

Contract: can acceptance by conduct override a requirement for signature?

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THE REVEILLE V. ANOTECH DECISION.

1. In Reville Independent LLC v. Anotech International (UK) Ltd [2016] EWCA Civ 443 (6 May 2016), the Court of Appeal considered this familiar question: in what circumstances will a contract result when a written offer document states it is not binding until signed by the offeree, and the offeree does not sign but performs in the manner contemplated by its terms?
2. It held (upholding the decision of the Commercial Court Judge, HHJ Mackie QC) that an offer had been accepted by conduct, which resulted in a contract because the prescribed mode of acceptance had been waived (see para. 7 below).

3PB'S ANALYSIS.

3. **The facts.** Reville Independent LLC (“Reville”) promoted the *MasterChef* brand in the USA. Anotech International (UK) Limited (“Anotech”) was a cookware manufacturer that wished to integrate and promote its products in the *MasterChef* series, and also to obtain a licence to use that brand in its marketing in North America.
4. Reville sent its own standard-form 3 page deal memo to Anotech, summarising the terms and providing that it “shall not be binding on Reville until executed by both Licensee and Reville” (“the Pre-Condition”). Anotech modified and signed the deal memo on 28 February 2011, thus making a counter-offer. Reville never signed it.
5. It was also plainly contemplated that any signed deal memo would form the basis of a further, long form agreement. None was ever agreed. The parties nonetheless proceeded to perform the services expected.
6. **The claim.** Reville demanded payment of a contractual advance provided for by the deal memo, which Anotech resisted on the basis that there was no concluded contract. Reville’s claim for payment succeeded before the trial judge on the basis that Anotech’s counter-offer had been accepted by Reville’s conduct.

7. **The Court of Appeal.** Against a background of overriding legal policies: (i) emphasising the importance of certainty in commercial contracts; and (ii) that reasonable expectations of honest sensible business persons must be protected; the Court restated five principles (at [40]-[41]), including:
 - 7.1. **Conduct as acceptance.** It is well-established that acceptance can be by the conduct of the offeree, so long as that conduct (objectively analysed) is *intended* to constitute acceptance.¹
 - 7.2. **Waiver of prescribed modes of acceptance.** If an offeror indicates that signature is the prescribed mode of acceptance, he will nonetheless be bound by a contract if he waives that requirement and acquiesces in a different mode of acceptance.
 - 7.3. **Preconditions for signature, and performance.** A court will not lightly reach the conclusion that parties have, despite a clause requiring signature, bound themselves to a contract before it is signed. However, in deciding whether a party has accepted an offer by conduct the court must take a realistic approach that gives effect to the reasonable expectations of businessmen in their commercial dealings.

8. In concluding that a contract had been formed the Court of Appeal resorted to principles of waiver. The trial judge had steered away from those principles, because an application of waiver made it necessary to identify for whose ‘benefit’ the Pre-Condition had been inserted. (That was factually problematic because the initial deal memo had been put forward by Reville, but had become a counter-offer when Anotech amended it.) Instead, the trial judge considered that a prescribed form of acceptance did not *preclude* acceptance by other means, but made that “*more difficult to show*”.² What ultimately mattered was whether there had been *any* acceptance,

¹ Thus, where conduct is relied upon to form a contract, it will usually still be necessary to analyse it through the rubric of offer/acceptance. It was not necessary on the facts to consider the exceptional cases in which offer/acceptance might be displaced where a contract is inferred entirely from the parties’ conduct: G. Percy Trentham Ltd v. Archital Luxfer Ltd [1993] Lloyd’s Rep 25 (CA), at p.27.

² [2015] EWHC 726 (Comm) at [23]-[26].

for which “[t]he evidence must be clear and, when considered as a whole and in context, unequivocal”.

9. By contrast, the Court of Appeal’s analysis depended on the following steps:
 - 9.1. When Anotech amended the offer, it amounted to a counter-offer. That counter-offer included a prescribed form of acceptance, namely the Pre-Condition.
 - 9.2. The Pre-Condition was for the benefit of Reveille, as offeree. Reveille was therefore entitled to waive the prescribed form of acceptance, and had done so and accepted the offer by performing the contract (see at [43]-[44]).
 - 9.3. The trial judge had been right to focus on whether there were clear and unequivocal acts by Reveille, known about by Anotech, such as to amount to acceptance (at [45]).

IMPACT OF THE DECISION

10. First, the decision confirms that, where a contract has been partly performed, the parties’ conduct will be viewed objectively and with a view to upholding their commercial expectations and the commercial reality. In those circumstances, arguments that the parties had not intended to enter into a contract will often lack force because:

“the governing criterion is the reasonable expectations of honest men. And in the present case that means that the yardstick is the reasonable expectations of sensible businessmen....” G Percy Trentham v Archital Luxfer Ltd [1993] 1 Lloyd’s Rep 25 (per Steyn LJ)

11. Secondly, however, the Court of Appeal’s analysis of waiver may be seen by some as unduly formalistic. The

waiver analysis indicates that the Court disagreed with the trial judge’s view (see para. 8 above) that the existence of a prescribed form of acceptance does not preclude demonstrating acceptance in another way. On the contrary, as the party arguing that a contract had been formed, Reveille had to show that the Pre-Condition had been waived. That in itself is unproblematic, and contributes to legal certainty, but it is the application of the waiver principles that may lead to arbitrary results. Why, for example, should the outcome have depended on the happenstance of Anotech making a counter-offer? How does one tell if a clause is inserted for the benefit of one party or another?

12. There is no clear answer to these questions, although the focus on commercial realism may provide the answer in many cases.

26 May 2016

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