

Court of Appeal before Neill LJ, Ralph Gibson LJ and Steyn LJ : 20th July 1992

Lord Justice Neill: I will ask Lord Justice Steyn to give the first judgment.

JUDGMENT : Lord Justice Steyn:

1. This is an appeal against a judgment on preliminary issues given by His Honour Judge Rich, Q.C., sitting as an Official Referee, on December 19th 1991. The Judge was asked to decide whether two contracts were concluded between the plaintiffs ("*Trentham*") and the defendants ("*Archital*"). The Judge ruled that Trentham had established that the two contracts were concluded. He also made rulings as to the terms of the contracts. There are no independent grounds of appeal challenging the rulings as to the terms of the contracts. The grounds of appeal are directed solely at the Judge's rulings that the conclusion of the two contracts was established. Leave to appeal on questions of fact was given under Order 58, rule 4(b).
2. The way in which the dispute arose must now be sketched. Trentham were building and civil engineering contractors. Municipal Mutual Insurance Limited ("*Municipal Mutual*") engaged Trentham as main contractors to design and build industrial units in two phases on land known as the Summit Centre, Southwood, Cove, Farnborough, Hampshire. An agreement dated February 2nd 1984 ("*the main contract*") governed phase 1. An agreement dated Dec. 18, 1984 ("*the supplemental agreement*") governed phase 2. The work for both phases included the design, supply and installation of aluminium window walling, doors, screens and windows. It will be convenient to refer to such work as "*window works*". Archital carried on business as manufacturers, suppliers and installers of aluminium window walling, doors, screens and windows. It is common ground that Archital in fact undertook for Trentham the window works in phase 1 and in phase 2, and that Trentham paid Archital for the carrying out of the window works. Trentham contends that two separate sub-contracts, one covering phase 1 window works and the other phase 2 window works, came into existence. Archital denies that the dealings between the parties ever resulted in the conclusion of binding sub-contracts.
3. A distinctive feature of the case is that the transactions between Trentham and Archital were fully executed. Archital performed the agreed work and Trentham made the agreed payments. That fact calls for an explanation of the relevance of the dispute about the formation of the two alleged sub-contracts. The answer is to be found in subsequent claims made by Municipal Mutual against Trentham under the main contracts. Those claims were for alleged delays and defects. The claims were put forward in arbitration. Two interim awards have been made against Trentham in the sums of £558,335 and £343,820. Trentham instituted proceedings against seven sub-contractors for an indemnity in respect of such sums as Trentham is liable to pay Mutual Insurance. One of these sub-contractors is Archital, the first defendant in the proceedings. Trentham alleges that there were defects in the window works in both phase 1 and phase 2. Trentham's claim against Archital is brought in contract. Archital by their amended defence deny or do not admit the alleged defects. But Archital also disputes that any sub-contracts ever came into existence.
4. His Honour Judge Fox-Andrews, Q.C. ordered that as between Trentham and Archital preliminary issues should be tried. Those preliminary issues were defined by reference to the statement of claim. It is unnecessary to set out the terms of the statement of claim and the order. The principal issues ordered to be tried were whether valid sub-contracts governing phase 1 and phase 2 were made between Trentham and Archital. Those issues came before His Honour Judge Rich, Q.C. for hearing. He decided those issues in favour of Trentham. The appeal challenges those findings.
5. It is necessary to consider the basis of the Judge's decision that Trentham proved the formation of two valid sub-contracts. It is common ground that as between Trentham and Archital no integrated written sub-contracts ever came into existence. There was no orderly negotiation of terms. Rather the picture is one of the parties, jockeying for advantage, inching towards finalisation of the transaction. The case bears some superficial resemblance to cases that have become known as "*battle of the forms*" cases where each party seeks to impose his standard conditions on the other in correspondence without there ever being any express resolution of that issue. In such cases it is usually common

ground that there is a contract but the issue is what set of standard conditions, if any, is applicable. Here the issue is one of contract formation. Moreover, the present case is different in the sense that Trentham's case was that the sub-contracts came into existence not simply by an exchange of correspondence but partly by reason of written exchanges, partly by oral discussions and partly by performance of the transactions. It will be necessary to trace the dealings between the parties, taking into account the judge's findings. Given the fact that the grounds of appeal seek to attack the Judge's findings in respect of successive stages of the dealings between the parties, I will deal with those criticisms in the course of the narrative. The thrust of the criticisms is throughout that there was no evidence to support the findings which are now challenged. The appellant relies on the principle that it is a question of law whether there is evidence to support a particular finding of fact. At this stage I would assume that this is a useful exercise. Later in this judgment I will consider whether this approach is correct in this case, and I will consider the matter more broadly in the light of the totality of the evidence.

