Contract Law Case Law Update

St John's CHAMBERS

COMPANY AND COMMERCIAL NEWS June 2016

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

We hope that our contract law case law update will become an invaluable resource for keeping you up to date with the most important developments in contract law. In this first edition we cover some of the key cases from the last six months. From here we intend to produce a quarterly update designed to keep you in the know.

Our aim is to select a combination of the most groundbreaking contract law cases together with those which helpfully restate existing principles or contain useful clarifications in areas of practical importance.

Each case discussed will feature an "In brief…" summary panel, designed to allow those in a hurry to take the most useful points from each case. No case will occupy more than two pages of the update in total. Although authored by a litigator, attempts will be made where possible to identify useful points for the non-contentious practitioner too.

Nicholas Pointon (2010 call) specialises in commercial and contractual disputes and has taught the subject of contract law at both undergraduate and postgraduate level at the University of Bristol. He is ranked as a leading junior for commercial dispute resolution in Chambers UK 2015 and 2016. He regularly gives seminars and in-house training on issues of contract law and will happily discuss requests to do so.

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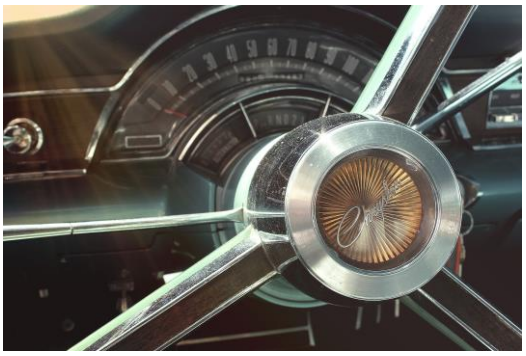
In this issue…

Commercial Barrister, Martha Maher will be speaking at the Bristol Law Society's Dispute Resolution Conference on 23rd June. To register your interest, please contact events@bristollawsociety.com



Oral variation in the face of anti-oral variation clauses…

Globe Motors Inc & Ors v TRW Lucas Varity Electric Steering Ltd & Anor [2016] EWCA Civ 396

"…the parties have made their own law by contracting, and can in principle unmake or remake it."

World Online Telecom v I-Way Ltd [2002] EWCA Civ 413, per Sedley LJ at [10]

In brief…

- An oral variation can take place even in the face of an anti-oral variation and entire agreement clause.
- The party contending for such variation must establish it on the balance of probabilities, nothing more.

In *Globe Motors Inc & Ors v TRW Lucas Varity Electric Steering Ltd & Anor* [2016] EWCA Civ 396, the Court of Appeal held that an oral variation can still take place notwithstanding the presence of an anti-oral variation clause.

Facts

TRW produced electric power assisted steering systems for several car manufacturers. In 2001 TRW entered into an exclusive supply agreement with Globe, by which it had to purchase all of its electric motors from Globe and Globe could not sell the same parts to anyone else. The agreement gave TRW the right to propose changes to the specification of the motors. Between 2005 and 2015 TRW purchased over three million "second generation" motors from another manufacturer. Globe contended that this breached the agreement, arguing that it could have produced the "Gen 2" motors by making changes to the specification of its motors.

Decision

At first instance HHJ Mackie QC found TRW to be in breach of the agreement by purchasing the Gen 2 motors from a third party.

TRW succeeded on appeal. The outcome of the appeal turned upon the application of established principles of contractual interpretation. Paragraphs [56] – [62] of Beatson LJ's judgment contain a useful summary of the principles of interpretation (including consideration of the Supreme Court's recent guidance in *Arnold v Britton* [2015] UKSC 36; [2015] AC 169 and *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co. (Jersey) Ltd* [2015] UKSC 72, [2015] 3 WLR 1843.

Interestingly Beatson LJ briefly addressed the relevance of pre-contractual negotiations in the process of interpretation. At [61] he noted that such negotiations could not be taken into account, save *"where a party seeks to establish that a fact which may be relevant as background was known to the parties or to support a claim for rectification or estoppel."* As we see below when considering the recent decision in *Narandas-Girdhar & anor v Bradstock* [2016] EWCA Civ 88, that may be fractionally too narrow a description of the role to be played by pre-contractual negotiations.

