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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

Transformers & Rectifiers Ltd v Needs Ltd

[2015] EWHC 269 (TCC)

The parties disagreed over the terms of the contract between them. T&R said that its terms and conditions applied because they were printed on the back of the purchase orders. Needs argued that its terms and conditions applied because they were referred to on its acknowledgements of order. The commercial relationship went back to the mid-1990s. T&R placed orders for nitrile gaskets and other components on almost a weekly basis and in a variety of ways: sometimes by fax, sometimes as a pdf attachment to an e-mail and, occasionally, by post.

The top copy of T&R's purchase orders was printed on white paper. On the reverse, printed in small type and light-coloured lettering, were the terms and conditions. Mr Edwards-Stuart was shown an example of a blank purchase order. He said that it was not obvious that there was any printing on the back. Accordingly he thought that anyone receiving the document would probably not know that there was anything on its back unless they turned it over or were specifically referred to its existence. This was relevant because there was no reference on the face of the purchase order itself to the existence of the terms and conditions on the reverse. Further, when T&R placed an order by either fax or e-mail it did not transmit a copy of the conditions on the reverse of the purchase order. All that was sent was the front page of the purchase order. This meant that Needs did not receive a copy of the terms and conditions on the back. Needs responded to purchase orders by sending an acknowledgement, which included the following wording: "*The quoted prices and deliveries are subject to our normal Terms and Conditions of Sale (copies available on request)*".

T&R argued that since Needs was aware of its terms and conditions, it must be taken to have accepted an offer which included those terms when it returned its acknowledgement of order. Needs argued that T&R had failed to take sufficient steps to give reasonable notice of its terms and conditions which meant that they were not incorporated into the contract.

By contrast, Needs had given sufficient notice of its terms in its acknowledgement of order, which was therefore a counter-offer that had been accepted by T&R when it took delivery of the goods. The purchase orders were offers made by T&R. But these were responded to by Needs sending to T&R its written Order Acknowledgement. This stated the terms upon which the goods were to be sold, namely upon Needs' written Terms and Conditions of sale. This was a counter-offer which T&R accepted by taking delivery of the goods.

The Judge concluded that the following legal principles applied:

(i) Where A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, assuming that each party's conditions have been reasonably drawn to the attention of the other, there is a contract on B's conditions;

(ii) Where there is reliance on a previous course of dealing it does not have to be extensive. But that course of dealing by the party contending that its conditions are incorporated has to be consistent and unequivocal;

(iii) Where trade standard terms exist, it will usually be easier to persuade the court that they should be incorporated, provided that reasonable notice of the application of the terms has been given;

(iv) A party's standard terms will not be incorporated unless that party has given the other party reasonable notice of them;

(v) It is not always necessary for a party's terms and conditions to be included or referred to in the documents forming the contract; it may be sufficient if they are clearly contained in or referred to in invoices sent subsequently. By contrast, an invoice following a concluded contract effected by a clear offer on standard terms which are accepted, even if only by delivery, will or may be too late.

Here, Mr Justice Edwards-Stuart thought that the problem for T&R was that it did not place its orders in the same way each time. The majority of orders were sent by fax or e-mail, when the terms and conditions were not included. Where a buyer wishes to incorporate his own standard terms (and those orders are sent by fax or e-mail), the buyer must give the seller reasonable notice of those terms and must make it clear to the other party that he intends to rely on them. This might include faxing the terms on the back of the purchase order as a separate document together with the purchase order or ensuring that the pdf attachment on an email includes both the face of the purchase order and the terms on its back.

What about Needs? Their terms were not trade standard. Needs further took no steps to provide T&R with a copy of their terms and at the time T&R did not ask for them. A seller who wishes to incorporate his terms by referring to them in his order acknowledgement - thus making it a counter-offer - must, at the very least, refer to the conditions on the acknowledgement and make it plain that they are to govern the contract. Here, as Needs' terms were not printed on the reverse of its acknowledgements of order, it had not done enough to bring those terms to the attention of T&R. Accordingly, the Judge held that neither party's terms and conditions were incorporated into the purchase orders.

