Contract Law Case Law Update

St John's CHAMBERS

Welcome to the third update in a new series of contract law case law updates produced by St John's Chambers' Company and Commercial team.

In this issue…

An autumnal roundup of contract litigation…

Welcome to the autumn edition of our contract law case updater, now in its third publication. We hope you will continue to find these handy case summaries to be a useful tool in keeping you up to speed with the most significant contract law developments of the last quarter.

In this issue Nick Pointon considers when commitment letters become binding following the Commercial Court's decision in *Novus Aviation v Alubaf*, and when "close of business" takes place in the London commercial banking sector following the latest decision in the Lehman Brothers litigation.

Emma Price looks at the recent decision on the Brogden bankers' claim for bonuses and considers the approach taken by the Court of Appeal to the construction of contracts.

Natasha Dzameh reviews several recent decisions, ranging from issues of offer and acceptance considered in *Arcardis Consulting v AMEC* to the recovery of damages for a loss of chance in *McGill v Sports and Entertainment Media Group*.

Since our next instalment will be due in March 2017, we take this opportunity to wish all readers a merry Christmas and a happy New Year!

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Ranked as a leading junior in commercial dispute resolution by Chambers UK 2015, 2016 and 2017, Nick acts in a wide range of commercial and chancery matters. Nick has also taught the subject of contract law at both undergraduate and postgraduate level at the University of Bristol and regularly delivers seminars to regional and national law firms.

"He's a class act who is really good at the detail – he just oozes ability." **Chambers UK, 2017**

"An impressive advocate and one to watch; an extremely capable and bright young barrister." **Chambers UK, 2016**

Natasha Dzameh, Barrister, St John's Chambers (Call 2010)

Natasha joined Chambers as a commercial and chancery tenant in October 2016 following the successful completion of her pupillage. She already enjoys a busy court and paper practice, regularly appearing in trials and interim applications on the Western Circuit and beyond. Natasha accepts instructions in a broad range of commercial fields including specialist areas such as insolvency, insurance and intellectual property.

Natasha previously spent two years working as a County Court Advocate. This involved representing clients in more than 600 commercial, chancery and general civil hearings at courts across the North, the South West and Wales. She attained an LLM (Distinction) in International Commercial Law from the University of Nottingham and has marshalled at the Court of Appeal Civil Division.

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Emma is Chambers' current chancery and commercial pupil and joined us on 1 October 2016. She is presently assisting senior members of chambers in a variety of chancery and commercial litigation, and looking forward to getting on her feet in April 2017.

Prior to joining Chambers Emma studied law at the University of Bristol, followed by an LLM at UCL. She has also spent two years working as a law reporter for the All England Reporter, writing and editing digests of cases across all areas of law.

To find out more about the authors of this newsletter, visit www.stjohnschambers.co.uk where you can find their full profiles.

Binding commitment letters and contractual discretion.

Novus Aviation Limited v Alubaf Arab International Bank BSC(c) [2016] EWHC 1575 (Comm)

Nick Pointon

In Novus Aviation Limited v Alubaf Arab International Bank BSC(c) [2016] EWHC 1575 (Comm) the Commercial Court considered whether Novus and Alubaf had made a contract under which Alubaf agreed to provide equity funding for the purchase of an aircraft to be leased to Malaysian Airlines.

Facts

The parties were in discussions for such an arrangement between April and June 2013, including the creation of a commitment letter dated 6 May 2013 and a management agreement dated 15 May 2013. Alubaf eventually pulled out before the aircraft had been purchased. Novus argued that a binding agreement had already been reached and that Alubaf's withdrawal constituted repudiatory breach. The key issue was whether the commitment letter of 6 May 2013 was binding on Alubaf, despite the fact that Novus had never signed it.

The commitment agreement contained spaces for both parties to sign. Alubaf had signed it but Novus had not. Nevertheless, work continued to progress the transaction, including the incorporation of special purpose companies, appointment of directors and opening of bank accounts. Alubaf then became concerned that, given the size of its equity in the proposed transaction, both the aircraft and the associated debt would have to be consolidated within Alubaf's financial statements. Following confirmation from Alubaf's accountants, Ernst & Young, that such consolidation could be avoided if Alubaf brought its equity in the transaction down to 49%. Alubaf hoped to achieve this by down selling its equity while a related entity, LFB, agreed to increase its equity to over 50%. Unfortunately on 6 June 2013 LFB informed Alubaf that it was unwilling to do so. Later that day Alubaf communicated the problem to Novus, who had since removed the investment from the market given that Alubaf had signed the commitment letter. Various steps were taken to assuage Alubaf's concerns, but on 17 June 2013 its board resolved to reject the deal. Over the following weeks solicitors stepped in and the parties' positions crystalised, leaving Novus unable to fund the purchase of the aircraft or to participate in the lucrative management agreement thereafter. Novus put its loss at over US$8m.

Decision

Alubaf ran a myriad of defensive arguments. Firstly, it argued that the commitment letter and management agreement entailed no intention to create legal relations. Secondly, it argued that Mr Abdullah (its "Head of Treasury and Investment") lacked authority to bind Alubaf. Thirdly, it argued that nothing became binding because neither the commitment letter nor management agreement were countersigned and returned to Alubaf. Finally, it argued that even if the documents were binding, upon their proper construction they did not oblige Alubaf to proceed with the transaction.

Finding for Novus, Leggatt J held that the commitment letter created a binding contractual relationship despite not having been countersigned by Novus. Central to that finding was the work undertaken by both parties after the commitment letter had been signed by Alubaf and returned to Novus.

