Neutral Citation Number: [2020] EWCA Civ 370

Case No: A4/2019/1138

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS IN LEEDS
CIRCUIT COMMERCIAL COURT
HIS HONOUR JUDGE KLEIN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 March 2020

Before:

THE SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE POPPLEWELL

- -

Between:

UK LEARNING ACADEMY LIMITED	**Appellant**
- and -	
SECRETARY OF STATE FOR EDUCATION	**Respondent**

- -
- -

Clifford Darton QC and George Woodhead (instructed by **Avisons Law Limited**) for the **Appellant**
Lesley Anderson QC, David Warner and Kristina Lukacova (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date: 3 March 2020

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Approved Judgment

Lord Justice David Richards:

1. UK Learning Academy Limited (UKLA) appeals against the dismissal by HH Judge Klein, sitting in the Business and Property Courts in Leeds, of its claim for some £800,000 said to be due under a contract dated 1 August 2008 with the Learning and Skills Council (LSC). The claim was made against the Secretary of State for Education (the respondent) because he has assumed the liabilities of the LSC.

2. UKLA is a private provider of education and training. By the contract with the LSC (the Contract), UKLA agreed to provide literacy and numeracy courses to adults (termed "learners") in the Yorkshire area as part of the Government's Train to Gain programme (TTG). This involved the provision of National Vocational Qualifications (NVQ) Level 2 and Skills for Life (SFL) courses. The Contract covered the 2008/09 academic year and ran from 1 August 2008 to 31 July 2009.

3. Two express terms of the Contract are central to the dispute. First, the maximum contract value (MCV) was fixed at £135,553.76. Second, the Contract was not to be varied except by instrument in writing signed by the parties.

4. UKLA's case is that it provided the relevant courses to a substantially larger number of learners than provided by the Contract, such that it became entitled to the additional sum of £800,553.24, and that the LSC either agreed to pay this additional amount or, by reason of estoppel, became liable to pay it.

5. The relevant terms of the Contract as regards payment are as follows. Clause 12.1 provides that "[i]n consideration of the Services to be provided by the contractor, the Council will make the payments to the contractor in accordance with Schedule 2". Schedule 2, paragraph 2.1 provides that "[t]he Council agrees to pay to the contractor the amounts set out in Schedule 1, Appendix 1…of this Contract on condition that the contractor delivers the Services in accordance with the terms and conditions of the Contract…". Schedule 2, paragraph 4.3 provides that "[w]here the contractor's actual delivery has resulted in an underpayment to the contractor by the Council, the Council will adjust the amount due to the contractor accordingly. This adjustment shall not exceed the overall maximum value set out in Schedule 1 of this Contract".

6. Schedule 1, paragraph 2.2 provides:

> "The maximum value for each learning programme as shown in Appendix 1 above may not be exceeded for any reason except by an agreed variation in writing to the Contract. The Council will not be liable to make any payment in excess of the maximum values set out above or as varied in writing."

7. Schedule 1, paragraph 2.4 provides:

> "For the avoidance of doubt the overall maximum values for each learning programme at Appendix 1 above take precedence over the delivery profile and volumes in Appendix 2. Where the contractor considers that the combination of funding rates… and volumes would result in the overall maximum value being exceeded, the contractor must notify the Council and the parties

> will either agree a variation to the volumes, funding rates or to the maximum value for the learning program to ensure the contractor remains within the agreed maximum value",

8. The MCV was fixed at £135,553.76 (Schedule 1, Appendix 1 entitled "Summary of Programme Funding 2008/2009").

9. A document entitled "Funding Allocation Detail", which the judge said appeared to have been part of Appendix 2, indicated that the "total adult learners" were to number 200, of whom 70 were to be SFL learners on a literacy course, 30 were to be SFL learners on a numeracy course and 100 were to be NVQ learners.

10. As regards variations, clause 30.2 provided:

> "This Contract constitutes the entire Contract between the parties and shall not be varied except by instrument in writing signed by the parties."

11. The requirement for variations to be in writing was repeated, as regards the MCV, in schedule 1, paragraph 2.2, which I have quoted above.

12. UKLA's claim to the payment of £800,553, in addition to the MCV of £135,553 which it was paid, is based on having, it says, started the provision of 143 SFL courses and 449 NVQ courses before 1 April 2009.