6. Before I turn to the facts it is important to consider briefly the approach to be adopted to the issue of contract formation in this case. It seems to me that four matters are of importance. The first is the fact that English law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. and in the present case that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See **Brogden v. Metropolitan Railway** (1877) 2 A.C. 666; **New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd** [1974] 1 Lloyd's Rep. 534 at p. 539, col. 1; [1975] A.C. 154 at p. 167 D-E; **Gibson v Manchester City Council** [1979] 1 W.L.R. 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See **British Bank for Foreign Trade Ltd v Novinex** [1949] 1 K.B. 628, at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See **Trollope & Colls Ltd v Atomic Power Construction Ltd** [1963] 1 W.L.R. 333.
7. The story starts on Jan. 12, 1984 when Archital submitted four alternative quotations for phase 1 window works to Trentham. Discussions followed. On January 24th 1984 Archital substituted a revised offer in respect of one of the earlier quotations at a revised price of the order of £140,000. The offer was conditional on the incorporation of Archital's standard conditions or the so-called blue form. Trentham was not prepared to accept this offer but made a counter-offer contained in Order No. 8285 dated January 30th 1984. This counter-offer stipulated the work and price described in Archital's revised offer but was conditional on the incorporation of Trentham's standard terms of sub-contract. Moreover, the order was expressed to be – “. . . *subject to (a) Form of sub-contract being entered into . . . [and] (b) the signing and immediate return of the attached acknowledgment slip.*” Neither of these formalities for acceptance was ever completed. The counter-offer was subject to measurement and/or adjustment on completion. By an addendum dated February 1st 1984 this last stipulation was deleted and it was made clear that it was a lump sum contract. That was the offer which was open for acceptance by Archital from February 1st 1984. On February 2nd 1984 the main contract for phase 1 was concluded.

8. On February 10th 1984 Archital responded by letter to Trentham's counter-offer as revised on Feb. 1, 1984. Archital confirmed that "*we have entered the contract into our Drawing Office Programme*". In the context, the Judge held, one should read "*contract*" as meaning "*project*". Two obstacles remained. First Archital's letter stated that at the meeting which led to Trentham's counter-offer – "*. . . it was confirmed that the sub-contracts would be in the Blue Form of sub-contract.*"
9. In other words, Archital thought that there had been agreement to use Archital's preferred standard terms and conditions. Secondly, Archital said that they would not be able to comply with a programme with a commencement date of May 14.
10. On February 17th 1984 Trentham's regional office at Rainham sent a reminder to Archital. It stated: "*Our order is subject to the signing and immediate return of the Acknowledgment slip as stated in the order form.*" Negotiations then continued between Mr. Chapple, on behalf of Trentham, and Mr. Hazell, on behalf of Archital.
11. On February 17th Trentham's site office wrote to Archital as follows: "*We confirm our Contract period is very short and that it is essential that you make every effort to meet the dates agreed with your Mr. Rogers. We also confirm that you have already commenced working drawings, that you have sufficient information to enable you to proceed with your drawings, and that further details will be forwarded to you to enable you to complete your drawings as soon as possible.*"
12. The Judge inferred that between February 10th and 17th 1984 Mr. Chapple had agreed the programme with Mr. Rogers, although in terms which were not proved before the Judge. The appellants submit that there was no evidence on which to base this finding, and that the letter referred to a discussion which took place before February 10th. Having regard to the terms of the letters of February 10th and February 17th. I regard it as more probable than not that the Judge's inference was right. It follows that one obstacle to the conclusion of a contract was removed.
13. That left the problem of Archital's request for the use of their preferred standard conditions. Mr. Hazell reiterated this preference in a letter dated February 24th 1984. This letter reads as follows: "*Thank you for your letter dated 16th February 1984, we note your comments but our query was in connection with the sub-contract document. We wish the sub contract to be carried out under the terms and conditions of the Standard Blue Form of Sub Contract as agreed at the meeting attended by our Mr. Rogers. Please confirm that we are to return your own form and that the Blue Form will be forwarded to us.*"
14. In this letter, and in a letter of the same date from Archital to Trentham's Rainham office, Archital described their reaction as a "*query*". Archital thought that Trentham had accepted Archital's request. Contrary to the submission of the appellant's Counsel, I take the view that the Judge was entitled to conclude that the letter of February 24th was not a rejection of the counter offer as revised on February 10th. This construction is reinforced by the letter of March 9th 1984 from Archital to Trentham which shows that the issue as to the standard conditions had been resolved.
15. The Judge pointed out that there were now three matters to be considered: (i) payment procedure; (ii) insurance of unfixed goods; and (iii) disputes procedure. The Judge found as a fact that the payment procedure had been agreed by February 24th and that the letter merely confirmed the position. In any event, from this time regular stage payments were made "*on the basis of the timetable provided in the Grey Form*". These findings are not challenged. But it is important to note that by March 9th Archital had already commenced the work and that from about this time Trentham made regular stage payments.
16. The second matter relates to Archital's request that Trentham should pay the cost of insuring unfixed goods which remained the property of Archital. Trentham did not agree to bear these costs. But the Judge made the following findings of fact: "*Archital nevertheless delivered such goods to the site at its own risk. In accepting such risk, they accepted that in this respect the provisions of PGT's main contract should apply to their relationship with PGT in performing work at Southwood.*"
17. This finding of fact is challenged on the ground that there was no evidence to support it. I disagree. By a letter of March 23rd 1984 Trentham refused to accept these costs. Trentham described the risk as minimal. On April 2nd 1984 Archital wrote to say that they were asking brokers for a quotation, and that they would write again. They failed to mention the matter again. Instead they continued to

