Easter Term
[2015] UKPC 23
Privy Council Appeal No 0013 of 2013

JUDGMENT

Hall (Appellant) *v* Maritek Bahamas Ltd (Respondent) (The Bahamas)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lord Mance
Lord Kerr
Lord Clarke
Lord Carnwath
Lord Gill (Scotland)

JUDGMENT GIVEN ON

18 May 2015

Heard on 5 March 2015

Appellant	*Respondent*
Peter Knox QC	James Guthrie QC
Daniel Clarke	Thomas Roe QC
(Instructed by MA Law (Solicitors) LLP)	(Instructed by Carter Perry Bailey LLP)

LORD CARNWATH:

Introduction

1. Maritek Bahamas Ltd ("the company") owns a large area of land (some 24,682 acres) on Long Island in the Bahamas, known as the former Diamond Crystal Salt Company property ("the property"). In 2002 the appellant, Mr Hall, wanted to acquire the property, but as a non-Bahamian, he could not do so without first obtaining a permit from the government. The main issue is whether, pursuant to the dealings between Mr Hall and the company and its agents between August and November 2002, there was a concluded and enforceable contract for the sale of the property.

2. Other significant players were Sam Shen, a shareholder and former director of the company, and also representative of its estate agents, Properties of America; Phylo Chiang and his son Eddie Chiang, who were directors of the company at the relevant time; and as lawyers, Vincent Peet and Co for Mr Hall, and Mrs Harding-Lee (of Harding-Lee and Co) for the company. Also acting as estate agents for the company were Sunshine Real Estate Ltd ("Sunshine").

The alleged contract

3. The contract is alleged to have arisen out of exchanges between the parties from August to December 2002. On 12 August 2002 Mr Hall made his first offer, subject to contract, to buy the property. On behalf of the company, Sunshine sent him a draft contract for sale, which he returned signed. On 20 October Mr Hall sent to Sam Shen a document entitled "Contract for the Sale of Land", again signed by him (and witnessed). The covering note read:

> "I enclose a hard copy of the contract. Please detach the maps (signed by you and me) from the previous contract and staple them to this new one"

The draft contract gave the purchase price as US $11.5m. Under the heading "Deposit" it provided:

> "$1,150,000, being 10% of the purchase price, paid to the Purchaser's attorney to be held by that attorney or by his bank as stakeholder pending completion. In the event that completion fails to take place (other than

> through the failure of the Purchaser to complete) the deposit and interest on it is to be returned to the Purchaser."

Under the heading "Completion":

> "The completion by the Purchaser of this contract and the payment of the purchase price is conditional upon the Purchaser or his attorney receiving formal written approval from the relevant agency of the government of the Bahamas ('Government Approval') for the purchase of the land."

and under "Title":

> "If the Vendor shall, on or before the completion date, have produced a good and marketable title to the land and the Purchaser shall nevertheless have failed, despite having received Government Approval, to complete his purchase on or before the completion date the Vendor shall be entitled to serve a notice of completion setting out full details of the default, requiring the Purchaser to complete within a period of ten working days of the service of the notice and if the notice is not complied with the deposit shall be forfeited to the Vendor and this contract shall be deemed cancelled without further or other liability of either party or person."

4. On 11 October Mr Hall's bank, Credit Lyonnais Suisse (The Bahamas) Limited, established a stakeholder account in the name of "VINCENT PEET and CO / DIAMOND PROPERTY", into which it deposited $1,240,000, of which $1,150,000 represented the 10% deposit under the proposed contract for sale (the remaining $90,000 being payable to Vincent Peet and Co). By an "October 2002 Stakeholder Agreement" the bank undertook to "act as stakeholder", and as such, upon completion of the purchase of the property, to release the 10% deposit to the sellers. The agreement added:

> "In the event that the purchase is not completed within nine months of this agreement or such longer period as may be specified in writing by the Buyer, the funds in the Account shall be held to the sole order of the Buyer. All interest to the Account is to be for the benefit of the Buyer."

