Fenwick Elliott
The construction law specialists

Issue 130 April 2011

Dispatch

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

Valuing architectural services

Michael Phillips Architects Ltd v Riklin & Anr

[2011] EWHC 27 (TCC)

The Riklins wished to renovate their residential property and engaged MPA for the full suite of architectural services as defined by the RIBA. The Riklins made it clear from the outset that they were cost conscious and anxious to complete the project by spring 2008. They also requested a project manager for on site supervision of the contractor; however, MPA assured them that the management capability of his professional staff was such that there was no need to do this. A contractor was engaged in April 2008, though no formal written contract was entered into. In July 2008, the contractor then went into liquidation. By this time, the Riklins had overpaid the contractor in excess of £80,000 but MPA had not performed any cost control or certification duties. In order to complete the project, the Riklins were forced to engage alternative contractors at a cost considerably over the original budget.

A dispute then arose over the payment of MPA's fees. MPA first sought payment of £147k, being its fees based on an hourly basis and amounting to 1/3 of the originally agreed construction costs. No attempt was ever made by MPA to agree a percentage lump sum fee. Ultimately, MPA brought court proceedings seeking an architectural fee in the amount of £94,430.21. This was based on a percentage of the construction costs for architectural services and a time charge for interior design services. MPA contended that a letter was sent to the Riklins outlining that its fees would initially be on a "time expended" basis as it was a refurbishment of an existing Grade II listed building and once the exact scope of works was known, then the time charge fee would be converted to a lump sum fee. The Riklins denied that this letter was ever given to them.

The issue before the court was what was the reasonable value of the professional services provided by MPA and what was the proper approach to the assessment of a reasonable fee in the situation where no appointment was signed? Here, the Judge held that the necessity for the court to assess what was a reasonable fee for the services rendered by MPA arose out of MPA's clear failure to comply with his professional obligation under Rule 11.1 of the Architects Code of Conduct, which requires him to record the appointment in writing. In assessing what was a reasonable fee, the Judge preferred the submission of the Rikllins' expert who suggested that the approach should be to look at the value of the services provided by MPA that were in fact performed at each stage of the project, and value it against "the reasonable percentage rate".

The Judge did not agree with MPA's expert who had suggested that each stage be examined to determine what point had been reached and then the proportion of the duties performed by MPA apportioned to it, applying the "reasonable percentage rate", irrespective as to how competently the services were performed. The reasonable percentage rate was 9%, that being 12%, minus a 25% fee reduction for non performance and part completion of the later stages. MPA had failed:

"to properly administer the project by providing the contractual tools to manage risk and to monitor and control costs and the failures to ensure compliance with building regulations and listed building consent, reduced not only the value of the administration elements but also serve to reduce the value of the earlier design elements to the client by reason of the delay, the excessive costs and subsequent adjustment to design to achieve planning consent and listed building compliance and pursuit of appeals."

Entire agreement clauses

Axa Sun Life Services plc v Campbell Martin and Others

[2011] EWCA Civ 133

Entire agreement clauses are frequently relied upon in an attempt to prevent one party from asserting that the written contract is not the sole repository of the terms of the contract and that there is another term of that contract which has been broken by the other party. The defendants here were appointed to act as AXA's authorised representative to sell investment and other products on its behalf. In each case the agreement, which was in AXA's standard form, had been terminated and AXA was claiming outstanding monies. The defendants argued that the standard agreement incorporated certain implied terms imposing obligations on AXA and that they were induced to enter into the agreement by negligent and fraudulent misrepresentations and/or by collateral warranties given by AXA. AXA said that the defendants were prevented from raising these arguments (other than fraudulent misrepresentation, which cannot be excluded) as a result of clause 24 of the agreement which provided:

"This Agreement and the Schedules and documents referred to herein constitute the entire agreement and understanding between you and us in relation to the subject matter thereof. Without prejudice to any variation as provided in clause 1.1, this Agreement shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us relating to the subject matter of this Agreement but this will not affect any obligations in any such prior agreement which are expressed to continue after termination."

The defendants also said that the clause was contrary to the requirements of reasonableness under the Unfair Contract Terms Act 1977.

The CA held that clause 24 did not exclude misrepresentations of fact. The clause only sought to ensure that prior representations did not become terms of the contract. In relation to the implied terms they were implied in order to give business efficacy to the agreements. As such they were intrinsic to the agreements and could not therefore be excluded. Collateral warranties were, however, excluded. The CA thought that the purpose of entire agreement clauses, such as clause 24, was obvious. A clause such as clause 24 gave both sides certainty as to the terms of their contract. "Sensible parties", when faced with a written agreement of the length and detail of the Agreements, would not expect it to be attended by oral collateral agreements, and would expect their contract to be contained in the document they sign.

LJ Stanley Burnton said that he had no doubt that clause 24 did not exclude or supersede misrepresentations as to matters that are not the subject of the terms of the Agreement. Notwithstanding the words "*This Agreement … constitute the entire agreement and understanding between us in relation to the subject matter thereof*" were not sufficiently clear for this purpose. For example, a representation by AXA such as "We are the largest insurance company in the country", if false and relied upon, is not superseded by the clause. The exclusion of liability for misrepresentation has to be clearly stated. It can be done stating the parties' agreement that there have been no representations made; or that there has been no reliance on any representations; or by an express exclusion of liability for misrepresentation. However, as here talk of the parties' contract superseding such prior agreement will not by itself absolve a party of misrepresentation.

Further, in relation to the entire agreement clause, the CA said this was subject to Section 3(2)(b)(i) of UCTA and therefore subject to the UCTA reasonableness test. The purpose of such a clause was to provide legal certainty as to the terms of the contract and, in circumstances in which the sums involved in any dispute are likely to be relatively modest, if unchallenged it has the effect of limiting the costs involved in litigation. The agreements were entered into between commercial organisations and within a commercial context. In addition the clause in question was not unusual within the insurance industry. Finally, if the defendants were dissatisfied the agreement could be terminated on only two months notice. Therefore it was reasonable. As financial advisors, the defendants were accustomed to dealing with written agreements and the CA thought it fair to assume that they would generally, if not always, advise their own clients to ensure that they were content with the written terms of their policies.

Had the parties entered into a binding contract?

Immingham Storage Co Ltd v Clear plc

[2011] EWCA Civ 89

Immingham provide storage facilities for petroleum and similar products. Clear, was a commodities trader. In October 2008, Clear made enquiries of Immingham regarding diesel storage space. 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 which was headed "*Subject to board approval and tankage availability*" set out various essential details 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 it 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 fax 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 for the court was whether a contract was 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 CA upheld the trial judge's decision that a binding contract was concluded by Immingham's email of 9 January 2009. The CA held that the quotation was expressed to be subject to two conditions only: the approval of the 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*".

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.
Dispatch is a newsletter and does not provide legal advice.

Edited by Jeremy Glover, Partner, Fenwick Elliott LLP
jglover@fenwickelliott.com

Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN
www.fenwickelliott.com