In respect of intention to create legal relations, Leggatt J simply applied RTS Flexible Systems v Molkerei [2010] UKSC 14; [2010] 1 WLR 753, holding that the obligatory language used for the most part suggested that the parties intended the document to bind them. Counsel for Alubaf sought to make use of an argument developed by Andrew Smith J at first

In brief…

- The question of intention to create legal relations is an objective one, save in truly exceptional and developing circumstances.
- It is generally easier to infer from conduct the acceptance of a contractual offer than it is to infer the waiver of an express contractual stipulation.
- If a document is intended to bind only upon signature then very careful language should be used to make this clear. The presence of a signature strip alone affords a poor level of protection.

instance in Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm), to the effect that, exceptionally, one party's subjective intention not to be legally bound by a document is relevant if that intention is or ought reasonably to be known to the other party. Leggatt J observed that this argument found short shrift on appeal (at [2009] EWCA Civ 1334), but went on to recognize that it was certainly not dead in the water and that, in an appropriate case, the scope of any such rule would need to be tested. This was not that case.

As for Mr Abdullah's authority to bind Alubaf, Leggatt J thought that he had both actual and, in any event, apparent authority to do so. Given his grand title as Head of Treasury and Investment, that is not altogether surprising.

Finally, on the subject of signature to the commitment letter, Leggatt J rejected Novus' submission that the letter became binding immediately. Instead he said *"[t]he intention manifested was therefore that, after the commitment letter had been signed on behalf of Alubaf, Novus should signal its acceptance before the letter became contractually binding"* (at [102]). However, he continued: *"There was no term of the commitment letter, however, which stipulated that the only way in which Novus could signal its acceptance was by counter-signing the letter. It is well established that, in the absence of such a stipulation (and, even then, if the requirement for a signature is waived) acceptance of an offer can be communicated by conduct which as a matter of objective analysis shows an intention to accept the offer: … Reveille Independent LLC v Anotech International (UK) Ltd [2016] EWCA Civ 443*[1]*"*. Leggatt J went on to set out the many instances of conduct which, in his view, demonstrated that the commitment letter had been accepted notwithstanding the absence of a signature. However, perhaps surprisingly, Leggatt J reached precisely the opposite conclusion in respect of the management agreement. For that latter agreement he held that signature was the prescribed mode of acceptance. At [107], applying *Reveille v Anotech* he acknowledged that even this requirement could be waived, but went on to find that on this occasion it had not been waived. He distinguished between inferring acceptance of a contract by conduct and inferring the waiver of a contractual requirement by conduct. Although both are possible, the latter is much more difficult to demonstrate (as the outcome of this case demonstrates).

Novus nevertheless succeeded in their claim to damages, on the basis that if Alubaf had complied with its obligations under the commitment letter then the management agreement would in due course likely have been signed also. Leggatt J acknowledged that there was always a possibility that something might have intervened to lawfully prevent the deal from completing, and so treated Novus' claim as a loss of a chance of completing. *"Based on what can only be a matter of impression rather than any mathematical calculation, [Leggatt J] assess[ed] the chance of such an occurrence at 15%."*

Comment

The case is interesting because its facts illustrate perfectly the distinction between inferring acceptance of a contractual offer by conduct and inferring from conduct an intention to waive an express contractual stipulation. Evidently the former is easier to achieve than the latter. As the distinction between the letter of commitment and management agreement demonstrates, a great deal can turn upon the precise drafting of such instruments and, in particular, whether it is expressly stipulated that a signature is required before the instrument will become binding. In the absence of such an express stipulation, the presence of a signature strip alone is unlikely to impede the court in finding that the instrument became binding as a result of the parties' subsequent conduct.

> *"Whether it is theoretically justifiable to apply a difference test in deciding whether parties intended to undertake contractual obligations from the test applied in determining the scope of those obligations is open to doubt."*
>
> Novus Aviation Limited v Alubaf Arab International Bank [2016] EWHC 1575 (Comm)

Further, when considering the options open to Alubaf in the face of their accounting woes Leggatt J took it as a given that any contractual discretion which Alubaf had to withdraw from the deal could only have been exercised in good faith (see para [114]). In previous editions of this updater we have charted the oscillating approaches taken to the emerging role of good faith in English contract law. Evidently Leggatt J (who famously authored the *Yam Seng* judgment which advocated the development of good faith principles) was not deterred by the remarks of Moore-Bick LJ in *MSC v Cottonex Anstalt* [2016] EWCA Civ 789, or of Richard Salter QC in *Monde Petroleum v Westernzagros* [2016] EWHC 1472 (Comm)[1], curtailing the role to be played by good faith.

Time to go home? "Close of business" in commercial contracts.

Lehman Brothers International (In administration) v ExxonMobil Financial Services BV [2016] EWHC 2699 (Comm)

Nick Pointon

In Lehman Brothers International (Europe) (In administration) v Exxonmobil Financial Services BV [2016] EWHC 2699 (Comm) the High Court considered when home time might be in the London investment banking world. More accurately, the High Court had to construe what was meant by the phrase "close of business" when used to identify the deadline for receipt of a default valuation notice under a repo agreement between Lehman Brothers and ExxonMobil.

The notice clause in the agreement stipulated that a default valuation notice must be received before "close of business", failing which it would be deemed to have been received the next day. ExxonMobil's notice was received at Lehman Brothers' London office at 6.02 pm on 22 September 2008. Lehman Brothers (or rather their administrators) argued that the "close of business" was 5.00 pm, whereas ExxonMobil said that it was actually 7.00 pm. Perhaps unsurprisingly, the wrought out and exhausted junior desk monkeys of neither entity were called upon to attest to the ringing of the home time bell. In fact, the Court held that Lehman Brothers had failed to adduce *any* admissible evidence whatsoever as to when close of business occurred. The Court suggested that, in the particular context of repo financing in the international investment world, a reasonable man would be surprised to hear that business closes at 5.00 pm. No doubt Lehman Brothers' former employees would have agreed with that sentiment.