On the same day Vincent Peet and Co told Mrs Harding-Lee that the stakeholder account had been established and the payment duly made, and supplied her with a copy of the stakeholder agreement.

5. There followed some discussions between Mr Hall and Mrs Harding-Lee about her wish for some form of time-limit. He indicated that he was keen for matters to proceed quickly, but was unsure how to "frame a reference to a time limit which allowed for dilatoriness on the part of the Government". On 19 October Mrs Harding-Lee sent to Mr Hall a draft document headed "Amendment Re: Completion Date", which included a proposed "completion clause". On 27 October Mr Hall replied with some proposed amendments.

6. Following some further exchanges, on 8 November 2002 Mrs Harding-Lee wrote to Vincent Peet and Co as follows:

> "Enclosed herewith please find Contract for Sale and Amendment. As mentioned to you, Phylo Chiang is the President of the Vendor Company and is therefore authorised by such Company to execute the Agreement on its behalf."

The letter attached two documents: (i) the document entitled "Contract for the Sale of Land", already signed by Mr Hall but now counter-signed by Phylo Chiang on behalf of the company (no maps were attached); (ii) the document "Amendment Re: Completion date", in the original form supplied to Mr Hall on 19 October, rather than as later amended by him. Mr Phylo Chiang's signature appeared, witnessed, above a space for the appellant to sign.

7. There followed a series of exchanges between Mr Hall and his own lawyers and his bank, and (orally and in writing) with Mrs Harding-Lee, dealing first with whether the receipt of the deposit had been acknowledged and whether as a result there was a binding contract for sale, and secondly on the terms of the proposed amendment. They were the subject of evidence and cross-examination at trial.

8. Three written exchanges between Mr Hall and Mrs Harding-Lee have been the subject of particular attention:

> i) On 3 December Mr Hall sent a fax to Mrs Harding-Lee, in which he thanked her for "the Contract for the Sale of Land of 11 October 2002 and the Amendment both signed by Mr Phylo Chiang". He accepted that "the Contract for the Sale of Land could have been drawn more tightly, and could have contained the points made in your Amendment". He understood her reservations "about the wording of my offer and the need for more precise terms as set out in the Amendment". After some further explanation, he said:

> "I accept that the offer as I made it was unsatisfactorily worded and I therefore withdraw it so that we can replace it with tighter wording and any other matters such as governing law which it might be helpful to deal with at the same time, provided of course that in all cases we are both in agreement."

Finally, to guard against the risk of misunderstanding and of faxes getting mislaid, he asked her to note that, starting from the following week, all faxes or other communications were to be taken as being "subject to contract"; binding force would attach only to "a hard copy signed by me and duly witnessed".

ii) In an email to Mr Hall dated 5 December 2002, Mrs Harding-Lee wrote:

> "Hi Peter, as per our conversation, we confirm that there is a binding contract between the parties despite the fact that you have not executed the amendment yet. I must stress however that my clients are concerned that no attempt has been made to apply to the Government for approval by yourselves."

iii) On 10 December 2002, in a fax to Mrs Harding-Lee, Mr Hall said:

> "As discussed we both accept each party is committed to this deal, and there only remain some loose ends to tidy up. I am perhaps more cautious than most, but no reasonable businessman could have signed the amendment entitling your clients to back out of the deal and take our deposit …"

He asked her to confirm that she had received his fax of 3 December.

