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WHEN AND ON WHAT TERMS? COMMERCIAL COURT ON FORMATION AND TERMS OF CONTRACT, MEANING OF DELIVERY AND LIMITATION

In *Tullow Ghana Ltd v Vallourec Oil and Gas France* SAS, the Commercial Court determined seven preliminary issues and in doing so considered some common issues which arise in the context of international sale and purchase contracts relating to contract formation and its terms, when does delivery occur as well as limitation. Whilst the Court's findings on the preliminary issues were fact specific, the Judgment contains useful summaries of the relevant legal principles, which would be of assistance to anyone looking at similar questions.

FACTS

Tullow Ghana Limited ("**Tullow**"), the operator of the Jubilee oil field offshore Ghana, entered into a contract with Vallourec Oil and Gas France S.A.S ("**Vallourec**"), a leading supplier of tubular products to the oil and gas industry, for the purchase of 17,500 meters of 7-inch VAM TOP tubing for installation in six water injection wells in an oil field offshore Ghana in 2008 on delivery "*CFR Takoradi*" terms (the "**Contract**"). The tubing was delivered to Tullow during the course of 2009 and installed into each well at different times between September 2019 and September 2011.

In the underlying dispute, Tullow alleges that the tubing was defective and lead to leaks, which resulted in it having to carry out investigations into the wells and leaks, monitoring the wells and carrying out remedial works at the costs in excess of USD 257 million. Tullow's position is that the leaks were caused by manufacturing defects as well as, or alternatively, mechanical damage which occurred during their manufacture by Vallourec.

Tullow further argues that Vallourec has breached terms implied by sections 14(2), 14(2A) and 14(2B) of the Sale of Goods Act 1979 (the "**SGA**")[1].

Vallourec denies that it was in breach of Contract, alleging that the leaks were caused by excessive stress forces either during installation or operation of the wells and that the effect of its General Conditions of Export Sale ("**GCs**") being incorporated is that the SGA implied terms are excluded and Tullow's only remedy is the warranty in Clause 8 of GCs. Vallourec also takes an issue with the costs of investigations and their recoverability on the basis of the terms of the Contract and raises issues of limitation.

Whilst the substantive dispute itself is still to be heard at trial, on 26 April 2024, HHJ Pelling KC ordered a trial of seven preliminary issues.

ISSUES 1 AND 2: WHEN AND HOW WAS THE CONTRACT CONCLUDED AND ON WHAT TERMS?

The first issues the Court had to consider was when and on what terms had the Contract been concluded, with the key question being whether it had been concluded on the terms of a previous purchase order ("**PO 167**") or on the terms of the PO 167 *and* Vallourec's GCs. It was common ground before the Court that this turned on the effect of Vallourec's letter to Tullow sent on 25 November 2008, which enclosed a countersigned purchase order, which referred to the terms of PO 167, an acknowledgment and a copy of Vallourec's GCs.

Tullow's position was that the Contract was made when Vallourec returned the countersigned PO confirming that they were contracting on PO 167 terms and that neither the acknowledgement nor the inclusion of Vallourec's GCs had any contractual effect. Vallourec's position was that the letter of 25 November 2008, enclosing the acknowledgement and the GCs was the "last shot" and was a counteroffer to contract on the PO 167 terms *and* the GCs. Vallourec further submitted that Tullow had accepted this counteroffer by its conduct in proceeding with the order, including by inspecting and taking delivery of the tubing.

In approaching these preliminary issues, the Court summarised the relevant principles as follows:

a) An acceptance has no legal effect until it is communicated to the offeror.

b) The acceptance of an offer involves a final and unqualified expression of assent to the offer. In contrast, where a communication varies a term of the offer, or introduces a new term or only partially accepts the offer, it is not an acceptance of the offer, but it may be a counteroffer.

c) Where parties wish to contract by reference to a standard form contractual document, any conflict between the forms being proposed will usually be resolved by reference to the so-called "last shot" doctrine, namely the principle that where conflicting communications are exchanged, each is a counter-offer, so that if a contract results, for example from acceptance by conduct, it is on the terms of the final document in the series leading to the conclusion of the contract.

d) However, the "last shot" doctrine may be displaced where there is evidence of the parties' objective intention that the last shot should not prevail.

e) The Court would have to have regard to the contemporaneous evidence as a whole to determine when a contract was concluded.

f) Just because parties are negotiating by reference to their respective standard terms does not necessarily give rise to a "battle of the forms" situation.

g) Even where there is a "battle of the forms" situation to which the "last shot" doctrine applies, it is still necessary to look at the documents said to constitute the "last shot" (or final counteroffer) as a whole to determine whether the party in question intended to make a final counteroffer or whether they were in fact accepting the last offer made by the other party.

[1] I.e. that the tubing was (a) not of satisfactory quality, (b) not fir for the purpose of being utilised in an offshore injection well and (c) not durable.

The Judge did not consider this to be a typical "battle of the forms" situation – there was no one party offering to sell on its terms and other offering to buy on its terms, but rather discussions took place over several months against background of previous purchase orders and tender documents, nor was it a case where the dispute was over whose terms were incorporated on the basis that they were the last in time, with the question here being whether Vallourec's GCs overlay onto the PO 167 terms so that both would be incorporated.

After considering all the contemporaneous evidence the Judge held that the Contract was concluded on PO 167 terms, which had been specifically negotiated and referenced throughout the negotiation process, when Vallourec sent back the countersigned purchase order and the letter of 25 November 2008 did not amount to a counteroffer. It is worth noting that the Judge considered the inclusion of Vallourec's GCs with that letter a purely administrative act, which had no contractual effect.

ISSUE 3: WAS CLAUSE 8 OF GCS INCORPORATED?