In the event ExxonMobil won the point because Lehman Brothers' adduced no admissible evidence to the contrary. The only potentially relevant evidence came from ExxonMobil's expert, who said that in his view commercial banks closed at 7.00 pm. In the absence of anything to the contrary, the Court accepted that evidence but was keen to emphasise that this was simply a finding of fact in respect of this particular case.

One would think the lesson to be learned was that phrases such as "close of business" should be jettisoned in favour of specified time limits. Yet Blair J opined that such terminology is a useful concept, allowing an amount of flexibility where desirable. While the presence of some flexibility might be desirable during the performance of a contract between two commercially pragmatic entities, commercial pragmatism tends to disappear altogether in the event of a dispute. Laudable flexibility then transforms into a licence to argue every point possible, apparently including when home time is.

In this author's view, flexibility is only a useful feature in contractual terms for so long as the parties' relationship is a good one. Yet when the parties' relationship is a good one, one would hope that they would have the commercial good sense to overlook a small delay or slight deviation from the certain provisions of a contract, without the need to build in the use of vague terminology. Indeed as this particular case demonstrates, where one party enters insolvency and any relationship of good commercial sense falls away, a phrase such as "close of business" simply invites costly and time consuming litigation.

That said, in agreements designed to overarch a variety of transactions or dealings, the flexibility alluded to by Blair J can perhaps assume greater utility. In such circumstances it may not be possible or practicable to specify time limits applicable to each type of transaction captured by the agreement. Ultimately the cost or inconvenience of such specificity is the price to be paid for avoiding the potential uncertainty and consequent litigation that such flexibility allows. At a broader level of generality, this latest episode in the Lehman Brothers litigation emphasizes the importance of detailed and precise prospective drafting of commercial agreements. As Blair J observed, the court cannot tailor its construction of the terms of a standard agreement to meet unusual or exceptional circumstances.

In brief…

- "Close of business" takes its meaning from the context in which it is used.
- On the facts of this case, "close of business" in the London commercial banking sector was held to be 7.00 pm.

Bankers' bonuses: a question of entitlement

Brogden v Investec Bank Plc [2016] EWCA Civ 1031

Emma Price

In Brogden v Investec Bank Plc [2016] EWCA Civ 1031 the Court of Appeal upheld the dismissal of the appellants' claim for breach of contract on the part of the respondent ("the Bank") in failing to pay bonuses to which they claimed to be entitled.

Background

In 2007, the Bank recruited the appellants to set up a "desk" trading in equity-based derivatives. In addition to their salary, the appellants were promised very substantial guaranteed bonuses in the first year of their employment, followed in subsequent years by bonuses related to the profitability of the desk. In particular, the appellants' employment contracts provided that, in the second and subsequent years, the bonus calculation would be based on an economic value added ("EVA") formula. The Bank considered that, under the appellants' contracts, their bonuses were to be calculated by reference to the revenue generated within the activity centre represented by the desk. However, in the second and third financial years, that produced bonuses far lower than the appellants thought properly reflected the value to the Bank of their operations. They considered that their bonuses ought to be calculated taking into account the full value to the Bank of having at its disposal the funds they had raised from investors. On each occasion, the difference of opinion was resolved by the Bank agreeing to make a greater sum available for bonuses than that to which it considered the appellants were entitled. However, in the following year, the profit and loss account for the desk showed a loss. The Bank, therefore, decided that no bonuses were payable. On that occasion, the dispute could not be resolved by agreement and the appellants decided to leave the Bank's employment. They brought proceedings to recover what they alleged were the sums due to them by way of bonuses for the year in question.

High Court

The judge, in dismissing the claim, held that the Bank had a discretion in relation to the manner in which it assessed EVA and that its decision could not be challenged unless it could be shown that it had acted irrationally or in bad faith. There were no grounds, in his view, for suggesting that the Bank had acted in bad faith and he was not persuaded that it had acted irrationally.

Court of Appeal

In dismissing the appeal, the Court of Appeal held that the judge was right to hold that the expression "EVA generated by the Equity Derivative business" meant the amount calculated as the EVA of the desk using the method normally used by the Bank to calculate the measure of performance known as EVA for each business unit. That was all the more so,

In brief…

- The judge had not been right to hold that the contracts had given the Bank a discretion in relation to the manner in which EVA was calculated.
- Whilst the Bank had been entitled to make an ex gratia payment to increase the size of the bonus pool, those payments were not capable of giving rise to any reasonable expectation that it would act in the same way in future.

"It is unnecessary… to consider the authorities relating to the limits that may be placed on the exercise of a contractual discretion, although the principles for which they stand were not controversial."

Brogden v Investec Bank Plc [2016] EWCA Civ 1031, per Moore-Bick LJ at [20]

given that the desk had been intended to be a trading desk whose profit and loss would reflect essentially the same factors as other trading desks.

However, the judge had not been right to hold that the contracts had given the Bank a discretion in the established sense in relation to the manner in which EVA was calculated. Having been told that, in the operation of its existing systems, the Bank used the term "EVA" to mean revenue, minus costs, minus cost of capital, all calculated before tax, and that EVA for the new desk would be calculated in the same way as that for other business units, the appellants had a right to have the EVA for the desk calculated in that way and the Bank's obligation was correspondingly limited. It had to be borne in mind that the desk had not been established to sell financial products of that kind to the retail market and that the contractual formula for calculating bonuses was appropriate for a trading desk of the kind intended.