9. Also on 10 December, Mr Hall sent a fax to his own bank:

> "... Unfortunately the seller did not accept the offer of 11 October 2002, but replied with an amended version. Under English and Bahamian law this means a contract automatically fails to exist. (As confirmation of his intention the seller did not acknowledge the deposit, which was the specified means of acceptance, and also failed to deliver the title deeds.) I have therefore in accordance with the law written to the seller agreeing to withdraw my version of the offer, and agreeing to work towards a new contract acceptable to both sides. … I think the seller is still keen to sell, and we need only agree on terms. Therefore please leave the money in the

> stakeholder account so that there will be no difficulty in reviving it if needed. The actions in the previous para mean that, in law, no contract exists at present and whatever we agree on (if we do) constitutes a new contract …"

Subsequent exchanges

10. It is convenient at this stage to summarise the subsequent chain of events leading eventually, in late 2005, to the commencement of these proceedings. This is not directly relevant to the existence of the alleged contract, but may be relevant to an application to adduce new evidence which it will be necessary to consider later in this judgment. It is unnecessary to do more than note some of the more significant events.

11. Correspondence between the parties continued, one subject of discussion being the form of the time-limit. On 29 April 2003 Mr Hall sent to Mrs Harding-Lee a form of agreement offering by 1 May 2003 to sign a fresh contract for sale -

> "Identical in substance to that he signed on 11 October 2002 except for the alteration that 1 May 2003 is the due date for submission of his signed Proposal and the Purchaser shall deal promptly with government enquiries about his Proposal or Proposal amendments, upon approval of which the sale is conditional, and that governing law and jurisdiction is that of England. Upon Peter Hall signing the new land sale contract the Vendors' attorneys shall sign it on behalf of the Vendors."

He agreed to pay compensation of $100 an hour until he performed these conditions, as well as interest which would have been earned on the $11.5m, and further to transfer $25,000 immediately and $25,000 every three months thereafter if no completion due to government delay. This was signed by Mrs Harding-Lee, though it was not clear what authority she had to do so. It was not relied on by Mr Knox as in itself constituting a contract for sale of the property. $25,000 was duly paid into the Harding-Lee trust account on 2 May, and a further $25,000 on 1 August, but no further payments were made. (According to the appellant's printed case (para 71) the April agreement "appears later to have been abandoned".)

12. On 13 June 2003 Mr Hall signed a joint venture agreement with a company called Matrix Securities Ltd ("Matrix"). On 16 June he sent a note to Mrs Harding-Lee and his bank, noting that the stakeholder agreement had been subject to a nine-month limit, but giving "irrevocable notice" extending "the period to whatever time is required for completion to take place". Mr Hall had prepared a new version (version 4) of the contract of sale dated 16 June 2003. This was sent to Mrs Harding-Lee on 9 July in

advance of a meeting with the Sam Shen and Eddy Chiang on 17 July at Harding-Lee's offices.

13. Matters seem to have come to a head at that meeting. Sam Shen refused to sign the new version of the agreement. Mr Hall asserted that a binding contract had been made on 11 October 2002. That assertion was repeated in letters written to the company by lawyers on his behalf on 21 July and 1 August 2003. In October 2003, Mr Hall arranged for the Minister and Matrix executives to visit the property. On 11 December 2003, in the course of an exchange with Mrs Harding-Lee relating to the deposit, Mr Hall claimed to have been "spending large sums" on the understanding that he had a binding contract.

14. In January 2004, EMC International Inc ("EMC") agreed to buy the shares owned by Phylo Chiang and his family in the company's parent, Maritek Corporation Inc. ("Maritek"). The contracts of sale contained warranties by the sellers that the company owned the property "subject to an agreement (with Mr Hall) made on or about 11 October 2002 regarding the purchase of the said property". The Chiangs were replaced as directors of the company by Mr Young and Mr Fulton.

15. In a letter dated 30 January 2004, new solicitors for the company wrote to Mr Hall, noting that he had "entered into an agreement for the purchase of certain land", and purporting to rescind the contract on the grounds that the deposit had not been paid. In reply Mr Hall's lawyers said that the proposed cancellation of the contract would be a repudiatory breach, and that Mr Hall intended to honour it. Inconclusive correspondence continued through 2004 and the first half of 2005.

