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Case No: M5X152

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY

Courts of Justice
Crown Square
Manchester
7th April 2006

B e f o r e :

HIS HONOUR JUDGE PELLING QC
(Sitting as a Judge of the High Court)

NILESH MEHTA — **Appellant/ Defendant**

- and -

J PEREIRA FERNANDES S.A — **Respondent/ Claimant**

Mr Mehta in person
Mr P. Aslett (instructed by Ian Simpson & Co for the Respondent)

His Honour Judge Pelling QC:

Introduction

1. This is an appeal from the Judgment of District Judge Harrison given on 9th November 2005, by which he gave summary judgment to the Respondent (***JPF***) in the sum of £24,985.53 and ordered the Appellant (***Mr Mehta***) to pay the costs of the claim which were summarily assessed in the sum of £1080.00. Permission to appeal was given by His Honour Judge Holman on 20th February 2006.

2. JPF is a Portuguese company that supplies bedding products. It supplied such products in July 2002 to Bedcare (UK) Limited (***Bedcare***) a company of which Mr Mehta was a director. Bedcare failed to pay for the products it had received and ultimately it was wound up on JPF's Petition by an Order made on 7th March 2005.

3. The relevant history begins with the presentation of a winding up petition by JPF on 12th January 2005. On 20th February 2005, Mr Mehta asked a member of his staff to send an e mail to JPF's solicitors in the following terms:

   "… I would be grateful if you could kindly consider the following. If the hearing of the Petition can be adjourned for a period of 7 days subject to the following:

   > *(a) A Personal Guarantee to be given in the amount of £25,000 in favour of your client – together with a list of my personal assets provided to you by my solicitor*
   >
   > *(b) A repayment schedule to be redrawn over a period of six months with a payment of £5000.00 drawn from my personal funds to be made before the adjourned hearing.*

   I am also prepared to give a company undertaking not to sell market or dispose of any company assets without prior consent from your client pending the signing of the Personal Guarantee …"

   The e mail was not signed by Mr Mehta but is described in the header as having come from *Nelmehta@aol.com*. This e mail address appears on other e mails sent to JPF's solicitors by Mr Mehta, which have been signed by him.

4. The evidence in support of the application for summary judgment was given by Ms Albaster in a witness statement dated 21st June 2005. Ms Albaster is a clerk employed by JPF's solicitors. At Paragraph 7 of her statement, she says that when she received the e mail referred to above, she telephoned Mr Mehta, accepted his proposal and agreed to adjourn the hearing of the Petition which in the event was adjourned for a period of 14 days. Ms Albaster continues:

   "Although I sent the Defendant an agreement to cover the instalment payments and Personal Guarantee, I heard nothing further from him, he never returned the documents and he did not pay the £5,000 which had been promised from his personal funds."

5. Mr Mehta's statement in answer to the application is dated 12th July 2005. Aside from a suggestion that the debt owed by Bedcare was £14,715.00, Mr Mehta sets out his case as to the claim against him in Paragraphs 4-6 of his statement. In essence, he says the claim against him should fail because JPF has failed to produce any signed agreement or Personal Guarantee and that the only maintainable claim that JPF has is against Bedcare.

6. Mr Mehta appeared in person before me as he did before the District Judge. In the course of his initial submissions he told me that the e mail had been sent with his authority by one of his staff who he later identified as a Ms Durkin. Later, in the course of his reply submissions, Mr Mehta told

me that the sender name that appears in the e mail had been typed by his employee Ms Durkin without his authority. There was no evidence to support such a contention (or to explain how, technically, it could be right) and the application by Mr Mehta to adduce such evidence was strongly resisted by Mr Aslett who appears for the Respondent. For reasons that I gave at the conclusion of the hearing, I dismissed that application. In summary, there was no satisfactory explanation as to why the evidence had not been adduced at a much earlier stage. The evidence in support of the application for summary judgment and in particular Paragraph 7 of Ms Albaster's statement made clear that the application was based on the contention that the e mail I have referred to in Paragraph 3 above constituted the guarantee and in any event it was or ought to have been entirely clear to Mr Mehta as to how JPF's case was being put at the latest by the time when the District Judge gave judgment. It is also fair to say that Mr Mehta had accepted that he had authorised the sending of the e mail in the form it was sent until a very late stage in his reply submissions. In those circumstances, it seemed to me that the application to adduce further evidence ought to fail.