Ground 6 of the appeal concerned whether an oral variation had taken place, adding an additional party to the agreement. Since the appeal succeeded on the question of interpretation, the Court's remarks on ground 6 were *obiter*.

Nevertheless, Beatson LJ took the opportunity to resolve conflicting previous decisions as to the effectiveness of anti-oral variation clauses.

As Beatson LJ recognized at [96], the Court of Appeal's previous decisions in *United Bank Ltd v Asif* and *World Online Telecom Ltd v I-Way Ltd* [2002] EWCA Civ 413 presented an inconsistent position on this issue.

In the former case Sedley LJ had refused permission to appeal on the papers from summary judgment, on the basis that no oral variation could have legal effect in the face of an anti-oral variation clause. In the latter case the same Lord Justice of Appeal held the point to be sufficiently unsettled to be unsuitable for summary determination (Steel J later held the contract to have been varied by oral agreement following a full trial: see [2004] EWHC 244 (Comm)).

After a brief detour into Australian authority at the turn of the 20th century, Beatson LJ concluded *"Thus, an oral agreement or the conduct of the parties to a contract containing such a clause may give rise to a separate and independent contract which, in substance, has the effect of varying the written contract"* (at [107]). One might have queried whether such reasoning remains valid in the face of an entire-agreement clause, the purpose of which is to avoid the presence of such separate, independent or collateral contracts. Yet Article 6.3 of the agreement in issue in *Globe v TRW* (reproduced at [20]) is a combined entire-agreement and anti-oral variation clause. One can therefore surmise that the prospects of establishing an oral variation, even by means of a "separate or independent contract" to that effect, are no less for the presence of an entire-agreement clause.

What must be shown in order to establish an oral variation in the face of an anti-oral variation clause? Beatson LJ agreed with the comments of Gloster LJ in *Energy Venture Partners v Malabou Oil & Gas* [2013] EWHC 2118 (Comm) and of Stuart-Smith J in *Virulite LLC v Virulite Distribution* [2014] EWHC 366 (QB), to the effect that the party alleging any variation must establish that such a variation was indeed concluded on the balance of probabilities. In so doing he eschewed previous suggestions that "strong evidence" was needed, or that a "very high evidential burden" needed to be discharged (see [2011] EWHC 57 (Comm) at [53] and [2012] EWHC 3134 (QB) at [33]).

"The parties have freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct. The consequence in this context is that in principle the fact that the parties' contract contains [an anti-oral variation clause] does not prevent them from later making a new contract varying the contract by an oral agreement or by conduct."

Globe Motors Inc & Ors v TRW Lucas Varity Electric Steering Ltd & Anor [2016] EWCA Civ 396, per Beatson LJ at [100]

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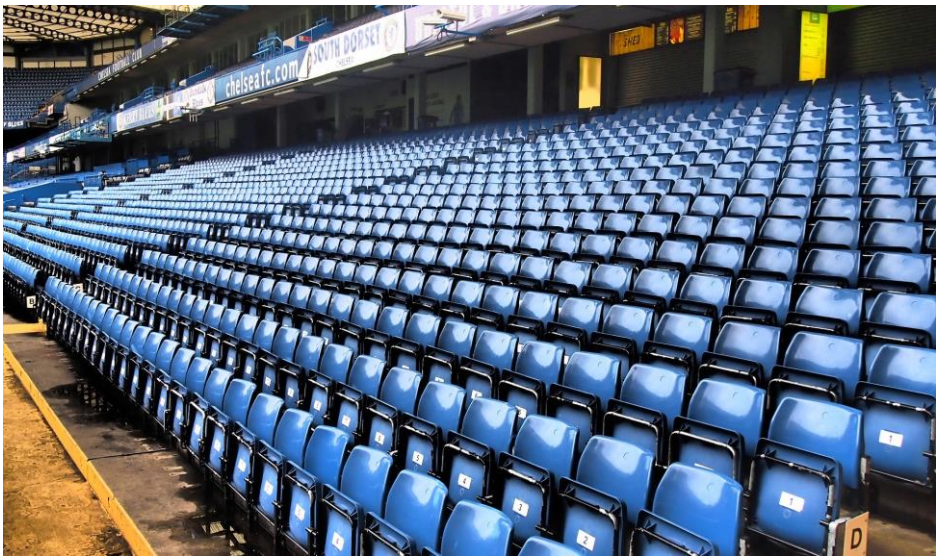
Chambers UK (2016)