16. At a special board meeting held on 7 June 2005, the directors of Maritek authorised an agreement for the sale of part of the property to a corporate vehicle owned by one of its directors (Mr Young). The approved minutes of this meeting produced on discovery referred to the "Hall Offer", and to a "counteroffer" which Mr Hall had not accepted. Subsequently, after the hearing in the Court of Appeal in this case, previous drafts of these minutes and other related documents were obtained by Mr Hall, and are the subject of his application to adduce fresh evidence before the Board.

17. On 11 October 2005 lawyers for the company wrote to Mr Hall's lawyers asserting that there was no contract between the parties, but merely an offer and counter-offer, and that, if there had been a contract on the terms of the October 2002 document, Mr Hall was in repudiatory breach of the terms concerning the deposit. On 19 October 2005, the company began these proceedings, claiming declarations that there was no binding agreement, or that any such agreement had been validly terminated because of Mr Hall's failure to fulfil the deposit requirement. By his defence and counterclaim, Mr Hall asserted that the contract was made with the company in writing on 11 October

2002, and that the deposit had been lodged in accordance with the terms of the contract. He alleged also that the company was estopped from denying the existence of a binding contract by reason of the assurances given to him by Mrs Harding-Lee at the beginning of 2003 as to the existence of the contract on the terms of the 11 October 2002 document, and because for twelve months thereafter the parties had proceeded on the basis that a contract existed.

The proceedings below and the issues in the appeal

18. The trial took place before Albury J over nine days beginning on 26 November 2007. She gave a reserved judgment in December 2008. She found that the evidence of the company's witnesses, Mrs Harding-Lee, Sam Shen and Geoffrey Fulton, was "straightforward" and that, where there were discrepancies, "the explanations proffered by them were credible"; conversely Mr Hall's evidence was "discursive, evasive and at times clearly misleading". She held that there had been no concluded agreement:

> "The evidence shows that after 11 October 2002 the plaintiff and the defendant were engaged in protracted negotiations to arrive at a mutually acceptable agreement. The plaintiff was intent to secure an agreement which provided for a definite completion date; conversely the defendant, while offering increasingly favourable terms, never accepted the terms of the plaintiff's counter offer, which included the Amendment. In the result the two essential elements of a contract, offer and acceptance, were absent …" (para 259)

She held also that there was no "memorandum or note" of the agreement as required by section 4 of the Statute of Frauds, and further that assurances as to the existence of a contract, allegedly given on the company's behalf in the months after October 2002, had been given without authority. She said:

> "The defendant, in support of his claim placed great reliance on alleged assurances made to him by Willis Harding, Mrs Harding Lee and Mr Shen, as the plaintiff's real estate broker, attorney, and intermediary respectively, during the 15 month period after October 2002 when the alleged contract came into existence. However, neither the evidence led during trial nor the authorities commended to me, show that such assurances if made were within the scope of their usual authority. Moreover, those witnesses gave unequivocal evidence that they had no extra authority conferred on them by their principal …" (para 260)

Finally she held that the terms of the stakeholder agreement relating to the deposit were inconsistent with the requirements of the alleged contract, and that the failure amounted to a repudiatory breach which had been accepted by the company.

19. In his notice of appeal, Mr Hall challenged the judge's reasoning on numerous grounds. In particular he challenged the finding that there had been no concluded contract, arguing that either the execution by both parties of the agreement dated 11 October 2002, or payment and acceptance of the deposit should have been taken as conclusive evidence of a binding contract. On the issue of estoppel he did not in terms challenge the judge's finding that the alleged representations on which that case was based were made without authority.

20. The appeal was rejected by the Court of Appeal, who in a single judgment given by John JA, upheld the judge's conclusion on the contractual issue. In short, the parties never had "agreeing minds":

> "That is, in my view, Maritek's contemporaneous forwarding of the purported contract along with an amendment to Peter Hall amounted to a refusal to enter into the agreement on the terms of the written document and instead was a counter-offer which was rejected by Peter Hall's refusal to agree to the same."

They found it unnecessary to deal with any of the other issues.

