and no objection is taken. The "last shot" prevails.;
(iii) acceptance by conduct can be inferred, although conduct will amount to acceptance only if it is clear that the party intended to accept the terms. Acceptance of a delivery of itself may not be enough;
(iv) where the parties have not agreed which set of standard terms applies, then the only inference that can be drawn is that the agreement was made on the basis that neither set of standard terms would apply;

Here, Mr. Justice Coulson suggested that care needed to be taken with the notion that the critical act may be the firing of the last shot. He referred to a CA decision, *Tekdata Interconnections Ltd v Amphenol Ltd*. Here, the sellers quoted on their terms, the buyers sent a purchase order which stated that the purchase was on their terms but when the sellers acknowledged that order, they repeated that their own terms applied. The Judge at first instance said that whilst the traditional view would be that the acknowledgement was the last shot, it appeared that the parties intended that the buyers' terms should apply. There was a commercial history of the parties contracting on the buyers' terms. The CA disagreed. Where there is a battle of forms, the traditional analysis had to be adopted unless the parties' previous conduct clearly showed a common intention that other terms were intended to prevail. Dyson LJ said:

"The rules which govern the formation of contracts have been long established and they are grounded in the concepts of offer and acceptance. So long as that continues to be the case, it seems to me that the general rule should be that the traditional offer and acceptance analysis is to be applied in battle of the forms cases. That has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships."

This all mattered here because Trebor argued that there was a previous course of dealing between the parties which incorporated their own terms and conditions. The principal problem with this argument was that none of the witnesses of fact were able to demonstrate that such previous contracts had been agreed on that basis. The fact that ADT had been given a "vendor number" meant merely that ADT had entered into contracts with Trebor before, not that they had necessarily expressly previously agreed to the terms and conditions.

The relevant specific background to the contract was that Trebor wanted to move their 'oil pop' popcorn production lines. Those production lines were protected by a CO2 suppression system. Unless Trebor were specifically advised, either by the specialist fire prevention contractor or their own Group Risk Department, that a CO2 suppression system was inappropriate in all the circumstances, they were going to replicate the CO2 system at their existing plant in the new facility. So Trebor had decided on a CO2 suppression system before making any contact with ADT. Although ADT was provided with very little information on which to quote, it was invited to quote for this work because they were the suppliers of the fire systems at Monkhill. And so:

(i) On 28 August 2003, ADT sent Trebor a quotation on its terms and conditions.;
(ii) On 3 September 2003, Trebor sent to ADT a purchase order which was based on their own terms and conditions;
(iii) Work commenced; and
(iii)) On 17 September 2003, ADT produced an updated quotation and specification.

What was the last shot? The answer was the 3 September 2003 purchase order. Although the evidence suggested that the revised specification and covering quotation were dated 17 September 2003, there was no evidence that the documents were every received by Trebor . In addition to that, the critical work was carried out by ADT in accordance with the exchanges made at the end of August and the beginning of September. Therefore work was taking place in accordance with the 3 September 2003 purchase order. This meant that the "specification of 17 September" was immaterial, because the work was being undertaken pursuant to earlier documents. Whilst the Purchase Order accepted the quotation for work it said nothing that could be possibly construed as an acceptance of the defendant's terms and conditions. What were the terms and conditions on which the quotation was being accepted? Here there was no express agreement to be bound by ADT's terms and conditions.

ADT were not finished there. They also argued that they had received no notification of Trebor's terms and conditions. Although the Purchase Order referred to them, they were not provided, had never been seen and so could not be incorporated. The same was of course equally true of ADT's terms. However, there was reference in the Purchase Order to the terms and conditions having been "already supplied". Therefore the words on the Purchase Order would in the view of the judge not only have alerted ADT to the existence of Trebor's terms and conditions, but would have also alerted to them at least the possibility, if not the probability, that they already had those terms and conditions, because they had already contracted on them in the past. In other words, "the ball was in the defendant's court". If they did not have a copy, they should have asked for it.

Adjudication - natural justice

Carillion Utility Services Ltd v SP Power Systems Ltd [2011] CSOH 139

This dispute arose out of contracts made under a framework agreement whereby Carillion carried out certain excavation, installation and reinstatement works for SP. Carillion were awarded £2.7million by an adjudicator in respect of claims for payment for the provision of lamping and guarding of cable excavations during periods when it was waiting for SP personnel to carry out and complete cable jointing operations.

SP said that the adjudicator had failed to comply with the rules of natural justice in the method which he adopted to quantify Carillion's claim. In short, he did not adopt the method of quantification which Carillion had put forward and which SP had criticised but used his own experience of what would constitute reasonable commercial rates for the additional equipment used at the time the contract was formed.

Further, he did not give the parties an opportunity to consider and comment on his proposed methodology and the material on which it was based. In so doing he acted in breach of natural justice in a material respect. The adjudicator concluded that:

"that additional payment is due but the adoption of a multiplier which is simply the application of a number derived by dividing the actual plan perimeter of the excavated area by the theoretical plan perimeter of the standard excavation as stated in the Contract is not appropriate....I have decided therefore to evaluate the applicable charge for excavations that are larger than that specified in the Contract on the basis of my experience of what would constitute reasonable commercial rates for the additional equipment employed at the time the contract was formed..."

SP further said that this meant that the adjudicator had decided the case on undisclosed factual material and on a basis which neither party had advanced. Lord Hodge referred to the comments of Lord Drummond Young in the case of *Costain Ltd v Strathclyde Builders Ltd* who listed 9 principles of natural justice including at number 6:

"6. An adjudicator is normally given power to use his own knowledge and experience in deciding the question in dispute... If the adjudicator merely applies his own knowledge in assessing the contentions, factual and legal, made by the parties, I do not think that there is any requirement to obtain further comment. If, however, the adjudicator uses his own knowledge and experience in such a way as to advance and apply propositions of law or fact which have not been canvassed by the parties, it will normally be appropriate to make those propositions known to the parties and call for their comments."

In the Judge's view, an adjudicator should disclose to the parties information, which he has obtained from his own experience or from sources other than the parties' submissions, if that information is material to the decision which he intended to make. Whether the information is of sufficient potential importance to the decision is a question of degree which must be assessed on the facts of each case. Here, the adjudicator did not go off on a frolic of his own.

The adjudicator's task was to fix a reasonable price for the lamping and guarding of the larger excavations. He had before him Carillion's claim which he considered to be overstated but which disclosed the size of the excavations in respect of which it claimed payment. Having concluded that the perimeter multiplier overstated Carillion's claim, he was entitled to look at the sizes for which Carillion claimed and form the view from that material that on average the equipment which was needed amounted to what he stated. In doing so, he applied his knowledge and experience to assess both Carillion's claim and SP's comments on that claim. Here the adjudicator derived his reasoning from the parties' submissions rather than adopting a wholly extraneous methodology.

However, the Judge was concerned about the way in which the adjudicator had applied the commercial rates which from his experience he saw as reasonable and about which there appears to have been no evidence. There was no doubt that this was a material part of his decision. It could not be regarded as being in any way peripheral or insignificant. The Judge noted that this was an addition to a daily charge and that even a minor adjustment could have a large impact. A change of some 30% would have altered the mark up which he allowed by over £100,000. Therefore parties were entitled to know of this input into the adjudicator's reasoning and to have a chance to comment on it.

This was a breach of natural justice as the parties were entitled to have notice of the commercial rate which he proposed and the way in which the adjudicator proposed to apply it in reaching his conclusion.

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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