All reasonable endeavours and good faith

Bristol Rovers (1883) Ltd v Sainsbury's Supermarkets Ltd [2016] EWCA Civ 160

In *Bristol Rovers (1883) Ltd v Sainsbury's Supermarkets Ltd* [2016] EWCA Civ 160 the Court of Appeal considered the scope of an all reasonable endeavours and an express good faith clause in the context of an agreement to sell the Bristol Rovers' Memorial stadium site to Sainsbury's supermarkets.

Completion of the sale agreement was conditional upon *inter alia* Sainsbury's obtaining planning permission permitting deliveries at all hours. In the event that restrictions were imposed Sainsbury's were obliged to challenge them by appeal, provided certain conditions were met. Restrictions were imposed and Sainsbury's lodged two successive appeals before withdrawing one upon receipt of expert advice that one of the conditions (triggering the obligation to appeal) was not met. Sainsbury's then exercised a contractual right to terminate the agreement.

At first instance Proudman J found that Sainsbury's were entitled to do so. Bristol Rovers appealed, *inter alia* on the basis that Sainsbury's refusal to permit Bristol Rovers to launch a further planning appeal in Bristol Rovers' name was a breach of the agreement. Bristol Rovers sought to rely upon Sainsbury's obligations to use all reasonable endeavours to procure an acceptable planning permission and to act in good faith in relation to its obligations under the agreement.

The appeal failed on the basis that Sainsbury's reasonable endeavours and good faith obligations were to be read alongside the contract's detailed provisions in relation to appeals. Floyd LJ held that the latter curtailed the former, such that they could not operate to oblige Sainsbury's to permit Bristol Rovers to launch a fresh planning appeal in either Sainsbury's or Bristol Rovers' name.

Counsel for Bristol Rovers contended that the good faith clause in the contract obliged Sainsbury's to *"adhere to the spirit of the contract"* rather than resort to its black letter. Such a broad submission found no favour with Floyd LJ (at [98]).

Clause 32.1 required each party to act in good faith in relation to their obligations under the agreement. Floyd LJ dispatched reliance on this clause on the basis that there was no obligation under the agreement for Bristol to apply for planning permission (at [99] – [100]).

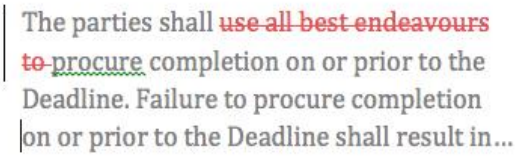
Clause 32.2 of the contract required Sainsbury's to lend such assistance as lies in its power to give as Bristol Rovers may reasonably and specifically request. Floyd LJ noted that clause 32.2 was not limited in the same way as clause 32.1, by reference to the parties' obligations under the agreement. Nevertheless, Floyd LJ refused to accord the clause its broad, literal effect, instead confining it to providing assistance in relation to the discharge of the opposite party's obligations under the agreement (at [103]).

In brief…

- General / fallback obligations to use all reasonable endeavours or act in good faith will be construed against specific obligations.
- The more detailed the contract, the less room for reasonable endeavours / good faith to fill the voids.

Previous iterations of a contract as an aid to construction

Narandas-Girdhar & anor v Bradstock [2016] EWCA Civ 88



In *Narandas-Girdhar & anor v Bradstock* [2016] EWCA Civ 88 the Court of Appeal considered the vexed issue of when previous iterations of a contract and evidence of deleted words may be used as an aid to the construction of the finalized agreement.

Facts

A debtor (Mr Parekh) sought to set aside a modified proposal in his IVA on the basis that *inter alia* it had been conditional and dependent upon the simultaneous proposal for an IVA from his wife, which had been rejected.

