



# Dispatch

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

## Contract formation

### **Liberty Mercian Ltd v Cuddy Civil Engineering Ltd**

[2013] EWHC 2688 (TCC)

One of the many questions in this case was whether the contract between Liberty and the Contractor was formed in May or July 2010. Liberty relied on the witness evidence from Mr Jones about a meeting at the Contractor's offices on either the 6 or 7 May 2010 where a Mr Evans (of the Contractor) signed and initialled the contract documents. Mr Jones was of the view that an agreement had been reached on the terms of those contract documents. Mr Evans understood that Liberty agreed those terms and that the contract documents would subsequently be signed by Liberty.

Mr Jones in evidence said that there would have been an agreement if Liberty Mercian had signed and sent back the contract document, albeit he accepted that he was not aware of any terms which had not been agreed or were outstanding or of anything which had to be done for there to be a contract. Liberty also noted that the contract documents were signed by Mr Crabtree on behalf of Liberty on 11 May 2010. On this basis Liberty said that, in the alternative, the Contract was formed on 11 May 2010, even though there were minor amendments to the terms on or around 5 and 23 July 2010.

The Contractor accepted that unsigned contract documents were put forward by Mr Jones and signed by Mr Evans on 6 or 7 May 2010, and also that the contract documents were signed by Mr Crabtree on about 11 May 2010. However the Contractor said that it was not made aware that Mr Crabtree had signed the Contract on 11 May 2010 and that, in fact, Liberty was still in the process of checking and seeking approvals for the contract documents and so the version signed by Mr Crabtree was not dated or sent to it on 11 May 2010 or at all.

Indeed, the Contractor said that on 26 May 2010 when the contract documents were eventually sent to them, Mr Crabtree's and Mr Evans' signatures had been struck through and Liberty asked for a different agreement with different terms; it named a different contractor and it was to be executed as a deed and not a contract under hand. There were also changes requested to some of the terms, which led to Mr Jones sending Mr Evans five pages of the Contract on 5 July 2010 requesting that the amendments be signed, which was duly done on 5 or 6 July 2010. Further changes were then made to the identity of the Contractor which were initialled on 23 July 2010. Thus, the Contractor said that no contract was formed in May 2010 because any acceptance of the terms of the contract documents by Mr Crabtree signing it on 11 May 2010

was not communicated to them but rather those documents were sent with amended pages on 26 May 2010. It also said that the disagreement about the terms took until July 2010 to resolve. As a result the Contract was formed in July 2010 not in May 2010 but if an agreement had been formed in May 2010 it was replaced in July 2010 or varied by agreement in July 2010.

Mr Justice Ramsey found that the parties had agreed a process by which Liberty and the relevant Contractor originally intended to enter into a contract. That process involved the contract documents being signed first by the Contractor and then by Liberty shortly thereafter. At the meeting on 6 or 7 May 2010 Mr Jones provided a copy of the contract documents for Mr Evans to sign. Significantly, that in itself did not amount to an offer which was then accepted by Mr Evans when he signed them. In accordance with the agreement and in accordance with what the standard NEC3 Form of Agreement envisaged, a contract was to be entered into by the signature of both parties. Therefore the Contract was not entered into on 6 or 7 May 2010 when Mr Evans signed it. Rather the Form of Agreement signed by Mr Evans amounted to an offer which was to be accepted by Liberty, in turn, signing the Form of Agreement. The Judge referred to the rule stated in *Chitty on Contracts* (31st edition) at paragraph 2-045:

*"The general rule is that an acceptance has no legal effect until it has been communicated to the offeror. Accordingly there is no contract where a person writes an acceptance on a piece of paper which he simply keeps..."*

Here, after Mr Evans had signed the contract documents they were sent to Mr Crabtree for signature. After he had signed, there was no communication of the contract documents as signed by Mr Crabtree as an unequivocal acceptance of the terms of the Contract in the form signed by Mr Evans. Instead, Mr Jones asked Mr Evans to make changes to certain pages of the contract documents which by then had been signed by Mr Crabtree. Therefore there was a counter-offer by Liberty in sending an amended version of the contract documents to Mr Evans, seeking his acceptance of those changes. It was further clear that it was only on 5 July 2010 that Mr Jones was able to send Mr Evans the pages dealing with the amendments with a request for two directors to sign the agreement. The agreement was then signed as a deed and initialled by the Contractor first and then Liberty. It was on 6 July 2010 that the Contract was formed by the parties agreeing the terms of the contract documents. Although some corrections were made after that date, they were to give effect to what had been agreed by 6 July 2010 and were, at most, agreed variations to the previously binding agreement.