The Issue Concerning The Amount Owed by Bedcare

7. Ms Albaster's evidence is that Mr Mehta had agreed the sum due from Bedcare as being £24,709.33. This is clearly evidenced by the run of e mails at pages 21-26 of the Bundle. No evidence has been produced by Mr Mehta to support his contention that the true sum owed by the company is less than £24,709.33 or to explain why, if this was the case, he had agreed to the figure advanced by JPF's solicitors. This point is not mentioned by Mr Mehta in his Grounds of Appeal at Section 7 of the Appeal Notice. In those circumstances, it is not open to him to argue this point on the appeal. However, even if I am wrong on that point, for the reasons set out earlier in this paragraph, I am satisfied that on the evidence before the District Judge he was correct to conclude that Mr Mehta has no reasonable prospect of success on this issue.

The Issues In The Appeal

8. The only issue of substance that was considered by the District Judge concerned the assertion by Mr Mehta that there was no guarantee signed by Mr Mehta. The District Judge concluded that the e mail I have referred to in paragraph 3 above was sufficient to satisfy the requirements of the Statute of Frauds. He said that "*The e mail document in itself is the guarantee"*. He concluded that the presence of Mr Mehta's e mail address on the copy of the e mail received by JPF's solicitors constituted a sufficient signature for the purposes of *Section 4* of the *Statute of Frauds* and he entered judgment accordingly.

9. *Section 4* of the *Statute of Frauds* provides that "*no action shall be brought … whereby to charge the defendant upon any special promise to answer for the debt default or miscarriage of another person … unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."*. It follows that:

9. 1. The agreement in question must be in writing or, if the agreement is made orally, there must be a memorandum or note evidencing the oral agreement; and

9. 2. The agreement or memorandum must be signed by either

   9.2.1. The guarantor , or

   9.2.2. Someone authorised by the guarantor to sign the agreement or memorandum on his behalf.

   The effect of a non compliance with *Section 4* is that the contract is unenforceable.

10. There were thus two issues that were argued at the hearing of the appeal namely:

    10.1. whether the e mail constituted a sufficient note or memorandum of the alleged agreement for the purposes of *Section 4*; and

    10.2. Assuming the e mail was a sufficient note or memorandum, whether it was sufficiently signed by or on behalf of Mr Mehta, it being contended on behalf of JPF that the presence of the e mail address on the copy of the e mail received by JPF's solicitors was a sufficient signature for these purposes.

Was The E Mail A Sufficient Note Or Memorandum?

11. The e mail relied on contains an offer. That this is so is apparent from the opening words of the operative part which starts with the words " *…I would be grateful if you could kindly consider the following. If the hearing of the Petition can be adjourned … subject to the following …"* . It is also apparent from the fact that the e mail contemplates that formal documents will be entered into by the use of the phrase "*… pending the signing of the Personal Guarantee"*. It is clear from the evidence of Ms Albaster that it was regarded as such – see the part of Paragraph 7 of her witness statement referred to in Paragraph 4 above.

12. As a matter of first impression, such a document ought not to be sufficient to constitute a memorandum for *Section 4* purposes. I say this because what has to be signed under *Section 4* is " *… the agreement upon which such action shall be brought or some memorandum or note thereof …"*. As Cave J said in *Evans v. Hoare* [1892] 1 QB 593 the effect of these words is that " *… there must be a memorandum of a contract, not merely a memorandum of a proposal …"*. However, that is not the way the law appears to have developed. I was referred to the current edition of *The Law of Contract* by Sir Guenter Treitel. At page 184 he says "*… an offer signed by one party and orally accepted by the other … ha[s] been held sufficient"*. That this is the current state of English law is acknowledged (in relation to the old law under *Section 40* of the *Law of Property Act 1925*) in Paragraph 4-027 of *Chitty On Contract* (29th Ed., Volume 1), where however it is described as "*exceptional"*.