Tullow asserted that Clause 8, which limited liability and excluded implied terms was not incorporated. Vallourec's position was that it was. As the Judge had found that GCs were not incorporated, Clause 8 of GCs did not form part of the Contract.

However, even if GCs had been incorporated, the Judge was of the view that Clause 8 of GCs would have not been incorporated in any event, because it would have contradicted or otherwise been inconsistent with the bespoke warranty in Clause 11 in the PO 167 terms. In coming to this conclusion, the Judge applied the following relevant principles:

a) it is trite law that it is necessary to try and interpret all of the provisions of a contract together if possible;

b) for a term to be inconsistent, it would have to contradict another term or be in conflict with it, such that effect could not fairly be given to both clauses.

c) It is possible to read two clauses as supplementing or qualifying one another without there to be a conflict.

d) It is only if terms are manifestly inconsistent that a clause should be rejected.

ISSUE 4: WHAT IS THE CORRECT AND PROPER CONSTRUCTION OF CLAUSES 6 AND 11 OF THE PO 167 TERMS?

The Court was also asked to determine the correct and proper construction of Clauses 6 (Acceptance) and 11 (Warranty), and to what extent these placed any limits on Tullow's right to recovery.

The Court held that Clause 6 provided a right of rejection for defective goods but did not limit other remedies, and Clause 11 preserved Tullow's right to damages for breach of statutory or implied terms. In doing so, the Court was guided by the general principles of contractual construction, namely, that the Court's task is to ascertain the objective meaning of the language which the parties have chosen and how this would be done. The Judge also highlighted that in circumstances where it is alleged that an effect of a provision is to restrict remedies available for breach of contract, clear words are necessary before the Court would hold that a contract has taken away valuable rights or remedies which one of the parties to it would otherwise have.

ISSUE 5: WERE THE SGA IMPLIED TERMS INCORPORATED INTO THE CONTRACT?

Whilst Tullow's position was that the Contract included terms implied by the SGA, Vallourec argued these were excluded either by Clause 8 of its GCs[2], by the entire agreement clause[3] and that the parties had agreed to a bargain, the express terms of which are inconsistent with the SGA terms.

The Judge held that the SGA implied terms were incorporated into the Contract.

[2] Which at relevant parts provided that Vallourec "*gives no other warranty or guarantee express or implied, including (without limitation) any warranties [of] merchantability or fitness for a particular purpose.*"
[3] Which at relevant parts provided that "*the terms and conditions set out in the Purchase Order … represent the entire terms and conditions of the agreement*"

Whilst it is possible for parties to contract out of the SGA implied terms either (i) by excluding those terms by express provision or (ii) by agreeing a bargain, the express terms of which are inconsistent with those terms, however, any wording would have to be sufficiently clear and precise to do that. For example, Clause 8 did not refer to "conditions" and if an "entire agreement" clause is to exclude statutory implied terms, clear words are required. The Judge was also of the view that this was not a case where the express terms of the contract were inconsistent with the SGA implied terms.

ISSUE 6: WHEN DID "DELIVERY" OCCUR?

The question of when delivery occurred is relevant to whether any of the claims are time barred, as time began to run when the tubing was "delivered" under section 5 of the Limitation Act 1980. Tullow contended that delivery occurred upon arrival of the individual pieces of tubing in Takoradi in circumstances where the terms of the Contract provided that risk and title remained with the Vallourec until the tubing was "*fully delivered … at the point specified in the Purchase Order*".

Vallourec, however, argued that the ordinary position of CFR terms apply and delivery occurred when the pipes crossed the rails of the vessel carrying these to Takoradi.

The Judge held that "delivery" occurred where the tubing passed the ship's rail as it was clear that the Parties had intended to, and did contract, on CFR terms and incorporated INCOTERMS 2000, provisions of which are clear as to the usual point at which title and risk pass, and that this is when the delivery occurred. The Judge noted that the fact that this had the effect of potentially shortening the warranty period was a consequence of parties' agreement rather than a reason to give the delivery obligation a different meaning to that which it would ordinarily bear.

ISSUE 7: BURDEN OF PROOF IN THE LIMITATION CONTEXT?

The Judge also had to decide which party has the burden of proof in relation to limitation defence. Here, the parties had entered into various standstill agreements.

The Judge held that the initial onus is on the claimant to show that on the balance of probabilities, its cause of action came into existence within the limitation period prior the standstill agreement and to satisfy this this onus the claimant needs to adduce *prima facie* evidence of a breach of the contract, causally connected with the damage sought to be recovered, accruing within the six years immediately preceding the standstill agreement. If the claimant can satisfy this onus, the burden passes to the defendant to show that in reality the cause of action accrued at an earlier date.

COMMENT

The Judgment contains useful short summaries of the relevant legal principles and their application to issues of contract formation and incorporation of terms, the applicability and extent of the "last shot" doctrine in the "battle of forms" scenarios, which are some of the common issues arising in sale contracts. The Judgment also highlights the fact that a mere inclusion of one's standard terms in a response to the contractual counterparty is unlikely, in of itself, to ensure their incorporation.

The Judgment also emphasises the importance of clear and unambiguous drafting – whilst the Courts strive to give effect to contracts as a whole to the extent possible, there are limits to their ability to do so in instances of conflict and inconsistency and clear and precise words will be required to limit liability or exclude statutory implied terms. It also reiterates the point that a simple entire agreement clause, at least as a matter of English law, is not sufficient to exclude statutory implied terms without express references to it doing so.

The decision also touches on the importance of knowing when contractual delivery occurs, particularly if the applicable limitation regime, be it statutory or contractual like in the BP GTCs, is linked to "delivery" and serves as a reminder that one should not assume that it is arrival or discharge which is the relevant point in time as otherwise one could find themselves time barred.

Please click here for a copy of the full judgment.

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