"BATTLE OF THE FORMS"

GHSP INC v AB ELECTRONIC LTD
[2010] EWHC 1828 (Comm)

This case involves the familiar scenario in commercial contractual relations known as a "battle of the forms". This is the situation where two parties negotiating a contract submit a series of offers each subject to their own terms and conditions. An acceptance expressed as being subject to different terms to the original offer constitutes a counter offer, which is not capable of concluding a contract. This means that when the contract is finally performed the question remains: on what terms and conditions?

This particular case involves a sale and purchase agreement between the claimant buyer ("C"), a designer and manufacturer of electro-mechanical control systems, and the defendant seller ("D"), a manufacturer of electrical components. The contract was for the sale and purchase of a pedal sensor to be incorporated into an electronic throttle pedal for use in Ford motor vehicles. In 2006 a defective batch of sensors led to vehicles suffering from stumbling engines and uncontrolled reduced acceleration. The losses suffered were significant, however, prior to determining issues of liability and quantum a preliminary issue was ordered to be determined as to whether the contract was concluded on the C's terms and conditions or the D's terms and conditions.

The facts involved a number of purchase orders ("PO") and an acknowledgment of order ("AO") before the contract was finally performed and the goods delivered. The first PO was provided by the C on the 2 November 2004, this expressly referred to the C's terms and conditions and was acknowledged by the D but only to the extent that this was a "*kick-off*" order with more details to be confirmed such as the schedule and the 2004 C sent a new PO with a new engineering drawing, exact specification of the product. On the 18 November this was also expressed as being subject to C's terms and conditions and was followed by a supplier's schedule on the 23rd November 2004 expressed as subject to the C's terms and conditions. On the 3rd December 2004 C asked D for confirmation that it would be shipping against the PO of 18 November 2004 and on the same day D sent an AO to C which contained on the reverse D's terms and conditions. The contract was then subsequently performed.

C argued that the first PO provided on the 2nd November 2004 had been explicitly accepted by D's email of the 3rd November 2004 acknowledging the "*kick-off order*". Alternatively, C argued that the first PO and/or PO on the 18th November 2004 had been implicitly accepted by D's conduct during the course of November. Conversely, D argued that neither PO had been accepted until the AO on the 3rd December 2004 which was subject to their terms and conditions. C had not rejected this AO and in accepting deliveries had concluded the contract on D's terms and conditions.

In his judgment Mr Justice Burton identified the main issues as being whether the contract incorporated as terms either:

1. the terms and conditions of C's PO;
2. D's terms and conditions; or
3. some other terms and conditions, if so which.

A number of well known authorities on this point were cited and in particular the words of Lord Denning MR in *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401 at 404H ff:

"*…in most cases when there is a "battle of the forms", there is a contract as soon as the last of the forms is sent and received without objection being taken to it … the difficulty is to decide which form, or which part of which form, is a term or condition of the contract. In some cases, the battle is won by the man who fires the last shot. He is the man who puts forward the latest terms and conditions: and if they are not objected to by the other party, he may be taken to have agreed to them … There are yet some cases where the battle depends on the shots fired on both sides. There is a concluded contract but the forms vary. If…they are mutually contradictory…then the conflicting terms may have to be scrapped and replaced by a reasonable implication."*

The judge went on to cite authority on the principle that in English law acceptance can often be implied through conduct including the act if performing the contract. However, the judge referred back to the case of *Butler* as authority for the principle that acceptance by the buyer of a delivery form the seller may not be sufficient, referring to Lawton LJ (at page 406G to H):

"It cannot be said that the buyers accepted the counter-offer by reason of the fact that ultimately they took physical delivery if the machine, they had to make it clear by correspondence that they were not accepting [the plaintiff's conditions]"

The judge referred also to *Lidl (UK) GmbH v Hertford Foods Ltd* [2001] EWCA Civ 938 which held in principle that another option was that the parties had concluded a contract which did not incorporate either party's terms.

In reaching a conclusion the judge referred to a large amount of factual witness evidence provided by the two parties' representatives and their correspondence, this elicited that the matter of terms and conditions had been raised a number of times prior to the conclusion of the contract. The relationship between C and D commenced in November 2003 when D was invited to provide a quote on C's terms, D provided C with a quote on their terms and stated that a cap on liability was needed. C's representative clearly referred to C's standard terms and noted that any exceptions would need to be "*documented and agreed upon in a contract*". D carefully reviewed C's terms and there was a proposal between the parties to reach a written compromise agreement between the two companies. In evidence C accepted that he was told by D that they did not find C's terms at all acceptable but stated that he was waiting for their suggested amendments. In March D indicated that they would not want to sign C's conditions as they stood and proposals were put forward for amendment. C's representative sent an agenda for a working party meeting to come to an agreement, the meeting was scheduled for the end of March but was cancelled by D.

Ultimately the judge found that the contract was finally concluded when D accepted C's schedule on 3rd December 2004. However, he was satisfied that the contract was not concluded on wither party's terms and conditions due to the lack of consensus. The judge had not been charged with determining which implied terms and conditions applied in this case as the parties had already agreed that the implied terms as set out in the Sales of Goods Act 1979 would apply if neither party's terms were found to apply.

The concern here is that the court may all too readily find, where a situation of a "battle of the forms" arises, that a contract was not concluded on either party's terms choosing to rely on statutory implied terms instead. However, it does appear that in the present case there

was a large amount of factual evidence to suggest that both parties had extensively and comprehensively voiced their concerns over the inappropriateness of each other's terms and conditions to the extent that it was clear that any contract concluded would not be on either set of terms. In our view it remains the case, therefore, that if the parties are tacit over whose terms and conditions are to apply the 'last shot' rule will continue to govern the dispute of the "battle of the forms".

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