13. Four cases are cited by Chitty in support. Of those, only *Lever v. Koffler* [1901] Ch 543 was cited to me by Mr Aslett. That case was concerned with an offer in writing by the Defendant to sell two parcels of real property on alternative bases, where one of the alternatives was accepted both orally and by letter by the Plaintiff. In that case, there were two grounds on which it was submitted that *Section 4* was not satisfied – first that the reply letter did not define which alternative was being accepted and secondly that the letter from the Defendant did not sufficiently set out the terms of the agreement. The first point failed as a matter of construction and the latter argument was rejected by reference to an earlier judgment of the House of Lords (*Hussey v. Horne-Payne* 4 App.Cas. 311) in which it had been concluded that an exchange of letters which together constituted a binding agreement would satisfy the requirements of *Section 4* as it then applied to contracts for the sale of land. Neither *Lever v. Koffler* nor *Hussey v. Horne-Payne* addresses the issue of written offers orally accepted and neither considers the position in relation to guarantees. However, there is a high level of commonality between the treatment of contracts for the sale of land and guarantees under *Section* 4 as it stood when those cases were decided and so I am not persuaded that this last point assists Mr Mehta.

14. The position in relation to written offers accepted orally was considered in the latest of the cases cited by Sir Guenter and in Chitty – *Parker v. Clark* [1960] 1 WLR 286. That case concerned a written offer that was accepted in writing by a letter that was lost. Although it was recognised that oral evidence of the written acceptance might provide an answer, the case was argued on the basis

that the written offer was a sufficient memorandum – see the Judgment at 295. The argument that the statute required a concluded agreement to be existing when the memorandum was signed was rejected by Devlin J as he then was. He held that a written offer is capable of being a memorandum providing the language shows an intention to contract as opposed to being a mere statement of expectation. Devlin J relied on two earlier authorities, neither of which was cited to me. I have not been able to obtain copies of either in the time available to me. However, each is referred to in Chitty at footnote 126 to Paragraph 4-027. They are *Smith v. Neale* (1857) 2 CB(NS) 67 at 88 and *Reuss v. Picksley* (1866) LR 1 Ex. 342.

15. Cave J's observation which I have referred to in Paragraph 12 above was not cited to Devlin J. Although it would appear that Cave J made the observation he did without the citation to him of *Smith v. Neale* (1857) 2 CB(NS) 67 at 88, *Reuss v. Picksley* (1866) LR 1 Ex. 342 was cited to him – see the argument in *Evans v. Hoare* (ante) at Page 595.

16. Given that nothing has been formally cited to me other than *Lever v. Koffler*, identifying some generally applicable principle is not easy. The purpose of the statute of frauds is to protect people from being held liable on informal communications because they may be made without sufficient consideration or expressed ambiguously or because such a communication might be fraudulently alleged against the party to be charged. That being so, the logic underlying the authorities I have referred to would appear to be that where (as in this case) there is an offer in writing made by the party to be bound which contains the essential terms of what is offered **and** the party to be bound accepts that his offer has been accepted unconditionally, albeit orally, there is a sufficient note or memorandum to satisfy *Section 4*. I say nothing about the position where there is a dispute as to whether or not the written offer has been accepted orally. Such a situation does not arise on this appeal. In the result, subject to the signature issue to which I turn below, I conclude that the e mail referred to in Paragraph 3 above is capable of being a sufficient note or memorandum for the purpose of *Section 4* because it is in writing, and it is not disputed by Mr Metha that the offer was accepted orally on behalf of JPF as described by Ms Albaster in Paragraph 7 of her witness statement.

17. It is true to say that the e mail contemplates the preparation of formal documentation in relation to the guarantee. No argument was advanced by Mr Mehta to the effect that this qualification precluded the e mail from being a note or memorandum for *Section 4* purposes. I have considered it only because he appears in person. An agreement to do something which is expressed to be subject to the execution of formal documentation will usually be regarded as incomplete until the formal documentation has been settled and signed – see by way of example *Winn v. Bull* (1877) 7 Ch.D 29. However, I do not see that this rule would prevent an offer qualified in this manner from being a *Section 4* note or memorandum if Devin J's reasoning in *Parker v. Clark* (ante) is correct. If it is not, then the document would not be a *Section 4* note or memorandum irrespective of the *Winn* principle.