deliver goods to the site, to perform work and to receive stage payments. In these circumstances I am satisfied that there was sufficient evidence to support the Judge's finding of fact. This obstacle to the conclusion of a contract was removed in April 1984.

18. The third matter to be considered is the lack of agreement on dispute resolution. The Judge held that agreement on dispute resolution was not essential to the conclusion of the contract: the parties were content to treat it as a matter for further agreement after the conclusion of the contract. It was plainly not an essential matter as far as Trentham was concerned. Archital described their point of view as based on company policy. Nevertheless the letter describes Archital's concern about the identity of the adjudicator and stakeholder as a "*query*". This supports the view that Archital was also content to treat a dispute resolution mechanism as a non-essential matter. This ruling is criticised on the basis that there is no evidence to support it. I disagree. The Judge's inference was reasonable and legitimate. In any event the parties subsequently agreed on the adjudicator and stakeholder. It is conceded that there was agreement on the stakeholder. By letter dated April 22nd 1985 Archital said in respect of phase 2 that they took it that Trentham agreed to the same adjudicator and stakeholder "*as agreed for that contract*" (i.e. phase 1). That is retrospectant evidence showing earlier agreement on the identity of both the adjudicator and stakeholder. It is true that Mr. Steer, who testified on behalf of Trentham, was unaware of this agreement but he was not directly involved in the negotiations. It is also fair to add that the Judge could not identify the adjudicator. On behalf of Archital it is submitted that there was no evidence to support the Judge's finding of fact. That submission is wrong: there was strong evidence to support his finding.
19. The Judge also found that Trentham delivered to Archital four separate orders for additional work in phase 1 all " . . . *subject to the conditions and terms of the original order*". These supplementary orders were accepted and executed by Archital, and Trentham made appropriate additional payments. Moreover, the Judge pointed out that in the context of exchanges about phase 2, Archital offered to perform the work on the basis that the terms and conditions would be "*as for the original contract*".
20. The Judge's conclusion was as follows: "*I therefore conclude that Mr. Chapple modified the terms of PGT's offer contained in their Order dated 30th January, in his telephone conversation with Mr. Hazell on 9th March, and that those terms were accepted on behalf of Archital by the letter dated the same day. If such acceptance is to be construed as being subject to the resolution of the issues of insurance and of the disputes procedure, rather than, as I think, those "queries" being left for subsequent agreement, those matters were, in fact, duly resolved in the following months. At least from that point, Archital accepted PGT's modified offer by their conduct in carrying out the sub-contract work, and applying for and accepting payment on the agreed terms.*"