"As the late Professor Ronald Dworkin observed, discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. Like all terms, its meaning is sensitive to context."

Brogden v Investec Bank Plc [2014] EWHC 2785 (Comm), per Leggatt at [95]

Further, although the manner of the calculation of EVA for the desk was apparent from the outset, no formal attempt was made following the development of its retail products to renegotiate the basis on which bonuses were to be paid.

Therefore, the appellants' rights to bonuses remained as they had been from the inception of their contracts, although the Bank was entitled to make an ex gratia payment to increase the size of the bonus pool. However, those payments were not capable of giving rise to any reasonable expectation that the Bank would act in the same way in succeeding years and did not create any obligation on it to do so.

Analysis

It can be seen, therefore, that the Court of Appeal concluded that the order made below had been correct, but for different reasons. The Court of Appeal's judgment was centred on the proper construction of the appellants' employment contracts, as opposed to the exercise of a contractual discretion on the part of the Bank. Accordingly, it did not need to consider the exercise of contractual discretions in good faith, in respect of which there was an interesting discussion in the High Court judgment (see [2014] EWHC 2785 (Comm), at [91]-[103]). However, the case does perhaps serve to highlight the need for a contract to be explicitly clear as to the precise method by which bonuses will be calculated. Further, whilst the contention that a reasonable expectation had been created did not succeed in this case, it might give employers pause for thought, particularly in respect of whether their conduct might engender a reasonable expectation that they would continue to act in the same way in succeeding years.

The need for clear and unequivocal acceptance…

Arcadis Consulting (UK) Ltd (formerly called Hyder Consulting (UK) Ltd) v AMEC (BSC) (formerly CV Buchan Ltd) [2016] EWHC 2509 (TCC)

Natasha Dzameh

In *Arcadis Consulting (UK) Ltd v AMEC (BSC) Ltd* [2016] EWHC 2509 (TCC) the court applied the principles surrounding contract formation and incorporation of terms. The decision reinforces the importance of agreeing contractual terms even where correspondence repeatedly refers to a specific type of term or condition.

Facts

Buchan acted as a specialist concrete sub-contractor on two large projects. It engaged Hyder to execute design works connected to the projects in anticipation of a wider agreement between the parties. No such agreement materialised. It was alleged that one of the projects (Castlepoint Car Park) was defective and may need to be demolished and rebuilt. The rebuilding costs were expected to be many tens of millions but Buchan's claim was pleaded as £40 million. Hyder denied liability for the defects but, if found liable, asserted there was a simple contract in relation to the design works. Under said contract they considered any liability to be capped at £610,515.

A variety of correspondence had passed between Hyder and Buchan including 3 separate sets of terms and conditions. These were sent to Hyder on 8 November 2001 ("the November letter"), 29 January 2002 ("the January letter") and 6 March 2002 ("the March letter"). The correspondence included reference to Schedules 1-4 with liability caps contained in Schedule 1. The contents of these Schedules did not remain the same throughout albeit there were liability caps present.

Within the Particulars of Claim Hyder sought a declaration such that there was no connection between the £610,515 and a specific clause (Clause 2A). Buchan sought a declaration that there was no limit on Hyder's liability to Buchan for its defective design.

High Court

The issues to be determined by Mr Justice Coulson were:

1. Was a contract formed between the parties?
2. If such a contract was formed, what were the terms?
3. Was the limit on liability incorporated within any such contract between the parties?

Contract Formation

In assessing whether a contract existed between the parties, Coulson J referred to the summary of Lord Clarke in *RTS Limited v Molkerei Alois Müller GmbH* [2010] 1 WLR 753. This makes specific reference to the need to consider the communication between the parties and whether this results in an objective conclusion that they intended to create legal relations and had agreed upon the essential terms. Additionally, Coulson J stated it is usually implausible to argue a contract does not exist where works have been executed.

Buchan contended no contract existed as the correspondence between the parties envisaged a formal Protocol agreement with detailed terms and conditions. There

> *"Whilst the court should always strive to find a concluded contract in circumstances where work has been performed (and in the present case I do so find), the court is not entitled to rewrite history so as to incorporate into that contract express terms which were not the subject of a clear and binding agreement."*
>
> *Arcadis Consulting (UK) Ltd v AMEC (BSC) Ltd* [2016] EWHC 2509 (TCC) *per Coulson J [48]*

being no such agreement there could be no contract.

Coulson J rejected this argument. None of the relevant correspondence was marked "subject to contract". The works were performed on the express understanding that if the detailed contract did not come into fruition the correspondence would establish the legal relationship between the parties and Hyder would be paid for its work. There was a binding, simple contract between Buchan and Hyder.

Contractual Terms

Coulson J ruled that no set of terms and conditions had been incorporated into the simple contract, let alone the terms and conditions which had originally been proposed in November.

It was clear from the correspondence that Hyder had never accepted the terms proposed in the November letter. Instead Hyder had expressly objected to them and two further sets of terms and conditions were sent. The first set had clearly been superseded. No copies of the second set could be found by the parties and in any event, they did not relate to the Castlepoint Car Park contract.

In relation to the third set, it could not be said that on an objective analysis Hyder had provided a final and unqualified expression of assent (*Day Morris Associates v Voyce* [2003] EWCA Civ 189). Hyder specifically thanked Buchan for the instruction but did not state that it accepted every element of the offer in the March letter. Coulson J asserted this analysis was neither unrealistic nor artificial because Hyder, having sent 2 letters in March 2002, had two opportunities to use the word "accept" and failed to do so both times. There was doubt about the terms and conditions referred to by Buchan in that letter and there was evidence Hyder did not accept any version of the terms proposed. Consequently, Coulson J considered to accept one set of terms and conditions or the other, it needed to be stated by Hyder clearly and unequivocally. As there were no agreed terms and conditions, Schedule 1 was not agreed either.