13. UKLA accepts that there was no written variation to the Contract providing for an increase in the MCV of £135,553, or at least none signed by the parties so as to comply with clause 30.2.

14. It is important for the purposes of this appeal to be clear about the case put by UKLA to the judge.

15. The trial lasted 11 days, in the course of which the judge considered a significant body of documentary evidence, which he summarised in his judgment at [40] – [104], and heard eight witnesses employed or formerly employed by the parties and nine taxi drivers called by UKLA who, it said, had started courses as learners before 1 April 2009. He summarised the oral evidence at [107] – [208]. I should mention that there were other issues before the judge, almost all of which were decided against UKLA but there is no appeal against the judge's orders in those respects.

16. The judge's task in dealing with the case was hampered by the way it had been prepared by the parties. He said at [11]:

> "The parties' statements of case are discursive, unstructured and, in places, difficult to follow. Counsel who represented the parties at trial did not draft the initial statements of case and, although they may have had some input in the amendment of those documents, understandably, those documents were used as the framework for the amendments. As I reminded the parties at the pre-trial review and at trial, the statements of case ought, at the very least, to identify the issues to be determined. I recognise that a prevailing view may be that parties should not be held to their pleaded cases but it is unhelpful if parties

> proceed on the basis that the statements of case do not act as a limit on the issues to be tried. I was left with the clear impression, by the conclusion of the trial, that, in many significant respects in this case, both parties, more or less, were advancing cases which were unpleaded. *As it appeared to me that both parties encouraged me to determine the proceedings on the basis of the cases they actually advanced at trial, that is what I propose to do*. But for the very great assistance given to me by counsel, this would have been an even more difficult task that [sic] it has been." (emphasis added)

17. The judge's difficulties are further illustrated by his footnote to the first sentence in that paragraph, where he recorded: "I sought to overcome this problem by requiring the parties to agree a list of issues, which they apparently did. However, this led to further dispute between the parties when it became clear that they interpreted the agreed issues differently".

18. In a footnote to the italicised sentence in the quoted paragraph, the judge added "Indeed, in closing, Mr Fryer-Spedding [counsel then appearing for UKLA] encouraged me to follow the evidence wherever it might lead, whatever UKLA's pleaded case. If that is the appropriate course, so far as UKLA's case is concerned, as a matter of logic it ought to be the appropriate course in relation to the Defendant's pleaded case".

19. At [12], the judge continued "It may be helpful, nevertheless, to summarise what I understand the parties' respective pleaded cases to be, because the parties' statements of case do set out some of their respective cases about various (alleged) meetings and discussions (and, substantially, their respective cases about the further contracts)". The "further contracts" referred to in the last part of that sentence concern claims which are not raised on this appeal. It is therefore clear that, save as regards the "further contracts", the judge was referring to the pleadings only for the purpose identifying what they said about certain meetings and discussions, which would be relevant to the findings of fact that he might need to make. He was not referring to them for the ways in which UKLA advanced its claim and the respondent defended it.

20. At [5], the judge summarised UKLA's case as he understood it to be:

> "UKLA contends that (i) the Defendant is (and LSC was) liable to pay it £800,553.24 (in addition to £135,553.76 which has already been paid), as a result of an effective variation of the 2008 Yorkshire Contract, for learners who "started" before 1 April 2009 and (ii) if the Defendant contends that there has been no effective variation because any necessary contractual formalities have not been complied with, he is estopped from doing so."

21. In a footnote to (ii) in that passage, the judge added "[a]s pleaded, UKLA's estoppel claim is somewhat wider than this. At trial, Mr Fryer-Spedding advanced, properly, the more limited estoppel case I have summarised here". The judge repeated this point at [273] where he said that "UKLA's claim in relation to learners who started in the 2008-09 academic year was ultimately pursued, at trial, only on the basis that there was a contractual variation which had the effect of disapplying any MCV to those learners". He quoted Mr Fryer-Spedding as saying "[t]he upshot of [UKLA's] case is

that it is entitled to recover the sum for which it sues because the contract was varied so as to disapply the…MCV first included in the agreement…".