Conclusions on phase 1

21. On behalf of Archital Counsel challenged specific findings of fact regarding successive stages of the dealings between the parties on the ground that there was no evidence to support the findings. I have held that the individual criticisms were not well-founded. But ultimately the only issue is whether there is sufficient evidence to support the Judge's central finding of fact that a binding contract on phase 1 came into existence. Even if, contrary to my view, a particular finding was not supported by evidence, it would not matter provided that there was sufficient evidence to support the ultimate finding of fact.
22. In a case where the transaction was fully performed the argument that there was no evidence upon which the Judge could find that a contract was proved is implausible. A contract can be concluded by conduct. Thus in **Brogden v. Metropolitan Railway**, *sup.*, decided in 1877, the House of Lords concluded in a case where the parties had acted in accordance with an unsigned draft agreement for the delivery of consignments of coal that there was a contract on the basis of the draft. That inference was drawn from the performance in accordance with the terms of the draft agreement. In 1992 we ought not to yield to Victorian times in realism about the practical application of rules of contract formation. The argument that there was insufficient evidence to support a finding that a contract was concluded is wrong. But, in deference to Counsel's submissions, I would go further.

23. One must not lose sight of the commercial character of the transaction. It involved the carrying out of work on one side in return for payment by the other side, the performance by both sides being subject to agreed qualifying stipulations. In the negotiations and during the performance of phase 1 of the work all obstacles to the formation of a contract were removed. It is not a case where there was a continuing stipulation that a contract would only come into existence if a written agreement was concluded. Plainly the parties intended to enter into binding contractual relations. The only question is whether they succeeded in doing so. The contemporary exchanges, and the carrying out of what was agreed in those exchanges, support the view that there was a course of dealing which on Trentham's side created a right to performance of the work by Archital, and on Archital's side it created a right to be paid on an agreed basis. What the parties did in respect of phase 1 is only explicable on the basis of what they had agreed in respect of phase 1. The Judge analysed the matter in terms of offer and acceptance. I agree with his conclusion. But I am, in any event, satisfied that in this fully executed transaction a contract came into existence during performance even if it cannot be precisely analysed in terms of offer and acceptance. and it does not matter that a contract came into existence after part of the work had been carried out and paid for. The conclusion must be that when the contract came into existence it impliedly governed pre-contractual performance. I would therefore hold that a binding contract was concluded in respect of phase 1.

Phase 2

24. It is possible to deal with the issues on phase 2 quite briefly. The supplemental agreement between Municipal Mutual and Trentham, which governed phase 2, was concluded on December 18th 1984. The Judge found Trentham's Order 9241 of March 11th 1985 was an offer to Archital. It clearly was. Archital indicated that there had to be a variation in respect of the programme set out in the offer. Subject to this qualification the Judge found that the offer was accepted by Archital's performance of the work involved in phase 2 and by Archital's receipt of the appropriate stage payments.
25. The starting point of the challenge of the Judge's conclusion in respect of phase 2 is that the parties had not concluded a contract in respect of phase 1. The appellants submit that during negotiations for phase 2 the parties were mistakenly of the view that a contract had been made in respect of phase 1. I have already concluded that a contract was made in respect of phase 1. In my view the springboard of the argument in respect of phase 2 therefore collapses.
26. The exchanges regarding phase 2, and what was done in respect of this transaction, leave me in no doubt that the Judge came to the right conclusion.

Conclusion

27. I would dismiss the appeal.

Lord Justice RALPH GIBSON: I agree that this appeal should be dismissed for the reasons given by my Lord.

Lord Justice NEILL: Mr. Patchett-Joyce has said everything that could be said in support of this appeal. For the reasons given by Lord Justice Steyn, I agree that the appeal must be dismissed.

Order: Appeal dismissed with costs.

Mr. John Powell, Q.C. (instructed by Messrs. Nabarro Nathanson) for the plaintiffs;

Mr. Michael Patchett-Joyce (instructed by Messrs. Bristows Cooke & Carpmael) for the defendants.