The Signature Issue

18. The e mail referred to in Paragraph 3 above is not signed by anyone in a conventional sense. Mr Mehta's name or initials do not appear at the end of the e mail or, indeed, anywhere else in the body of the e mail. Inevitably, therefore, JPF must contend that the presence of the e mail address at the top of the e mail constitutes a signature sufficient to satisfy the requirements of *Section 4*.

19. As is well known to anyone who uses e mail on a regular basis, what is relied upon is not inserted by the sender of the e mail in any active sense. It is inserted automatically. My knowledge of the technicalities of e mail is not sufficiently detailed to enable me to know whether it is inserted by the ISP with whom the sender or the recipient has his e mail account. However, I accept Mr Aslett's

submission that as a matter of obvious inference, if it is inserted by the latter it can only be from information supplied by the former. Mr Mehta suggested that the address was inserted by his employee. I do not see how this could be so and certainly Mr Mehta was not able to give me a coherent explanation of how that might be so. It is possible that Mr Mehta's employee was authorised to use Mr Mehta's e mail account remotely but, even if that is so, I do not see how that can impact on any of the issues I have to resolve since it is not in dispute that the e mail was sent on the instructions of Mr Mehta and the method by which the sender address came to be inserted would not be affected even if that was the position.

20. It is submitted on behalf of JPF that the appearance of the sender's address at the top of the document constitutes a signature either by the sender or by "*… some other person thereunto by him lawfully authorised …"* because it is well known to all users of e mail that the recipient of the e mail will always be told the e mail address of the e mail account from which the e mail is sent in the form it appears on the e mail referred to in Paragraph 3 above. That being so, it is submitted that by authorising an agent to send an e mail using the sender's e mail account, to a third party the sender knows that his her or its e mail address will appear on the recipient's copy and that is sufficient for it to be held to be a signature for the purposes of *Section 4*.

21. It was submitted by Mr Aslett that intention was irrelevant – all that was required was a document that constituted a sufficient memorandum (which, as I have held, the e mail was) and the signature somewhere on the note or memorandum of either the person to be bound or his duly authorised agent. In support of this contention, Mr Aslett relied on the decision of the House of Lords in *Elpis Maritime Company Limited v. Marti Chartering Company Limited* [1991] 3 WLR 330. The facts of that case were very different to the facts of this case. There was no dispute in that case that the party to be charged had signed the document. The dispute in that case concerned whether or not the fact that the party to be bound signed the relevant document as agent made any difference given that there was a clause within the document that purported to create a guarantee by the party purporting to sign only as agent. It had been contended that if such was the case then the fact the agreement contained a clause under which the signing party personally agreed to guarantee certain obligations was not relevant. It was this last argument that was rejected by the House of Lords by reference to *In re Hoyle* [1893] 1 Ch 84 in which A.L.Smith LJ said: "*The question is not what is the intention of the person signing the memorandum but is one of fact, vis is there a note or memorandum of the promise signed by the party to be charged?"*. It is because this is so that in other cases the courts have accepted letters to third parties, instructions to telegraph companies signed by the sender, and affidavits in unconnected actions as being a sufficient memorandum providing they are signed by the parties to be bound. It was this that led the House of Lords to conclude that it was irrelevant in what capacity or with what intention the document there being considered was signed.

22. In my judgment, the issue that arises in this case is not the issue that the House of Lords considered in *Elpis Maritime*. Here the issue is not with what intention or with what capacity did Mr Mehta or his employee sign the relevant document – rather the issue is whether it has been signed at all.