21. The agreed issues for determination in the appeal are:

i) *The alleged contract* Whether there was a binding contract of sale on the terms of the Contract for the Sale of Land dated 11 October 2002, concluded by reason of the exchange on 10 October 2002 and 8 November 2002;

ii) *The deposit* If so, whether there was any breach of that contract by reason of the deposit arrangements, or, if there was, whether it was waived, or in any event was not a fundamental or repudiatory breach such as to justify the company terminating the contract;

iii) *Fresh evidence* Whether the Board should allow the appellant's application to adduce fresh evidence, and with what consequences.

The alleged contract

22. Before the Board, Mr Knox QC, appearing for the first time on behalf of Mr Hall, did not maintain the case as argued below that a contract had come into existence on 11 October. Rather he submitted that on 8 November, by countersigning and returning the contract for sale in the form signed by Mr Hall on 11 October, the company accepted his offer on its own terms. The proposed amendment was a new offer which did not undermine that acceptance.

23. In support he relied on the statement of principle by Sir Richard Scott V-C (giving the judgment of the Court of Appeal) in *Society of Lloyds v Twinn* (2000) 97(15) LSG 40:

> "49. Two situations must be distinguished from one another. An offeree who purports to accept an offer must accept unconditionally. An acceptance which adds a new term to the contract is not an unconditional acceptance. But there is, conceptually at least, no reason why an offeree should not accept an offer unconditionally and, at the same time, make a collateral offer to the original offeror. The original offeror may or may not accept the collateral offer but, whether he does or does not do so, the unconditional acceptance will stand as having concluded the contract on the terms of the original offer.
>
> 50. … An acceptance which seeks an indulgence will be effective if it is clear that the offeree was unconditionally accepting the offer. In a case where the terms of the offer held out a considerable benefit to the offeree, the offeree might well want to accept notwithstanding that in some respect or other he, the offeree, would not be able to perform. Suppose an offer with a stipulation requiring performance by a specified date. That time element might or might not be fundamental to the contract. It might or might not be of the essence of the contract. Why should the offeree not give an unconditional acceptance but, at the same time, try to agree an extension of time, warning the offeror that his (the offeree's) performance would anyway take place later than the specified date?
>
> 51. Whether an acceptance is truly unconditional, with the counter-offer being collateral to the concluded contract, or whether the counter-offer is a condition of the acceptance is an issue which will depend on the facts of the particular case. The intended effect of a purported acceptance must be judged objectively from the language used and the surrounding circumstances."

In the same way, Mr Knox submits, the amendment proposed by Mrs Harding-Lee was "collateral" to the offer and acceptance implied by the return of the main contract, and therefore could be rejected by Mr Hall without undermining the contract so created.

24. The passage on which Mr Knox relies does no more than provide him with a hook on which to hang his submissions. It indicates a possible interpretation of the exchanges between the parties, but leaves the answer to be determined on the facts of the particular case. The Vice-Chancellor gave the example of an acceptance which "seeks an indulgence" but from which it is "clear that the offeree was unconditionally accepting the offer". In this case, in the Board's view the facts point the other way.

25. Although Mrs Harding-Lee's letter of 8 November might have been more clearly expressed, there was nothing in it to indicate an intention to conclude the contract in unamended form. The company was not seeking an indulgence, but was looking for further protection for its own benefit in the form of a time-limit. This had been recognised by Mr Hall in the preceding exchanges. He had no reason to think that the company would be willing to accept the contract in its present open-ended form. Furthermore, the return of the proposed amendment in its original form, and the implied rejection of his suggested amendments, can have left no doubt as to the importance attached to this issue by the company. Indeed, it is apparent from Mr Hall's subsequent fax to his own bank that he fully understood the significance and legal effect of the company's counter-offer.

26. Accordingly the Board is satisfied that the exchanges between the parties in October and November 2002 did not result in a binding contract for sale of the land, and that on this issue the courts below reached the correct conclusion.