Limitation on Liability

Formal instruction to carry out the work occurred in the letter of 6 March 2002 which made no reference to Schedules 1-4. The reference to terms was simply a general reference to the terms being negotiated. Hyder made no reference to terms and conditions or Schedules 1-4 when thanking Buchan for the instruction. Schedules 1-4 were incomplete and parasitic on the agreements of the terms and conditions hence no versions of Schedules 1-4 were expressly or impliedly accepted by Hyder.

Coulson J found that Schedules 1-4 were not sent as part of the March letter. He noted that, if he was incorrect, the terms referred to in the November letter were the subject of binding agreements and Hyder's two letters of March 2002 must be read together, the limit referred only to a specific clause. This clause did not cover the situation with which the parties were concerned.

Coulson J refused Hyder declaratory relief and granted a declaration to Buchan in the terms requested.

Analysis

This decision confirms the importance of agreeing contractual terms and conditions. Most concerning of all is the idea that parties may repeatedly refer to a specific type of term or condition, in this case a clause limiting liability, yet the court will not necessarily consider this to have been incorporated into the contract. This operates as a stark warning to parties as to the potential difficulties they may face in the future should they fail to agree terms and conditions.

In brief…

- Where letters of intent are not marked "subject to contract" they may establish the existence of a contract.
- Relaying gratitude for instructions does not necessarily amount to acceptance of terms and conditions.
- The court will not incorporate express terms into a contract where they are not the subject of a clear and binding agreement.
- If no terms and conditions are agreed, even if many of the proposed sets of terms and conditions include a specific type of provision e.g. a provision limiting liability, the court may still arrive at the conclusion that the contract does not include that provision.

Ship withdrawal and the status of punctual payment stipulations for hire

Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd [2016] EWCA Civ 982

Natasha Dzameh

In *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2016] EWCA Civ 982 the Court of Appeal overturned the decision in *The Astra* [2013] EWHC 865 (Comm) and reinstated the decision in *The Brimnes* [1973] 1 WLR 386.

Facts and First Instance Decision (High Court – QBD, Commercial Court)

Spar was the registered owner of three vessels which were let on a long-term charter to GCS under three individual charters which were guaranteed by GCL (GCS's parent company). The charterparties included a withdrawal clause which contained an anti-technicality clause. This permitted Spar to withdraw the vessels if GCS failed to pay overdue hire within 3 days of receipt of an arrears notice. GCS fell into arrears relating to the hire and Spar recouped some of the arrears by exercising a lien on sub-freights. A significant amount of arrears remained and Spar sought payment from GCL under the guarantees. Spar withdrew the three vessels, terminated the charters and commenced arbitration proceedings against GCS. GCS went into liquidation and the proceedings were stayed. Spar then brought proceedings against GCL under the guarantees.

Popplewell J expressed the principles relating to repudiation and renunciation as:

"(1) Conduct is repudiatory if it deprives the innocent party of substantially the whole of the benefit he is intended to receive as consideration for performance of his future obligations under the contract. Although different formulations or metaphors have been used, notably whether the breach goes to the root of the contract, these are merely different ways of expressing the 'substantially the whole benefit' test: Hongkong Fir at pages 66, 72; The Nanfri at pages 778G-779D.

(2) Conduct is renunciatory if it evinces an intention to commit a repudiatory breach, that is to say if it would lead a reasonable person to the conclusion that the party does not intend to perform his future obligations where the failure to perform such obligations when they fell due would be repudiatory: Universal Carriers v Citati at p 436, The Afovosat p 341 col 2.

(3) Evincing an intention to perform but in a manner which is substantially inconsistent with the contractual terms is evincing an intention not to perform: Ross T Smyth & Co Ltd v TD Bailey, Son & Co [1940] 3 All ER 60, 72. Whether such conduct is renunciatory depends upon whether the threatened difference in performance is repudiatory. It is not here necessary to explore the position where the innocent party misappreciates the nature or scope of his obligations (see Woodar Investment Ltd v Wimpey Construction UK Ltd [1980] 1 WLR 277 and Chilean Nitrate Sales Corporation v Marine Transportation Co Ltd (The Hermosa) [1982] 1 Lloyd's Rep 570, 572-3).

(4) An intention to perform connotes a willingness to perform, but willingness in this context does not mean a desire to perform despite an inability to do so. As Devlin J put it in Universal Carriers v Citati at p 437, to say: 'I would like to but I cannot' negatives intent just as much as 'I will not'."

Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd [2015] EWHC 718 (Comm) per Popplewell J [208]

In brief…

- Although certainty is important to commercial contracts it should not be given undue weight when determining whether a term is a condition or an innominate term.
- Stipulating a time for payment within a mercantile contact does not result in the presumption that it constitutes a condition for which the slightest breach is repudiatory.
- Within time charterparties an obligation to pay hire punctually is generally not a condition.

He assessed 7 different issues, deciding the guarantees had been properly executed and GCL must stand by them. The key determinations which were subsequently appealed were:

1. The term within the time charterparty requiring punctual payment of hire was an innominate term; and

2. There had been a renunciation of the charterparties by GCS.

Court of Appeal

GCL appealed in relation to the 2 key issues noted above.

Punctual Payment – Condition or Innominate Term

In *The Astra* [2013] EWHC 865 (Comm) Flaux J held that a clause requiring punctual payment of hire was a condition and its breach entitled the relevant party to terminate the charter and claim damages. The Lord Justices considered *The Astra* [2013] EWHC 865 (Comm) to have been wrongly decided on this point.

