



That's not what we agreed... is it?

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It is perfectly possible to be bound by terms you have not seen, if the existence of those terms is brought to your notice and you conduct yourself so as to give the outward appearance of having accepted those terms.

CLIENT A was a main contractor in the construction industry, B was a specialist subcontractor who was designing and building some essential components to fit into A's project. B submitted an original tender that was then subject to changes, alterations and revamps by way of the usual continuing negotiations. On 10 May 2004, A issued a letter of intent (LoI) [no1] authorising B to carry out design work up to a certain financial limit whilst these negotiations were ongoing.

In the letter, A made clear that the terms were to be the standard DSC form: *"Incorporating... particular amendments to the standard form of subcontract contained in appendix 1"* — A's bespoke amendments to the standard form. B had actually been in negotiations, part of which involved undertaking some limited design work before LoI [no 1] was issued and continued after receipt of it.

B wrote to A nine days later acknowledging receipt and setting out a number of points in LoI [no1] with which it took issue, including that appendix 1 had not been included. A never responded to B's letter.

On 22 May, A issued a second LoI [no2] which was virtually a repeat of LoI [no1] but increased the financial limit of expenditure. On 29 May, A, believing that contractual negotiations had been concluded, issued a formal subcontract order which again, clearly on the face of the articles of agreement, purported to incorporate appendix 1.

On 1 June, B wrote repudiating LoI [no2] because it failed to correct the points raised by B in its original objection to LoI [no1]. This letter crossed over with A's letter issuing the subcontract order. The order, because it had been sent to B's registered address, did not land on the desk of B's contract manager until 9 June 2004 and he, apparently, assumed that B's earlier repudiation of LoI [no2] would be sufficient to make it clear that B, by implication, rejected the order.

No further exchanges took place regarding the order or the validity of appendix 1 until well after the completion of the subcontract works.

B did not perform well and some three months after they completed, A sought to set-off substantial sums in respect of prolongation and disruption costs it alleged to be the result of B's failures and relied upon the terms of appendix 1 for its timing of the set-off. In response, B alleged entitlement to an extension of time and substantial loss and expense. B also alleged that appendix 1 was not operative as B had clearly rejected the subcontract order.

Matters were spiralling out of control. B appointed a well-known construction solicitor who immediately spotted the potential for a 'quickie'

adjudication on a technical point that appendix A did not apply and that the set-off was consequently void. From a tactical point of view this was an entirely sensible plan which, if it worked, might generate some quick cashflow and give B an early moral victory which could pave the way for a negotiated settlement. Oddly, albeit an aside, when the referral document was issued, it merely asked the adjudicator for a declaration that appendix A was not incorporated into the subcontract order. I am still baffled as to why B did not ask the adjudicator to also declare that the set-off was invalid and for reimbursement of the withheld sum but 'ours is not to reason why.'

B's case was that appendix A was not part of the subcontract because:

- i) It had never been actually physically incorporated into either of the LoIs or into the order.
- ii) Its terms were very onerous and therefore it needed to be clearly brought to B's attention before it could be accepted by B.
- iii) B had not accepted the order as submitted, but rather had accepted the order as amended by its letter of 1 June. The subcontract order as offered by A was, B argued, only capable of acceptance in writing because the covering letter to the order requested B to sign and return it.

A countered that:

- i) Physical inclusion of the document was not required to make appendix 1 legally incorporated.

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- ii) Whether it had been incorporated into the Lols was an irrelevance since the subcontract order was a complete and unambiguous document and, as such, no extrinsic evidence was necessary and would be inadmissible under the parole evidence rule.
- iii) Appendix 1 was brought to B's attention on the face of the articles of agreement in the subcontract order.
- iv) Acceptance in writing was not the only mode of acceptance. To make it so would require much clearer and more certain words than those used.
- v) B had accepted the subcontract order because it stayed silent after receipt of the order in contrast to its positive rejections of the Lols.

This was, when it came down to it, a classic battle of the forms/contract formation/exclusion clause analysis. A relied upon a run of well-known cases ending with *Machenair Ltd v Gill & Wilkinson* [2005] EWHC 445 (TCC) March 2005 which also involved the incorporation of terms by reference. However, the adjudicator in this matter drew a distinction because in *Machenair*, the purported incorporation clause was obscured

from the recipient's fax copy, making the communication of the terms illegible. The adjudicator accepted the argument that the subcontract order was an offer which was open to B for acceptance or rejection. The incorporation of appendix 1, because it was on the very face of the articles, had been sufficiently drawn to B's attention. Although A accepted that B's actual intention may have been not to accept appendix 1, the test when deciding such issues must be to view the parties' conduct objectively. That is to say, it is not what B actually intended by their actions, but rather what an objective ordinary professional would have taken their conduct to mean. It was obvious that B's letter of 1 June was a rejection of Lol [no 2], not the subcontract order. In response to the order, B stayed silent and then performed the works. Objectively viewed, this amounted to an outward appearance of acceptance by B.

It remains a crucial step in commercial negotiations, therefore, to undertake a rigorous review of proposed terms and conditions before committing to them and, most importantly, ensure you make clear if you intend to reject or take issue with the terms at each stage of proceedings. As a rule, if in doubt, ensure every communication is replied to.

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