The deposit

27. In view of the Board's conclusion on the first issue, it is unnecessary to reach a conclusion on the question of compliance with the deposit condition and its consequences. Even if the judge was right to hold that there was a breach of the contract in this respect, it does not follow that the company was entitled, having taken no objection to its form or content at the time and without prior notice, to treat it as a repudiatory breach entitling it to terminate the contract. The issues are not straightforward, and in the Board's view not concluded by the authorities on which the judge apparently relied. In the circumstances, the Board prefers to express no concluded view.

Fresh evidence

28. As the Board understands Mr Knox's submissions, the application to adduce fresh evidence is directed principally to support Mr Hall's case on estoppel. He had contended before the judge that, in reliance on assurances given by Mrs Harding-Lee and others, he had proceeded, and expended money, on the understanding that there was a concluded contract, and that accordingly the company was estopped from denying it. As noted above, this was rejected by the judge on the grounds that any such representations were made without authority. There having been no appeal against that finding, Mr Knox fairly accepts that it is only if the fresh evidence is accepted that he might be able to reopen it. (It is unnecessary for this purpose to decide whether the case is properly put as one of estoppel, or possibly as a contract implied from the subsequent dealings of the parties.)

29. The new evidence consists of documents disclosed by Maritek for the first time on 14 April 2014 (in the course of proceedings brought against it by Mr Hall in the Superior Court of Delaware), after the grant of permission to appeal to the Privy Council. They relate to the special board meeting of Maritek on 7 June 2005. They consisted of:

i) The agenda for the board meeting;

ii) Five versions of the board minutes (and their respective document histories) from this meeting, with various emails about them, and screen shots, showing when alterations were made;

iii) An agenda for a board meeting of 6 October 2005, and the minutes of that meeting approving the final, amended version of the 7 June 2005 board minutes;

iv) An advice from Maritek's US lawyers dated 8 June 2005.

30. Mr Knox submits, in summary, that the different versions of the minutes show a move from the view that there had in autumn 2002 been a binding contract with Mr Hall, to the view, reflected in the final, approved version, that there had been merely an offer and counter-offer. The timing of the changes is said to be particularly significant, in that the final version was approved almost four months after the June meeting, but only two weeks before the commencement of these proceedings. The inference, it is said, is that the record was "deliberately falsified" by the company's new directors in the light of a new analysis of the legal position provided by their lawyers. Further, it is submitted (in the words of the appellant's printed case) -

> "… the natural inference is that this was done (a) to conceal what they had really been told by Mr Shen, Eddie Chiang, Phylo Chiang and Mrs Harding-Lee – ie they believed there was a properly made binding contract and had acted and spoken on that basis, and (b) to create the misleading impression that instead, they had been informed by those people that there had been only an offer and counter-offer, and that this is what those people had believed and said to the appellant."

This evidence, it is said, if available at the trial, would have "tilted the balance in the appellant's favour", taken with other reasons for doubting aspects of the company's evidence.

31. In opposing the application, Mr Guthrie QC relies on the familiar principles summarised by Denning LJ in *Ladd v Marshall* [1954] 1 WLR 1489, 1491:

> "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

Although he challenges the application under all three heads, he puts particular weight on the second. There is no reason in his submission to think that the evidence would have had any material effect on the course of the trial or the judge's conclusion. He specifically rejects any allegation of impropriety on Maritek's side, and relies for this purpose on an affidavit by Mr Fulton, explaining the circumstance of the changes.

32. The Board finds it unnecessary to examine in detail the evidence relating to the making of the different versions, and is content to proceed on the basis that the first and third of Denning LJ's tests are arguably satisfied. Even on that assumption, it sees no reason to think that the availability of this evidence at trial would have been likely to have had any material influence on the result of the case.