The Court of Appeal held that it was not clear within the charterparties that the hire payment clause was a condition. The inclusion of an express withdrawal clause did not provide such an indication.The court was not inclined to interpret the clause as such given the lack of a clear indication and the fact that breach of this clause could result in consequences of varying severity, from trivial to severe. Gross LJ was particularly concerned with the attraction of certainty and the undesirability of trivial breaches resulting in the consequences of a breach of condition.

"…the modern approach is that a term is innominate unless a contrary intention is made clear."

Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd [2016] EWCA Civ 982 per Hamblen LJ [93]

Renunciation

The court acknowledged that the test for renunciation has various formulations throughout the authorities and that Popplewell J had adopted the correct test. The only argument in relation to the test concerned the edges of the test and whether it was applied correctly. The court accepted the three questions posed by Spar's counsel for analysing the facts:

1. What contractual benefit was Spar intended to obtain from the charterparties?

2. What was the prospective non-performance foreshadowed by GCS's words and conduct?

3. Was the prospective non-performance such as to go to the root of the contract?

The court determined the benefit to Spar to be the regular, periodical payment of hire in advance of performance. At best GCS was willing to pay hire but was unable to do so. This situation was commented on by Devlin J in *Universal Cargo Carriers v Citati* [1957] 2 QB 401, 437:

"Willingness in this context does not mean cheerfulness; it means simply an intent to perform. To say: 'I would like to but I cannot' negatives intent just as much as 'I will not'."

Finally, in relation to prospective non-performance, GCL argued that this should be assessed by way of an arithmetical comparison of the arrears and the total sum payable over the life of the charterparties. On this analysis Spar would not be deprived of substantially the whole benefit of the charterparties. Gross LJ stated that such a submission failed to *"grapple with the nature and importance of the bargain for the payment of hire in advance."* He also noted that failure to pay a single instalment of hire punctually is not a breach of condition but a demonstrated intention not to pay hire punctually in the future is different and goes to the root of the contract.

The appeal was dismissed.

Analysis

Ship withdrawal cases tend to be fact specific, nonetheless this decision is especially welcome. It overturns *The Astra* [2013] EWHC 865 (Comm) and returns the position to that established in *The Brimnes* [1973] 1 WLR 386, i.e. that an obligation to pay hire punctually is not a breach of condition of time charterparties generally.

Although hire payments are particularly important to vessel owners, the court has made it clear that this does not result in such terms acquiring the status of a condition. Further, the court's focus is whether the non-performance constitutes repudiatory or renunciatory breach thereby allowing for termination and damages. It is not simply a question of whether there has been a failure to pay promptly or evidence of an intention not to pay.

Recovering damages for loss of a chance and the effect of settlement agreements

McGill v Sports and Entertainment Media Group and others [2016] EWCA Civ 1063

Natasha Dzameh

In McGill v Sports and Entertainment Media Group and others [2016] EWCA Civ 1063 the court considered whether an argument as to loss of a chance remained open and the impact of a prior settlement agreement involving an individual who was not a party to the current proceedings.

Facts and First Instance Decision

Mr McGill was a licensed football agent who allegedly acted for a professional football player, Gavin McCann, under an oral contract. He was to arrange Mr McCann's transfer from Aston Villa to Bolton Wanderers ("Bolton"). Before the deal occurred SEM (the First Defendant) discovered its existence and induced the player to breach his contract with Mr McGill allowing SEM to take over the deal. Bolton paid commission of £300,000 to SEM. Mr McGill argued that he should have earned that fee on completion of the deal and brought an action against Mr McCann. This settled but Mr McGill brought a further action against nine defendants. The first four defendants were referred to as "the SEM defendants" and the remaining five were known as "the Bolton defendants".

HHJ Waksman QC held that, insofar as loss and causation were concerned, the claim could only succeed if it were proved that the player would have signed a written agency agreement with Mr McGill by the close of the transfer deal. The civil standard of proof had not been satisfied thus Mr McGill's claim was dismissed. The trial judge also determined that Mr McGill had not advanced a case on the basis of loss of a chance.

Mr McGill appealed in relation to dismissal against the SEM defendants on the basis that the trial judge's decision as to loss and causation was incorrect in law and on the facts. Mr McGill contended that his claim should have been analysed as loss of a chance i.e. the loss of a chance of earning commission under a written agency agreement.

The SEM defendants raised an argument they had run at the initial trial. Namely that Mr McGill, having sued Mr McCann and recouped some of its losses, was debarred from bringing a claim against them. This is known as a *Jameson* argument, after *Jameson v Central Electricity Generating Board* [2000] 1 AC 455.

Court of Appeal Decision

The Court considered that Mr McGill and Mr McCann had entered into an oral agency contract, the terms of which were sufficiently certain, albeit the contract did not comply with the FA 2006 Regulations. The trial judge was not wrong in his finding as to whether any of the SEM defendants acted as agent for Mr McCann nor was he wrong in determining whether any of said defendants induced Mr McCann to breach his contract or that they had knowledge of the existing agency contract.

The court held Mr McGill was entitled to damages based on loss of a chance.

The case was one in which the principles stated in Allied Maples Group Limited v Simmons & Simmons [1995] 1 WLR 1602 and Wellesley Partners LLP v Withers LLP [2015] EWCA Civ 1146 applied:

"The key principle, for present purposes, is that where the claimant's loss depends, not on what he would have done, but on the hypothetical acts of a third party, the claimant first needs to prove (to the usual civil standard) that there was a real or substantial, rather than a speculative, chance that the third party would have acted so as to confer the benefit in question, thereby establishing causation; but that the evaluation of the lost chance, if causation is proved, is a matter of quantification of damages in percentage terms."

per Henderson J [60]

In brief…

- Damages may be recovered for loss of a chance where the probability of the event occurring is no more than 50%.
- Settlement does not preclude advancing a claim against other defendants where the claimant has not been fully compensated, the cause of action is distinctly different and the scenario does not involve joint tortfeasors.