Decision

At first instance Jonathan Klein (sitting as a Deputy High Court Judge) found that the proposal was not conditional upon Mrs Parekh's IVA being approved by her creditors. He found that the purpose of certain modifications to Mr Parekh's proposal was to break the interdependence of his proposal and that of his wife. In doing so the Deputy Judge had regard to both the final proposal and the modifications which lead to it.

On appeal it was contended that the Deputy Judge erred by having regard to the provisions removed by the modifications and should instead have confined himself to the text of the proposal as approved, on the basis that pre-contractual negotiations are inadmissible as an aid to construction.

The appeal was dismissed. As to the legitimacy of having regard to the deletions made to a previous iteration of the proposal, Briggs LJ held that this case fell within the second of two exceptions identified by Clarke J in *Mopani Copper Mines v Millennium Underwriting* [2008] EWHC 1331 (Comm) at [120] – [123], namely where:

(1) "deleted words in a printed form may resolve the ambiguity of a neighbouring paragraph that remains"; or

(2) "the fact of deletion shows what it is the parties agreed that they did not agree and there is ambiguity in the words that remain."

Briggs LJ made clear that reference to deleted words as an aid must be used with care (at [20]), echoing the concerns expressed by Clarke J in *Mopani Copper Mines* at [122].

Significantly, Briggs LJ only felt able to have recourse to the deletions from previous iterations having found a level of ambiguity in the remaining provisions of the IVA (see [21] – [22]). Consequently it remains the case that if the concluded provisions are unambiguous, reference to deletions is inadmissible even if they would throw a different light upon the concluded terms.

Accordingly deletions from previous iterations might exceptionally form a legitimate aid to construction of an ambiguous finalized contract, but only in the two circumstances described above. Even then, caution must be exercised when drawing inferences from the fact of deletion.

In brief…

- Deletions from previous iterations of a contract are inadmissible in construing the finalized agreement except where:
  - (1) deleted words in a printed form may resolve the ambiguity of a neighbouring paragraph; or
  - (2) the fact of deletion shows what is is the parties agreed that they did not agree, and there is ambiguity in the words that remain.
- Even so, care should be taken when drawing inferences from the fact of deletion.

Waiving the requirement for a signature in offer and acceptance

Reveille Independent LLC v Anotech International (UK) Ltd [2016] EWCA Civ 443

In *Reveille Independent LLC v Anotech International UK Ltd* [2016] EWCA Civ 443, the Court of Appeal considered when a contract containing a stipulation requiring signature will nevertheless come into being without having been signed.

Facts

Reveille was a cookware distributor and Anotech a US television company.

In 2011 they began negotiating an agreement by which Anotech would integrate and promote Reveille's cookware products into three episodes of its television series and would grant a licence to Reveille for certain US intellectual property rights. In February 2011 Anotech sent a deal memo to Reveille, stating that it would not be binding until signed. Later that month Reveille returned the deal memo signed but containing handwritten amendments and additions. The deal memo was intended to be replaced by detailed long form agreements, but negotiations broke down by July 2012 and Anotech treated the agreement as repudiated.

"…where signature as the prescribed mode of acceptance is intended for the benefit of the offeree, and the offeree accepts in some other way, that should be treated as effective unless it can be shown that the failure to sign has prejudiced the offeror."

Reveille Independent LLC v Anotech International UK Ltd [2016] EWCA Civ 443, per Cranston J at [41]

The issue was whether the parties had by their conduct signified their acceptance of the amended deal memo so as to waive the requirement for signatures and to give rise to a binding agreement.

Decision

Judge Mackie QC held that by March 2011 Anotech was performing its obligations under the deal memo to the knowledge of Reveille, such that Anotech had accepted by conduct Reveille's offer contained in the amended deal memo, despite the fact that Anotech had never signed it.

Cranston J, with whom Underhill and Elias LLJ agreed in dismissing the appeal, listed the following propositions (at [40] – [41]):

(1) acceptance can be by conduct provided that, viewed objectively, it is intended to constitute acceptance;

(2) acceptance can be of an offer on the terms set out in a draft agreement but never signed;

In brief…

- A draft agreement can have contractual force even though a requirement for signature is unfulfilled.
- The subsequent conduct of the parties is admissible and key.