33. In the first place, taken at its highest the new evidence shows no more than that in or about June 2005 there may have been some on the Maritek side who understood that there had at one time been a contract for sale with Mr Hall, but who later, in the context of the present proceedings, became alive to the argument that there had been a mere offer and counter-offer. If so, that was nothing new. As has been seen, more than a year before, in January 2004, the contract with the new owners had referred to an

existing contract with Mr Hall, and Maritek's own solicitors had written to Mr Hall on that basis. That was apparent in the documents available at the trial. If Mr Hall or his representatives had thought that anything could be made of that material by way of challenge to the credibility of the company's witnesses, they had the chance to do so. It has not been explained what the later evidence adds to that point.

34. Secondly, the evidence relates entirely to the state of mind of the new directors of Maritek, who came onto the scene long after the events on which Mr Hall relies. The only way in which the connection can be made is by inferring exchange of information between those concerned at the time and the new directors. There is no direct evidence of such exchanges. The natural inference is that those advising the new directors would have made their own independent investigation of the position.

35. Thirdly, even if such a connection could be made, it is unclear how it would have affected the judge's perception of the critical events. For this purpose, it is important to understand Mr Hall's own case, by way of explanation or expansion of the written exchanges to which I have already referred. This is covered in detail in the judgment, and is helpfully summarised by Mr Knox in his printed case (para 53).

36. On Mr Hall's account, his fax of 3 December, in which he apparently withdrew his October offer, followed conversations with Mr Shen and Mrs Harding-Lee in which "they insisted that there was a binding contract, but on the terms of the amendment …". The judge (para 128) recorded his evidence as to what followed:

> "According to Hall his letter produced a speedy reaction from Donna Harding Lee. In an email to him dated 5 December 2002, she insisted that there was a binding agreement, but as he did not accept her implication that the Amendment was part of his agreement with Maritek, he maintained there was no contract. Hall's evidence was that when he telephoned Donna Harding Lee on 10 December 2002 she stated that her client, who did not want to lose him as a buyer, were prepared to proceed on the contract dated 11 October 2002 without the Amendment being signed by him. According to Hall, after that date the plaintiff dropped the subject of the amendment; thereafter both parties had proceeded for several months on the basis that a binding agreement between them existed."

37. According to this account, therefore, the critical assurance was that given orally by Mrs Harding-Lee on 10 December 2002, in which for the first time she indicated the company's willingness to accept the contract without the amendment. According to Mr Knox's summary, it was following this conversation that Mr Hall wrote the fax of the same day stating that both parties were "committed to this deal".

38. Even if one ignores the judge's general criticisms of Mr Hall's evidence, there are two obvious difficulties in reconciling this account with the contemporary record. First, Mr Hall's facsimile of 3 December did not simply withdraw his offer, but made clear that all future communications were to be taken as being "subject to contract", and of no binding force unless in hard copy "signed by (him) and duly witnessed". In that context it is impossible to read his reference, in his fax to her of 10 December, to the parties being "committed", as intended to indicate a binding contract. It was followed by the statement that there were "some loose ends to tidy up". Further, in the same fax, he asked Mrs Harding-Lee to confirm that she had received his fax of 3 December, presumably to emphasise once again the message of that fax that all dealings were "subject to contract". Secondly, there is his fax of the same day to the bank, which shows his understanding that no contract had yet been concluded. Even accepting, as he says, that his conversation with Mrs Harding-Lee came later in the day, it is extraordinary that he did not find it necessary to make a formal record of the changed position, for himself, the company, and the bank. The Board is unable to see how the new evidence, if available at the trial, could have helped Mr Hall to surmount these hurdles, nor in particular how it would have helped him to reverse the judge's finding on the issue of authority, which she regarded as determinative.

39. For these reasons, the Board is satisfied that the application to adduce new evidence should be rejected.

Conclusion

40. In conclusion, the Board will humbly advise Her Majesty that the appeal should be dismissed and that, subject to any written submissions (to be made within 21 days of delivery of this judgment) the appellant should pay the respondent's costs of the appeal.