23. What is relied upon is an e mail address. It is the e mail equivalent of a fax or telex number. It is well known that the recipient of a fax will usually receive a copy that has the name and/or number of the sender automatically printed at the top together with a transmission time. Can it sensibly be suggested that the automatically generated name and fax number of the sender of a fax on a faxed document that is otherwise a *Section 4* note or memorandum would constitute a signature for these purposes? If Mr Aslett is right then the answer depends solely upon whether the sender (or the sender's principal where the sender was an agent) knew that the number or address would appear on the recipient's copy.

24. Mr Aslet, relies on *Evans v. Hoare* (ante) in support of this argument. The issue in that case was

whether the Defendant was bound by the relevant document. The evidence in that case established that the relevant document had been drawn up by a duly authorised agent of the Defendants. The document was in the form of a letter from the Plaintiff and the words *"Messrs Hoare, Marr & Co, 26,29 Budge Row, London EC"* appeared after the Plaintiff's address at the head of the letter. The question was whether these words constituted a signature of "*… some person …thereunto lawfully authorised …"* by the Defendants. It was argued on behalf of the Plaintiff in that case that the appearance of the Defendant's name in the letter tendered to the Plaintiff for signature on behalf of the Defendant was sufficiently signed on behalf of the Defendant because the Defendant's name had been "*… written … with the defendant's authority, with the intention of designating the party to be charged, and for the purpose of making a contract which should be binding on the Plaintiff*" – see Pages 594-5 of the reported argument.

25. It was this argument that succeeded. Cave J, said:

> *"I am of opinion that the principle to be derived from the decisions is this. In the first place, there must be a memorandum of a contract, not merely a memorandum of a proposal; and secondly, there must be in the memorandum, somewhere or other, the name of the party to be charged, signed by him or by his authorized agent. Whether the name occurs in the body of the memorandum, or at the beginning, or at the end, if it is intended for a signature there is a memorandum of the agreement within the meaning of the statute."* [Emphasis supplied]

As was emphasised by Cave J, the appearance of the name of the party to be bound must be "*intended for a signature"*. It is noteworthy that that this case was cited to the House of Lords in *Elpis Maritime* but was not disapproved by Lord Brandon. I do not think it can be said (and, in any event, there is no evidence) that either Mr Mehta's employee or the ISP either sending or receiving the e mail intended Mr Mehta's e mail address to be a signature in the sense identified above.

25. There are *dicta* that support the approach of Cave J in *Caton v. Caton* (1867) LR 2 HL 127. In that case, the House was concerned with a document that started by referring to "*the under mentioned parties*" and then referred to the parties in question by name in relation to various promises. Neither party signed the document and the question was whether the document constituted a sufficient note or memorandum signed by the parties to be bound within *Section 4*. The House of Lords held that it was not. In arriving at this conclusion, Lord Chelmsford C said at 139-40:

> *"The cases on this point … establish that the mere circumstances of the name of a party being written by himself in the body of a memorandum of agreement will not of itself constitute a signature. It must be inserted in the writing in such a manner as to have the effect of "authenticating the instrument" or "so as to govern the whole instrument"… The name of the party, and its application to the whole of the instrument, can alone satisfy the requisites of a signature.*

Lord Westbury said (Page 143) that what is alleged to constitute the signature must

" *… be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to, every part of the instrument. … It must govern every part of the instrument. It must shew that every part of the instrument emanates from the individual so signing, and that the signature was intended to have that effect. It follows that if a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have legal effect and force which it must have in order to comply with the statute, and to give authenticity to the whole of the memorandum.* [Emphasis supplied]

26. In the light of the dicta cited above, it seems to me that a party can sign a document for the purposes of *Section 4* by using his full name or his last name prefixed by some or all of his initials or using his initials, and possibly by using a pseudonym or a combination of letters and numbers (as can happen for example with a Lloyds slip scratch), providing always that whatever was used was inserted into the document in order to give, and with the intention of giving, authenticity to it. Its inclusion must have been intended as a signature for these purposes. I agree with Mr Aslett's analysis in Paragraph 4 of his supplementary written submissions that in *Caton* the names were included in the document under consideration to describe intended performance. I also accept his submission in Paragraph 6 of his supplementary written submissions that the meaning of "*incidental"* in this context means "*… where the signature or name just happens to appear somewhere"*.

