



LEGAL BRIEFING

Immingham Storage Company Ltd v Clear plc [2011] EWCA Civ 89, Sir Anthony May P, Arden LJ and Richards J

The Facts

The claimant, Immingham Storage Company Ltd ("Immingham") provides storage facilities for petroleum and petro-chemical products. The defendant, Clear Plc ("Clear"), was a commodities trader. In October 2008, Clear made enquiries of Immingham regarding diesel storage space at Immingham's terminal. Following a site visit, the parties exchanged a series of emails regarding storage availability and likely costs.

Significantly, on 19 December 2008 Immingham emailed Clear offering storage space from 1 May 2009 and attaching a quotation for Clear to sign. Immingham requested Clear's confirmation by 3 January 2009.

The quotation was headed "Subject to board approval and tankage availability" and set out essential details including the parties' names; a description of the goods; the location, capacity and type of storage facilities; the commencement date and minimum storage period, and the monthly charge. The quotation stated that "all other terms will be as per our "General Storage Conditions" Version 2008 which shall be deemed to apply to this quotation". The final sentence of the quotation was "A formal contract will then follow in due course".

The quotation was signed by Immingham and contained a space for signature by Clear under the words "we hereby accept the terms of your quotation subject to your Board approval". The General Storage Conditions version 2008 was attached to the email.

On 5 January 2009, Clear emailed Immingham confirming that Clear wished to proceed and that the quotation had been signed on behalf of Clear and returned by fax. Immingham replied that day confirming receipt of the faxed quotation and advising that Board approval would be sought and availability of storage capacity would be investigated.

On 9 January 2009, Immingham emailed Clear under the subject heading "Contract Confirmation" accepting Clear's offer and stating that a full contract would be sent for signature and return.

Immingham sent the formal contract to Clear but it was never returned. Clear was unable to source the appropriate fuel for storage and made no delivery to Immingham. Immingham invoiced the monthly storage charges but did not receive payment, with Clear denying the existence of a binding contract on the basis that it had not signed the formal contract.

The Issue

Was a contract made by the acceptance in Immingham's email of 9 January 2009 of an offer constituted by the return on 5 January 2009 of the quotation signed on behalf of Clear, notwithstanding the inclusion in the quotation of the sentence "A formal contract will then follow in due course"?

The Decision

The Court of Appeal upheld the trial judge's decision that a binding contract was concluded by Immingham's email of 9 January 2009. The Court of Appeal held that the quotation was expressed to be subject to two conditions only: the approval of Immingham's Board and tankage availability. The quotation signed by Clear was an offer which was accepted by Immingham. These conditions were consistent with an intention that once satisfied

and once Immingham communicated its acceptance, a contract would exist between the parties on the terms of the quotation. The quotation was not stated to be “subject to contract” or subject to execution of a formal agreement.

The provision that a “formal contract will then follow in due course” did not indicate that Immingham’s acceptance of the signed quotation would be no more than an agreement subject to contract. This was “a mere expression of the desire of the parties as to the manner in which the transaction already agreed to, will in fact go through”.

Comment

The Court of Appeal resoundingly rejected Clear’s belated attempt to deny the existence of a contract. This decision shows that in circumstances where the essential terms are agreed (i.e. as set out in a quotation) and there are clear conditions to be satisfied before acceptance is communicated, if negotiations are not expressly stated to be “subject to contract” the fact that the parties have agreed to formalise the contract in another document will not negate the binding agreement which has already been reached.

If all essential terms are agreed, a contracting party will not be able to deny the existence of a binding contract by relying on an argument that the terms of the formal document which follows are different to the concluded agreement. Indeed, the Court of Appeal held that *“if the formal contract was inconsistent with the quotation or contained additional provisions not found in the quotation, the defendant would not be bound to accept them. Its consent would be required to any variation of the terms of the contract contained in the quotation”*.

The ability of parties to be certain as to whether or not they have entered into binding contractual relations upon acceptance of a quotation is of fundamental importance in the construction industry. If a negotiating party does not want to enter into a binding but conditional agreement, it should expressly state that negotiations are “subject to contract” or make this position clear using similar language.

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