## Adjudication and collateral warranties **Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd**

[2013] EWHC 2665 (TCC)

LOR had entered into a standard JCT Design and Build contract to design and build a swimming and leisure facility in Cardiff. Article 10 required LOR to enter into "a deed of warranty" with any financier of the project, first purchaser and mortgagee. LOR did this and Parkwood the tenant was named as the beneficiary. A question arose as to whether the warranty amounted to a contract for "construction operations" in accordance with the HGCR. The warranty included the following:

*"1 The Contractor warrants, acknowledges and undertakes that:-  
1 it has carried out and shall carry out and complete the Works in accordance with the Contract;  
2...it owes a duty of care to the Beneficiary in the carrying out of its duties and responsibilities in respect of the Works;  
3 it has exercised and will continue to exercise all reasonable skill and care [in respect of the design]...  
7 it has complied and will continue to ...carry out its obligations under the Contract [including in terms of proceeding regularly and diligently]."*

Looking at the wording of the warranty, the Judge had no doubt that it was to be treated as a construction contract "for...the carrying out of construction operations". He noted that the recital to the Warranty set out that the underlying construction contract was "for the design, carrying out and completion of the construction of a pool development" and that clause 1 of the warranty related expressly to carrying out and completing the Works. Further clause 1 contained express wording whereby LOR "warrants, acknowledges and undertakes":

*"One should assume that the parties understood that these three verbs, whilst intended to be mutually complementary, have different meanings. A warranty often relates to a state of affairs (past or future); a warranty relating to a motor car will often be to the effect that it is fit for purpose. An acknowledgement usually seeks to confirm something. An undertaking often involves an obligation to do something. It is difficult to say that the parties simply meant that these three words were absolutely synonymous."*

In the view of the Judge, the warranty related to the past as well as to the future. It was recognised that the Works under the Contract remained to be completed albeit that LOR had already carried out a significant part of the Works and the design. The undertaking primarily went to the execution and completion of the remaining works. The warranty went to the work and design that had already been carried out or provided and to that yet to be carried out and provided. Whilst LOR in clause 1 was undertaking that it will carry out and complete the Works in accordance with the underlying contract, the undertaking was being given to Parkwood, that, in the execution and completion of the Works, it would comply with that contract. This related to the quality and completeness of the Works.

The Warranty, being contractual in effect, would give rise to the ordinary contractual remedies. Although clause 10 expressly excluded liability for delay in progress and completion, it did

not exclude liability otherwise for non-completion. This was not a contract which was simply limited to the quality of work, design and materials. Thus LOR was not merely warranting or guaranteeing a past state of affairs, it was undertaking that it would actually carry out and complete the Works to a standard, quality and state of completeness called for by the Contract. Whilst to some, this may seem unexpected, the judgment is certainly not to be taken as meaning that it will apply to every warranty. As ever, it will all depend on the circumstances and precise wording.

## Part 36 and the court's approach to costs **Hammersmatch Properties (Welwyn) Ltd v Saint-Gobain Ceramics and Plastics Ltd & Anr**

[2013] EWHC 1161 (TCC)

Here, Saint-Gobain made a Part 36 offer, which was very near to but still below the sum which the Judge awarded to Hammersmatch. There was no question that this was a case where there had been an unreasonable refusal to negotiate by Hammersmatch. There had been an unsuccessful mediation. Further, the Judge did not consider that he should enter into speculation as to what might, or should have happened as a result of negotiations. This remained a case where Saint-Gobain failed by a small margin to make a Part 36 offer which provided it with the costs protection it was seeking. The fact that it was only a small margin was irrelevant. What was relevant was that the Part 36 offer was too low.

That said, the Judge then went on to assess the costs by reference to the other factors set out in CPR 44.2(4)(a) and (b). He considered that significant costs were spent in relation to issues raised by Hammersmatch which failed. In addition there was a small element of costs which should properly be awarded in favour of Saint-Gobain in relation to its success on certain other issues. Therefore taking account of all the circumstances, the Judge considered that the appropriate order for costs was one which reduced, by a percentage, the order for costs in favour of Hammersmatch. The order should reflect a reduction to take account of the costs expended by Hammersmatch on the relevant matters as well as the impact of an order in favour of Saint-Gobain. Hence the Judge concluded that Saint-Gobain should pay Hammersmatch 80% of its costs to be assessed on a standard basis, if not agreed.

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