Public procurement: *Pressetext* and material change

Gottlieb, R (on the application of) v Winchester County Council

[2015] EWHC 231 (Admin)

Following the *Pressetext* case, in public procurement procedures, where there is a variation to the contract which is *"materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract"*, then a new procurement exercise must be undertaken. Such an order was sought here. Gottlieb argued that variations to a Development Agreement ("DA") had changed the economic balance of the contract in favour of the developer in a manner which was not provided for in the terms of the initial contract. The Council disagreed and argued that the variations were not materially different in character. The Council had taken independent professional advice and noted that the DA, as varied, was a more favourable arrangement than the Council would be likely to obtain in the market.

The Council originally entered into the DA in December 2004. This did not carry out a procurement exercise when it entered into the DA. It provided for the comprehensive redevelopment by way of a mixed-use development comprising residential, retail, car parking, a replacement bus station, a civic square, a CCTV office, shop mobility and Dial-a-Ride service, and a market store. The DA further provided that the developer would pay a fixed sum to the Council during the construction period as well as a ground rent. The developer would itself receive a share of the profits.

In June 2014, the new developer sought the Council's consent to vary the DA. The Council agreed in August 2014. The proposed variations included: a reduction in the number of residential and affordable housing units; the removal of a bus station and the provision instead of an on-street bus interchange and facilities; the deletion of a requirement for a Shop Mobility Centre, Dial-a-Ride premises and a market store, but the provision of a shop unit and increased retail space; a reduction in the number of public car parking spaces; and an increase in the rent payable to the Council

Where there is "a public works contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the work or works to be carried out under the contract", then it might well be caught by the Public Procurement Regulations. This was the case here, because the agreement provided for the developer to be paid a majority share of the profits of the development, and to be granted a lease of the site under which tenants occupying the site would then pay rent to the developer.

Mrs Justice Lang DBE then considered whether the *Pressetext* principles applied here. The Judge considered that an increase in potential profitability for the economic operator can be a material variation for the purpose of the *Pressetext* test. The Judge then went on to say that Gottlieb had to satisfy the Court, on the balance of probabilities, that a realistic hypothetical bidder would have applied for the contract, had it been advertised, but he was not required to identify actual potential bidders.

Here, the evidence demonstrated that the variations to the DA were made because the Council accepted the developer's representations that the project was not viable on the original contractual terms, and therefore it would not proceed. To save the project it was re-negotiated. However, in the view of the Judge the varied contract was materially different in character from the original contract. The most significant difference was that, overall, the varied contract was considered by the contracting parties to be viable for the developer, whereas they considered the original contract to be unviable.

Further, the bus station would have been non-profit-making for the developer. Now, that site was available for profit-making retail use instead. This would add commercial value and was a major change. So was the removal of affordable housing. Further, the removal was not a consequence of any planning requirement in 2014. The reason for varying (i.e. reducing) the level of affordable housing was the wish to make the project more profitable for the developer. Also, the varied terms allowed the developer to be authorised to procure the construction of the whole scheme (retail as well as residential) by a construction company with a house building subsidiary, without competitive tender. These more flexible terms allowed the developer to offset risk by bringing in a joint venture partner to deliver the residential development and take on the construction and sales risk of the scheme. This too was a material variation to the original contract which, if in place in 2004, would have provided an economic benefit to potential bidders, although I consider it is too speculative to quantify.

Finally, there was evidence that other potential bidders, with a realistic prospect of success, would have bid for this contract, if the opportunity had arisen. The purpose of the procurement regime is to ensure open competition, not to secure the most favourable terms for the public authority. The fundamental change which the parties intended to achieve was to increase the potential profit to the developer so as to make the scheme viable (i.e. achieve more than the 10% threshold return). Both parties believed that the original contract was no longer viable.

Therefore the Council's decision to authorise variations to the DA without carrying out a public procurement process was unlawful.

Coincidentally, Regulation 72 of the Public Procurement Regulations 2015, which came into force on 26 February 2015, essentially codified the *Pressetext* principles which were applied in this case.

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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