22. The alleged "effective variation" referred to in (i) was said to include a unilateral variation of the Contract. There is no appeal against the judge's rejection of this part of UKLA's case.

23. This left the second way in which UKLA put its case. Not only did UKLA have to establish that a variation increasing the MCV had been agreed but also, given the terms of clause 30.2 and the decision of the Supreme Court in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119, that the respondent (or the LSC) was estopped from relying on the requirement for any variation to be in writing signed by the parties.

24. Correctly and logically, the judge addressed first the question whether any variation in the MCV had in fact been agreed. He said that this required an offer by one party and an acceptance by the other. As he records at [238] and [251], UKLA contended that such agreement had occurred as a result of offers made by the LSC which UKLA had accepted. Mr Fryer-Spedding identified five offers said to have been made by the LSC. These are recorded by the judge at [238]. At [239] – [251], the judge analysed each of the letters or other acts relied on by the LSC and rejected the case that any of them amounted to an offer by the LSC. That was the end of UKLA's case for an agreed variation in the MCV but, for good measure, the judge went on to consider whether, if any offer capable of acceptance had been made, UKLA had accepted it. One act by the LSC and oral statements made by the LSC were relied on by UKLA as constituting acceptance. The judge identified them at [255] and rejected both of them.

25. The judge also went on to consider whether, if (contrary to his findings) a variation to the MCV had been agreed, the respondent (or the LSC) was estopped from relying on the requirements of clause 30.2. UKLA contended that it was so estopped: see [260]. He was invited by UKLA as well as by the respondent to apply the dictum in paragraph [16] of Lord Sumption's judgment in *MWB v Rock Advertising*:

> "The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy

> the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] 2 AC 541, paras 9, 51, per Lord Bingham of Cornhill and Lord Walker of Gestingthorpe."

26. The judge said at [262] that he had carefully considered all the evidence to which he was referred and concluded that "[t]here is nothing, in my view, which amounts to an unequivocal statement or other representation by LSC that it would not rely on the 2008 Yorkshire Contract formalities in this case (that is, that it would not rely on the No Oral Modification clauses)".

27. UKLA's case on appeal is significantly different from that advanced at trial.

28. As set out in its skeleton argument for the appeal, UKLA's principal submission was not that there had been an agreed variation to the MCV and that the respondent was estopped from relying on a failure to comply with clause 30.2. Instead, its principal case relied on an alleged promissory estoppel. It submitted that the judge had only to decide (i) whether the LSC had made a clear and unequivocal promise that the MCV would not be enforced; and, if so, (ii) whether UKLA had relied on that promise to an extent that (iii) rendered it unconscionable for the respondent now to resile from the promise or to rely on clause 30.2.

29. UKLA submitted, correctly, that the judge had not addressed this case of promissory estoppel, but had considered estoppel only in the limited context of clause 30.2 and whether the LSC was estopped from relying on its terms. It submitted that he was in error in not dealing with this case of promissory estoppel.

30. UKLA went on to submit that, on this basis, it was essential for the judge to review the parties' course of dealing in order to determine whether the three requirements for promissory estoppel, summarised above, were established. UKLA set out in its skeleton argument 26 findings which it said were made by the judge covering the period from July 2008 to January 2010 and were sufficient to hold in favour of UKLA on the basis of promissory estoppel.

31. Further, UKLA submitted that the judge gave no consideration to two further alternative cases: first, that, by continuing to teach its additional learners after March 2009, UKLA had itself made an offer to vary the Contract which the LSC had accepted by various written statements; and, second, that the statements made by the LSC in some of its post-March 2009 communications were offers which invited acceptance by conduct, namely by UKLA's continued provision of courses to the additional learners.

32. UKLA is correct to say that the judge did not deal with any of these ways of advancing UKLA's case. He did not do so because none of them was advanced before

him. I have earlier quoted from the judgment from which the judge's understanding of the case put to him is very clear.

33. It is arguable that a case of promissory estoppel was pleaded in UKLA's amended particulars of claim in the wider terms advanced on this appeal, but it was not fully set out and it formed no part of the case as presented in UKLA's skeleton argument for the trial. Only the more restricted estoppel, confined to preventing reliance by the respondent on clause 30.2, was relied on. As it was put in paragraph 5.23, "the estoppel inhibits D from relying on a formalities argument against C: i.e. by objecting that any variation is ineffective unless reduced to writing".

