# Legal Briefing

## *Thameside Construction Company Ltd v Arthenella Ltd*

**[2011] EWHC 2695 (TCC), The Hon. Mr. Justice Ramsey**

*The Facts*

Arthenella (the "Employer") owns Frogmore Hall (a listed Victorian manor house) in Watton at Stone, Hertfordshire. It engaged Thameside Construction Company Ltd (the "Contractor") to carry out extensive refurbishment work to the property and to convert the property into a number of residential units. The key events are summarised as follows:

- The works consisted of two phases, however the parties could not agree the proper valuation of the Phase 2 works and therefore each party commenced proceedings.
- On 22 August 2011, the Employer's solicitors made a "without prejudice save as to costs" offer to settle, in the sum of £275,000 (the "Offer"). The Employer reserved the right to withdraw the Offer if it was not accepted by the Contractor within a reasonable time frame, which the letter suggested was no later than 9 September 2011.
- On 8 September 2011 the Managing Directors from both the Employer and the Contractor spoke on the telephone. After discussing the possible merits of the Contractor's claim, the parties agreed to sleep on it over night.
- On 9 September 2011, the day which the Employer's solicitors had set out as the last day for acceptance of the Offer, two telephone calls took place to discuss settlement of the claim, where it is alleged by the Contractor that the parties agreed to settle the dispute.
- Following the conversations, the Contractor emailed the Employer stating that:

  *"following our discussions today regarding settlement of the outstanding court cases…I confirm that you have agreed to a final payment of £275,000 but this is to be increased to a final figure of £300,000 if we can provide a written opinion from our barrister regarding the payment of preliminaries".*
- On 12 September 2011, the Employer's solicitors sent a letter to the Contractor stating that no agreement between the parties had been reached, and that any future settlement would be dependant on Counsel's opinion. The same day the Contractor submitted Counsel's opinion for consideration by the Employer.
- On 13 September 2011 the parties attended a further meeting, during which it is was alleged that the Employer did not agree with Counsel's opinion, and therefore was not prepared to settle the claims. Within 30 minutes of the meeting coming to a close, the Employer contacted the Contractor, and made an offer of £200,000 to settle the claim.
- On 14 September 2011 the Contractor's solicitors wrote to the Employer's solicitors setting out what it believed to be the terms of the agreed settlement.
- On 15 September 2011 the Employer's solicitors contacted the Contractor's solicitors to confirm the withdrawal of the £275,000 and that a new offer of £200,000 would be made.
- The Contractor subsequently applied to court for the determination of the issue of whether the claims had been settled by agreement on 9 September 2011.

*The Issue*

The principal issue that the court was asked to determine, was whether the claim had been settled by agreement on 9 September 2011.

In order to determine whether or not the claim had been settled by agreement on 9 September 2011, the court chose to consider, taking an objective view of the evidence, whether or not the offer dated 22 August 2011 had been accepted by the Contractor.

"Offer"
It is a matter of fact that the Employer made a "without prejudice" offer (in the sum of £275,000) to the Contractor on 22 August 2011 and which was open for acceptance by the Contractor until 9 September 2011.

"Acceptance"
The Contractor argued that during the telephone discussion on 9 September 2011 it accepted the original offer of £275,000 and also entered into a supplemental agreement with the Employer where the parties agreed that the Contractor would be entitled to an additional payment of £25,000 if Counsel's opinion supported the Contractor's position in respect of the preliminaries.

The Employer disputed the fact that during the telephone discussions on 9 September 2011 the Contractor accepted the original offer; however it did concede that it agreed to settle at £300,000 but only if the preliminaries issue was strongly in favour on the Contractor.

Both parties produced evidence supporting their positions; however the Court in considering the dispute, placed particular emphasis on an email sent by the Contractor a few minutes after the telephone conversation, which confirmed that the parties agreed to final payment of £275,000 which would be increased to £300,000 depending on the opinion produced, with the Court acknowledging that such contemporaneous documentation is inherently likely to record what had happened.

*The Decision*

The Court rejected the Employer's argument, and held that as a result of the telephone conversation between the Employer and the Contractor on 9 September 2011, and notwithstanding the Contractor's failure to provide a convincing argument regarding the payment of additional preliminaries, there was an agreement between the two parties, namely that the Employer would pay the Contractor £275,000 in full and final settlement of the claims and counterclaims, including costs, interest and any VAT.

Interestingly the Court, in giving its decision, commented that even if the parties had not come to an agreement during the telephone conversation on 9 September 2011, the resulting email was capable in itself to be construed as acceptance of the offer made on 22 August 2011.

*Comment*

Although decided on its facts, the judgment gives a stark warning to both parties to a settlement agreement that once an offer to settle is accepted by the other party, whether orally or in writing, parties cannot pick apart the settlement after the event if it transpires that the agreement is not as favourable as previously thought.

The case is also a lesson for both parties to proceed with caution when entering into any settlement agreements. If a party does not want to be bound by an oral agreement until after it has spoken with its directors and/or legal team it should make an express declaration at the time the agreement is made that it is subject to contract, and shall only be binding on the parties once both parties have signed up to it in writing.

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