27. I do not accept his submissions that *Godwin v. Francis* (1870) LR 5 CP 295 or *McBlain v. Cross* (1871) 25 LT 804 have relevance to the issue I have to decide. *Godwin* plainly involved a *Section 9* note or memorandum in the form of instructions to a telegraph company signed by the party to be charged on whose behalf the telegram concerned was sent. Bovill CJ then proceeded to consider the position in the event that this was wrong and concluded that "*… the mere telegram written out and signed in the way indicated by the telegram clerk, if done with the authority of the vendors, would have been a sufficient signature"*. This is not this case – no name or signature or any sort appears in the body of the e mail. *McBlaim* takes the issue no further because the telegram in that case stated that it came from the sender and did so with his express authority. That is not this case.

28. I have no doubt that if a party creates and sends an electronically created document then he will be treated as having signed it to the same extent that he would in law be treated as having signed a hard copy of the same document. The fact that the document is created electronically as opposed to as a hard copy can make no difference. However, that is not the issue in this case. Here the issue is whether the automatic insertion of a person's e mail address after the document has been transmitted by either the sending and/or receiving ISP constitutes a signature for the purposes of *Section 4*.

29. In my judgment the inclusion of an e mail address in such circumstances is a clear example of the inclusion of a name which is incidental in the sense identified by Lord Westbury in the absence of evidence of a contrary intention. Its appearance divorced from the main body of the text of the message emphasises this to be so. Absent evidence to the contrary, in my view it is not possible to hold that the automatic insertion of an e mail address is, to use Cave J's language, "*… intended for a signature…"*. To conclude that the automatic insertion of an e mail address in the circumstances I have described constituted a signature for the purposes of *Section 4* would I think undermine or potentially undermine what I understand to be the Act's purpose, would be contrary to the underlying principle to be derived from the cases to which I have referred and would have widespread and wholly unintended legal and commercial effects. In those circumstances, I conclude that the e mail referred to in Paragraph 3 above did not bear a signature sufficient to satisfy the requirements of *Section 4*.

30. Before leaving this issue I ought to mention the *Electronic Communications Act 2000*. This Act empowers the appropriate Minister to issue statutory instruments in order to modify any other stature or statutory instrument in order to facilitate electronic communications. My understanding is that this Act was enacted in order to give effect to the EU Directive on E Commerce (2000/31/EC). No relevant statutory instrument made under this Act has been drawn to my attention. It is noteworthy that the Law Commission's view in relation to this Directive is that no significant changes are necessary in relation to statutes that require signatures because whether those requirements have been satisfied can be tested in a functional way by asking whether the conduct of the would be signatory indicates an authenticating intention to a reasonable person. This approach is consistent with what I have said so far in this Judgment. Thus, as I have already said, if a party or

a party's agent sending an e mail types his or her or his or her principal's name to the extent required or permitted by existing case law in the body of an e mail, then in my view that would be a sufficient signature for the purposes of *Section 4*. However that is not this case.

Conclusion

31. In those circumstances, whilst I conclude that the e mail referred to in Paragraph 3 above is in principle capable of being a *Section 4* note or memorandum notwithstanding that it contains an offer and thus came into existence before not after the contract which it is said to memorialise, it does not bear the signature within the meaning of *Section 4* of the Statute of Frauds of either Mr Mehta or his duly authorized agent. Accordingly, I allow the appeal and dismiss the application for summary judgment on the guarantee point.

32. There then remains the question of whether or not there should be judgment against Mr Mehta for £5,000 being the alternative claim made against him by JPF. The District Judge made no alternative findings about this claim because he concluded that the £5,000 fell within the sum that he concluded had been guaranteed by Mr Mehta. However, there was no Respondent's Notice served or filed on behalf of JPF in relation to this issue. It was accepted by Mr Aslett that there would have to be such a Notice if this issue was to be disposed of on the hearing of this appeal and for that reason accepts that this issue will have to be dealt with either by fresh application to the District Judge or left to trial. In those circumstances I say no more about it.

33. I will now hear the parties on whether and if so what directions ought to be given pursuant to *CPR 24.6.*

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