

# CONSTRUCTION : BULLETIN

## Ignoring The Express Contract Terms – Will The Courts Uphold An Alternative Arrangement?

It is common for contracting parties to depart from the strict terms of their contract for their own convenience. However, as demonstrated in the recent case of **Mears Limited v Shoreline Housing Partnership Limited**, adopting alternative arrangements to those set out in the contract can cause serious problems if one party subsequently decides that they wish to revert to the original express terms.

### Background

Shoreline Housing Partnership Limited (“Shoreline”) engaged Mears Limited (“Mears”) to carry out on-going building repair and maintenance to a portfolio of social housing properties. Mears’ tender price had been significantly lower than other tenders and Shoreline hoped to achieve savings of around £1m a year by awarding the contract to Mears.

The parties intended to enter into an NEC3 Term Service Contract (TSC), incorporating Option C (target contract with price list) (the “Contract”). However, Mears started work in July 2009, some six months before the Contract was signed.

A key provision of the NEC3 TSC is clause 10.1, which requires the employer and the contractor to act “*in a spirit of mutual trust and cooperation*”.

Under the terms of the Contract, Mears was entitled to interim payments on the basis of actual costs plus a percentage for profit and overheads, with a “pain/gain share” reckoning every 6 months if the amounts paid to Mears were greater than or less than the tendered total of

the prices for the work.

However, it soon became clear that the payment mechanism set out in the Contract did not meet Shoreline’s needs. The price list contained hundreds of different items of work and it was very difficult for Shoreline’s staff to identify the appropriate prices for jobs based on the information given to them by tenants calling to request repairs.

As a solution to this problem, Mears and Shoreline agreed an alternative payment structure, whereby Mears would be paid against a series of “composite codes” and Shoreline’s staff would simply select the appropriate code for the job in question. The parties proceeded to operate the Contract on this basis and some 13,600 orders were placed by Shoreline, and paid for, using the code system.

In parallel to this, contract negotiations were on-going and Shoreline assured Mears that there was no need to amend the express terms of the Contract to reflect the code system.

The Contract was executed by Mears in December 2009 without any amendment to the payment mechanism. The Contract also included clause 12.3, which stated “*No change to this contract, unless provided for by the conditions of contract, has effect unless it has been agreed, confirmed in writing and signed by the Parties*”, and clause 12.4, which stated “*This contract is the entire agreement between the Parties*.”

By January 2010, Shoreline had realised that the code system was not



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achieving the savings they had anticipated. The parties got into dispute about Mears' contractual entitlement to payment and Shoreline alleged that the use of the code system had resulted in an overpayment to Mears of just over £300,000.

Mears commenced legal proceedings against Shoreline seeking a declaration that Shoreline was not entitled to recover the alleged overpayment on the basis that Shoreline:

- was estopped from doing so by an estoppel by convention and/or an estoppel by representation; and
- was acting in breach of clause 10.1 of the Contract.

### Relevance of the “entire agreement” and “no variation” clauses

Mears conceded that clauses 12.3 and 12.4 of the Contract prevented the Contract from being varied informally and also prevented any side agreements from arising. However, the court confirmed that the “entire agreement” clause did not prevent Mears from relying on estoppel.

### Estoppel

The court summarised the law on estoppel by convention as follows:

- An estoppel by convention can arise when contracting parties act on an assumed state of facts or law.
- The assumption must be shared by the parties, or one party must make an assumption in which the other acquiesces.
- The assumption must be communicated between the parties.
- The party claiming the benefit of the estoppel by convention must have relied upon the assumption.
- It must be “unjust” or “unconscionable” for the party denying the assumption to go back on it.

The court found that there was a clear agreement and convention between Mears and Shoreline that payment would be made using the code system. This was evidenced by substantial correspondence, meeting minutes and other documents, together with the “unarguable fact that from July 2009

to January 2010 Shoreline paid out to Mears on many thousands of individual jobs on the basis of the composite codes”. Both parties had relied upon the code system and it would be “unjust”, “unconscionable” and “almost dishonest” for Shoreline to seek to renege on what had been agreed and revert to the express terms of the Contract. Shoreline was therefore estopped by convention from reverting to the NEC3 TSC payment mechanism in order to recover the overpayments from Mears.

The court also noted an added element of unfairness in that the parties had shared a common assumption that the Contract did not need to be amended to reflect the code system and therefore Mears had lost the opportunity to make Contract amendments which would have secured its entitlement to be paid on the basis of the code system.

The court then considered whether there had been an estoppel by representation. Estoppel by representation can occur when one party makes a false representation to the other party, which the other party relies upon to its detriment, and then the party who made the representation subsequently seeks to deny that it is true. The court found that Shoreline had made representations that Mears would be paid in accordance with the code system. These representations were relied upon by both parties and it was again unjust and unconscionable for Shoreline to depart from them.

### Clause 10.1 and the duty of mutual trust and cooperation

Mears argued that clause 10.1 of the Contract created an implied term that a party would not take advantage of a departure by the other party from the strict terms of the Contract without warning the other party beforehand. Mears alleged that Shoreline had deliberately encouraged Mears to sign the Contract despite knowing that it would be seeking to enforce the strict terms of the Contract (as opposed to payment on the code system).

The court rejected this argument as there was no real evidence that

Shoreline had acted in the manner suggested by Mears. Furthermore, the court was not satisfied that the obligation of mutual trust and cooperation imposed by clause 10.1 would prevent either party from relying on the express terms of the Contract which each party had freely entered into.

### Analysis

This case demonstrates that, regardless of the existence of “entire agreement” and “no variation” clauses, it is still possible for the parties to depart from the express terms of their contract and for that departure to be upheld by the courts on the basis of an estoppel.

Any contracting party who is working under an informal arrangement that is not reflected in the terms of the contract should take steps to have the contract amended to reflect the circumstances so that it does not face the problems encountered by Mears in this case. This is important, because even if neither party subsequently tries to revert to the original express terms, there could still be a dispute about the nature and scope of the alternative arrangement that has been adopted if it has not been properly documented in writing.

Equally, contracting parties should be aware that if they wish to be able to rely on the express terms of their contract, they should not act in a manner which may contradict or undermine those terms and result in the express terms being overridden.

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