34. In opening the appeal, Mr Darton QC submitted that the documents and other evidence listed in his skeleton argument supported both an agreed variation to the MCV and a promissory estoppel obliging the respondent to pay sums in excess of the MCV. In the course of argument, however, Mr Darton did not pursue the wider case of promissory estoppel as sufficient in itself for the claim to succeed, but relied on an agreed variation.

35. He submitted that the judge erred in two important respects. First, he was wrong to approach the case of an agreed variation on the basis that there must be a specific express offer and a specific express acceptance. It was possible for a variation to have been agreed in the course of dealing between the parties. Further, and in any event, he had wrongly restricted consideration of the possible offers by UKLA to the five documents listed by the judge at [238]. Mr Darton proposed to rely on the much longer list contained in his skeleton argument. Moreover, the judge should have considered the possibility that an offer was made by the LSC and accepted by UKLA. In this respect, reliance was placed on the LSC's act in uploading details of additional learners to its computer system and on certain statements made by the LSC in communications after March 2009 as constituting offers which UKLA accepted by continuing to provide training to additional learners.

36. Second, the judge erred by approaching too narrowly the question of an estoppel preventing the respondent from relying on clause 30.2. He was wrong to apply the guidance given by Lord Sumption in *MWB v Rock Advertising* at [16] and should instead have conducted a wide-ranging review of all the evidence to determine whether it was inequitable for the respondent to rely on clause 30.2, having regard to the representations made expressly or by conduct by the respondent, the reliance on them by UKLA and the resulting detriment caused to UKLA. This was not the way that this part of the case was put below. On the contrary, as mentioned above, counsel for UKLA specifically submitted that the judge should apply the guidance given by Lord Sumption.

37. In answer to the point that the judge had limited himself to the case as put to him by UKLA, Mr Darton submitted that the judge had wrongly considered that, for a variation to have been agreed, there must have been an express offer in writing and an acceptance and that the judge had, in effect, required counsel for UKLA to concede as much. He relied on a passage from the speech of Lord Hobhouse in *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 1 WLR 3024 at [56]. We were shown nothing which would support this challenge to the judge. There are no grounds for considering that, when counsel identified the documents and other matters listed by the judge at [238] and [255] as the basis of UKLA's case of an agreed variation of

the MCV, he was being driven to making a "concession", still less one that was legally mistaken (as was the case in *Grobbelaar*). We were shown a small number of pages of the transcript of the trial, but none provided any support for this challenge.

38. I am in no doubt that the case that UKLA now wishes to advance on this appeal is a new case, both as to the alleged formation of an agreed variation to the MCV and as to estoppel, not advanced to the judge at trial.

39. The question that therefore arises is whether UKLA should be permitted to run this new case.

40. The circumstances in which a party will be permitted to advance a case for the first time on appeal have been considered in numerous authorities; see, for example, *Pittalis v Grant* [1989] QB 605 at 611 per Nourse LJ, *Jones v MBNA International Bank Ltd* [2000] EWCA Civ 514, *Singh v Dass* [2019] EWCA Civ 360 at [15] – [18] per Haddon-Cave LJ. Where the new point raises a pure point of law, not requiring any further evidence or involving any injustice to the other party, the court will usually permit it to be taken. However, the position is different where, if the new case had been run below, "evidence could have been adduced which by any possibility would prevent the point from succeeding", or the case would have been conducted differently with regards to the evidence at the trial. The quoted words are taken from *Ex parte Firth, In re Cowburn* (1882) 19 Ch D 419, 429 per Sir George Jessel MR, cited with approval by Nourse LJ in *Pittalis v Grant*. As Snowden J said, in a judgment with which Longmore and Peter Jackson LJJ agreed, in *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146 at [27]:

> "At one end of the spectrum are cases such as the *Jones* case in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual enquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in the *Jones* case (at para 38), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at para 52), there might none the less be exceptional cases in which the appeal court could properly exercise its discretion to do so."