(3) if a party has a right to sign a contract before being bound, it is open to it by clear and unequivocal words or conduct to waive the requirement and to conclude the contract without insisting on signature;

(4) if signature is the prescribed mode of acceptance, the offeror will be bound if it waives that requirement and acquiesces in a different mode of acceptance;

(5) a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly;

(6) the subsequent conduct of the parties is admissible to prove the existence of a contract, and its terms, although not as an aid to its interpretation.

Per procurationem – the consequences of signing on behalf of another without authority

Marlbray Ltd v Laditi [2016] EWCA Civ 476

In *Marlbray Ltd v Ladati* [2016] EWCA Civ 476 the Court of Appeal considered the validity of a contract purportedly entered into by A on behalf of A and B, but where A lacked B's authority to do so.

Facts

Mr and Mrs Laditi attended a sales fair at which Mr Laditi entered into a contract to purchase an "aparthotel" room in Park Plaza hotel at Westminster Bridge, developed and sold by Marlbray. Mrs Laditi had spent most of the day outside the fair, looking after the couple's young children. The first she learned of the deal was when Mr Laditi triumphantly announced it ex post facto. As the Court found in evidence, she was *"quite annoyed about that..."*.

The contract described a sale to Mr and Mrs Laditi as joint purchasers. Mr Laditi signed on behalf of both himself and his wife. After paying a significant deposit, Mr Laditi could not raise the balance and defaulted. Marlbray forfeited the deposit.

Mr Laditi sought to recover the deposit on the basis that, applying *Suleman v Shahsavari* [1988] 1 WLR 1181, there was no binding contract at all because he had lacked authority to sign on behalf of his wife.

Decision

Mr Laditi succeeded at first instance before Deputy Judge Strauss, who noted that Marlbray could easily have brought a claim for its "obvious remedy" for breach of warranty of authority by Mr Laditi, but had failed to do so. The Deputy Judge then rejected Marlbray's attempt to amend so as to plead that argument on the basis that it had, by then, become statute barred.

Marlbray succeeded on appeal, the Court of Appeal overturning the finding that no contract had come into being or was otherwise "void". Instead, a valid and binding contract had come into being as between Marlbray and Mr Laditi, but not as between Marlbray and Mrs Laditi, by reason of the absence of any authority for Mr Laditi to contract on her behalf.

Key to the reasoning developed by Gloster LJ was a term of the contract of sale which provided that the obligations of Mr and Mrs Laditi were to be joint and several. As Chitty on Contracts notes, at 17-003:

"Joint and several liability gives rise to one joint obligation and to as many several obligations are there are joint and several promisors."

In consequence it followed that Mr Laditi remained *"contractually bound under his several contract with the appellant to purchase the property"* (per Gloster LJ at [53] and [69]), despite the fact that no contract came into existence as between Malbray and Mrs Laditi.

The ramifications of the decision are potentially wide ranging, far beyond the factual context of this case. Prima facie, any multi-partite contract imposing joint and several liability is effectively severable if and insofar as the validity of the contract should be impugned as against one or more, but not all, parties.

In brief…

- Where A enters into a contract on behalf of A and B, but without B's authority, the contract may subsist as against A alone where A and B's obligations are joint and several.

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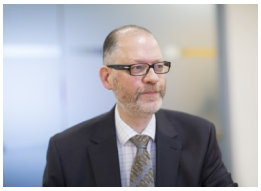

Leslie Blohm QC
Year of call: 1982, QC 2006

David Fletcher
Year of call: 1971

John Blackmore
Year of call: 1983

Richard Stead
Year of call: 1979

Robin Neill
Year of call: 1979

Charles Auld
Year of call: 1980

Martha Maher
Year of call: 1987

Guy Adams
Year of call: 1989

Andrew Kearney
Year of call: 2007

James Pearce-Smith
Year of call: 2002

John Dickinson
Year of call: 1995

Christopher Jones
Year of call: 2004

George Rowell
Year of call: 2004

Richard Gold
Year of call: 2006

Michael Clarke
Year of call: 2009

Oliver Wooding
Year of call: 2009

Nicholas Pointon
Year of call: 2010

Charlie Newington-Bridges
Year of call: 2011

Adam Boyle
Year of call: 2012

Joss Knight
Year of call: 2014

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