In respect of causation there was a real or substantial chance that, but for the interference by SEM and another defendant, a written agreement between Mr McGill and Mr McCann would have been entered into. It was an error in principle by the trial judge to require Mr McGill to prove that Mr McCann would have signed the agreement by the end of the transfer process.

Nonetheless the court still had to determine whether it was open to Mr McGill to advance his case on the basis of loss of a chance. Henderson J noted that loss of a chance was pleaded within the re-amended Particulars of Claim albeit there was some blurring of the issue by another sentence within the same paragraph. The argument as to loss of a chance remained in contention.

Henderson J attempted to discern how the trial judge arrived at the view that Mr McGill's case was not advanced on the basis of loss of a chance. He noted the argument did not appear to have been formally abandoned although it was not presented that way in the skeleton argument prepared by Mr McGill's counsel or in his written closing submissions. The judge was not referred to any cases on loss of a chance. Counsel for the SEM defendants had asserted that the loss and damage claimed was the same as the loss Mr McGill had sued Mr McCann for. Further there were discussions between counsel for the SEM defendants and the trial judge regarding proposed further amendments to the Particulars of Claim in which counsel for the SEM defendants indicated that loss of a chance was a new case.

Ultimately it was considered easily understandable that the trial judge had arrived at the conclusion that Mr McGill had not put his case on the basis of loss of a chance. Nonetheless this line of argument remained open to him and it did not cause injustice to the SEM defendants to allow that argument in the appeal.

The court held that the trial judge was not wrong to find that Mr McCann would not have entered into a contract with Mr McGill. Mr McGill was running a significant risk that Mr McCann would continue to refuse to sign a written agreement.

As to the *Jameson* argument, the earlier settlement with Mr McCann did not operate as a bar to the present claim. The present case was not similar to the concurrent tortfeasors in *Jameson* or successive contract-breakers in *Heaton v AXA Equity and Law Assurance Society Plc* [2002] UKHL 15. The claims were distinctly different i.e. breach of contract against Mr McCann and inducing a breach of contract and conspiracy against the SEM defendants. It was entirely natural for Mr McGill to recover what he could from Mr McCann and seek to recover the remainder from the other parties. Whether he has pursued the matters simultaneously or sequentially should not make a difference to his ability to recover.

The appeal was allowed. The court directed that the case be remitted to the trial judge for him to assess the percentage likelihood that Mr McCann would have entered into a written agreement with Mr McGill. This could not exceed 50% given his previous finding that on the balance of probabilities Mr McCann would not have entered into such an agreement.

> *"In cases of the present type, it would be most unattractive to have to conclude that a settlement reached between the innocent claimant and the contract breaker precludes a subsequent action in tort against the primary wrongdoers who induced the breach of contract in the first place."*
>
> per Henderson J [101]

Analysis

This case deals with two very important points which are especially relevant in the commercial sphere, namely recovery of damages for loss of a chance and the effect of settlement agreements.

The Court of Appeal has reiterated that damages may be recovered for loss of a chance even where the probability of the event occurring is no more than 50%. The court is instead concerned with whether the chance lost was real or substantial rather than speculative. It is after determining this question that it will proceed to quantify damages in percentage terms, assuming there are no causation issues.

More importantly the court has given clear guidance on when a settlement involving one defendant may discharge claims against the others. It indicates that where the causes of action are distinctly different, settlement of one will not impact upon the other claims unless it is clear from the settlement that the claimant has been fully compensated for his or her losses. This assumes that the settlement agreement contains no explicit provisions which are to be considered. Further, it should be noted that this was not a case where Mr McCann and the SEM defendants were joint tortfeasors as those situations are significantly different.

Finally, as a general note for practitioners, this case drives home the importance of ensuring a case is pleaded accurately in the Particulars of Claim and presented as such to the court.

Incomplete agreements and implied terms

Wells v Devani [2016] EWCA Civ 1106

Natasha Dzameh

In Wells v Devani [2016] EWCA Civ 1106 the Court of Appeal considered when it is appropriate to interpret or imply contractual terms, in particular whether it can imply a contractual term the effect of which is to create a contract.

Facts and First Instance Decision

Mr Wells developed fourteen flats in Hackney as part of a joint venture with a builder. The flats were marketed by an estate agency with a commission of 3% reduced to 2% on prompt payment. By the beginning of 2008 six flats were sold, one was under offer and the remaining seven were on the market.

Mr Wells' neighbour ("the Neighbour") informed him of a property investment company in London that may buy the remaining flats. The Neighbour made inquiries at Mr Well's request. He emailed an investment company and Mr Devani, an estate agent. A telephone conversation occurred between Mr Devani and Mr Wells. Mr Devani contacted Newlon Housing Association ("Newlon") who ultimately agreed, subject to contract, to purchase the remaining flats. Mr Wells contacted his solicitors and Mr Devani. After the acceptance of Newlon's offer Mr Devani sent an email to Mr Wells seeking payment of his fees in the sum of 2% + VAT, attaching his terms of business and requesting the details of Mr Wells' solicitor. Mr Wells provided these details albeit not as a reply to the email. In any event the trial judge considered Mr Wells had seen Mr Devani's email before sending his own.

The parties were in dispute as to the content of their telephone conversation. The trial judge determined that Mr Devani considered he was proposing himself as an agent not a buyer, he was seeking a commission from Mr Wells as profit and he neither described himself as a buyer nor said anything intended to give the impression that he was.