41. In the present case, there had been, as I earlier remarked, an 11-day trial with numerous witnesses and a large volume of documentary evidence. It was the task of the judge, which he fully discharged, to assess the parties' cases and to make the necessary findings of fact in the light of the totality of the relevant evidence. As has been frequently said, the trial judge is in the best position to assess the evidence not only because the judge sees and hears the witnesses but also because the judge can set the evidence on any particular issue in its overall context. This is true also of an assessment of what a particular document would convey to a reasonable reader in the position of the party who received it, having regard to all that had preceded it.

42. There are two principal steps that UKLA invites this court to take. First, it asks the court to expand significantly the documents and other evidence for examination to determine whether the statements and conduct of the LSC amounted to an offer which was accepted by UKLA, whether expressly or by conduct. Second, if a variation to the MCV was agreed in this way, UKLA submits that the court must determine whether the respondent is estopped from relying on the lack of a written instrument signed by the parties by a very broad enquiry, involving a consideration of all the relevant salient facts, the parties' oral statements listed in UKLA's skeleton argument for the appeal and the entire course of the parties' conduct. UKLA also invites this court to consider its further cases, first, that by its conduct in continuing to teach additional learners after March 2009, it made an offer which was accepted by the respondent by its written statements and, second, that statements made by the LSC after March 2009 were offers which invited acceptance by UKLA's conduct in continuing to provide courses to the additional learners.

43. In my judgment, the investigations necessarily involved in these new cases demonstrate why UKLA cannot be permitted to pursue them on appeal. It would be impossible fairly to assess all the evidence on which UKLA seeks to rely without in effect re-hearing the case. The few documents to which we were taken by way of illustration are by no means unequivocal and that is even more the case with oral statements and conduct. Over a number of paragraphs in his judgment, the judge carefully analysed the five documents on which UKLA relied before him to determine if any of them amounted to an offer to increase the MCV. He did so, not just by reading the words of the documents, but also by setting them in their factual context, which itself was in dispute. The same approach would have to be taken by this court in order to assess the far wider basis for its case now put forward by UKLA. This is a course which would, in practical terms, be impossible for this court to undertake.

44. It would also, in my judgment, be contrary to the public interest in the finality of litigation and in the just and efficient disposal of civil cases for this new and greatly expanded case now to be permitted. It was the responsibility of the parties to put their full case to the court at the trial. The parties were then able to adduce all the evidence they wished which was relevant to those cases, to cross-examine witnesses accordingly and to make submissions addressed to the cases as put to the court. As the fact-finder and primary decision-maker, the trial judge was uniquely well-placed to make the findings and evaluative judgments necessary to decide the case. This is what happened in the present case. There is no reason why the whole process should be repeated, either by this court or by remitting it to the court below, just because UKLA now wishes to put its case in a significantly different way.

45. Mr Darton submitted that the trial "went awry" because the judge thought, on the basis of clause 30.2, that there could be no agreed variation of the MCV without a document containing an offer. I can see nothing in the judgment to justify this challenge. He focused on documents because that was the case put to him by UKLA. There is no reason to suppose that, if it had also relied on oral statements or conduct, the judge would not have considered them.

46. Mr Darton also placed some reliance on the wider ambit of UKLA's pleaded case, which he submitted had not been abandoned by UKLA. He submitted that the judge should have addressed it. This submission disregards what the judge said in his judgment at [11], which I have set out above, and disregards that he was invited by

both parties to decide the case by reference to the submissions made to him at the trial. The fact is that the judge extended considerable indulgence to both parties, in order that the case could proceed on a coherent basis which, he concluded, was not possible on the pleadings as they stood at the start of the trial. No-one objected to that course (and it is hard to see how they could) and it is too late to complain of it now.

47. I would add here that I endorse the view expressed by the judge to the parties at the trial and repeated in his judgment at [11] that the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties' own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate. If, as he said, there was "a prevailing view that parties should not be held to their pleaded cases", it is wrong. That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished.

48. Having heard Mr Darton, and Ms Anderson QC on behalf of the respondent, we decided not to permit UKLA to run its new case on appeal. I have set out above my reasons for joining in that decision.

49. When we announced our decision, Mr Darton said that he did not wish to make submissions challenging the findings and decisions made by the judge on the case presented to him.

50. I would accordingly dismiss the appeal.

Lord Justice Popplewell:

51. I agree.

The Senior President of Tribunals:

52. I also agree.