The question then followed as to whether the parties reached an agreement which constituted a legally binding contract given that the written terms were sent after the introduction of Newlon. It was accepted that Mr Devani did not expressly inform Mr Wells as to the circumstances under which he would be entitled to remuneration however the trial judge found he had mentioned his fee was 2% plus VAT. The trial judge implied a term to the effect that payment would be due *"on the introduction of a person who actually completed the purchase".* He considered that Mr Devani had failed to comply with his obligations under section 18 of the Estate Agents Act 1979 and reduced the amount recoverable by one third. Mr Devani's costs were also reduced by 30%. Mr Wells appealed against the liability finding. Mr Devani cross-appealed regarding the fee reduction and the reduction of his costs by 30%.

Court of Appeal Decision

The trial judge had based his decision on an implied term instead of interpreting what the parties said to one another. Whilst the court may imply terms into a concluded contract, it cannot imply terms so as to create a contract between the parties in the first place. This was clearly stated by Lord Roskill in *Scancarriers A/S v Aotearoa International Ltd* [1985] 2 Lloyd's Rep 419.

In determining the appeal the court referred to the relatively recent case of *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] UKSC 76 in which Lord Neuberger was quite clear that implying additional words is different to construing the existing words. The processes involved in doing so are different as are the rules applicable to them. Implied terms are to be considered after the court has construed the existing terms. The court did not accept Mr Devani's submission that the trial judge was interpreting what the parties had said. It was clear from the judgment that he was not doing so.

The court also considered it would not be justified in filling in gaps in the trial judge's

> *"…it is wrong in principle to turn an incomplete bargain into a legally binding contract by adding expressly agreed terms and implied terms together."*
>
> per Lewison LJ [24]

findings of fact and adopting Mr Devani's interpretation of the words. Lewison LJ explained that there were a number of reasons for this: the case was not pleaded in this way; Mr Devani's oral responses in cross-examination did not repeat the phrase within the witness statement; the trial judge's preference for Mr Devani's evidence did not mean he believed every word; Mr Devani's interpretation should not be treated as if it were a written contract; and the Court of Appeal's function is to review the judge's decision not to make findings of fact.

The appeal was permitted and the cross-appeal dismissed.

"The acceptance of an offer must be in accordance with its terms. But if the offer does not specify what would amount to acceptance, I do not consider that it is capable of acceptance so as to result in a binding bilateral contract. It makes no difference whether this is considered in the context of acceptance of an offer, or performance of a unilateral contract."

per Lewison LJ [37]

Dissenting judgment

Arden LJ gave the dissenting judgment. In her view the agreement was enforceable but she did not reach this decision in the same way as the trial judge. She considered the trial judge had made a finding that Mr Devani and Mr Wells agreed Mr Devani should be entitled to commission of 2% plus VAT if he found a purchaser. She disagreed with Lewison LJ in that she considered the terms agreed by the parties in their telephone conversation to be a question of law and inference from or evaluation of primary facts, rather than a question of primary fact itself.

As a matter of interpretation, the agent had agreed to find a purchaser and the trial judge should have interpreted the agreement rather than implying a term. Nonetheless in her view the outcome of the judgment would have been the same.

The agreement between the parties ceased to be unilateral when Mr Devani introduced a purchaser. Mr Wells was unable to withdraw from his deal with Mr Devani after this time and as such the contract changed from a unilateral contract to a bilateral contract. The contract became a binding contract at the latest when the contract for sale with Newlon completed. *Scancarriers* applies to unilateral contracts thereby making it distinguishable and inapplicable to the present case. It is not uncommon for the court to imply terms where appropriate if the parties have made an agreement and a matter has not been expressed.

In interpreting the contract, it appeared the trial judge was correct to arrive at the conclusion that the commission became payable when the purchaser completed the purchase:

"The judge did not have to find that the parties expressly said that Mr Devani was to find a purchaser if in the context of their communications that is what they actually meant."

per Arden LJ [111]

Analysis

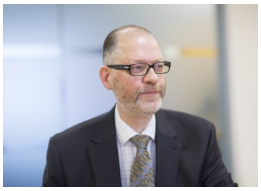
The effect of *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] UKSC 76 is evident in this decision which further demonstrates the courts' increasing reluctance to imply contractual terms. This case highlights the importance of ensuring that, even where parties have failed to agree the entirety of the contractual terms, the key terms are agreed upon. The court can and will interpret the discussions between the parties but it is not prepared to imply a term the effect of which will be to impose a contract upon them.

Arden LJ raises a curious point in relation to *Scancarriers*, namely that as it concerned a unilateral contract it would not apply to the present case. In the author's view the distinction as to whether a contract is unilateral or bilateral should not impact upon the court's inability to imply a term such that it gives effect to a contract which would otherwise not exist. It is accepted that there are instances where the court has determined a contract to be complete despite a lack of detail (*Chitty on Contracts*, vol 1, 32nd edn, (2015) para 2-120). Nonetheless there are numerous cases in which essential terms have not been agreed such that there is only an agreement in principle rather than a binding contract (*Chitty on Contracts*, vol 1, 32nd edn, (2015) para 2-119). The key feature of this case is the fact that the terms were such that Mr Wells was unaware what would trigger the requirement to make a payment. It is one thing to conclude there is a binding contract when only some terms have been agreed but the parties are roughly aware of their requirements as to performance. It is quite another to say that there is a binding contract when one party is unaware as to what may trigger performance and, as such, is in the dark as to his or her liability at any one time.

In brief…

- Terms will not be implied to impose a contract which would otherwise not exist.
- Parties should ensure that the pivotal terms have been agreed even if the entirety of the contract has not.

Company and Commercial Team



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