

IN THE MATTER OF PROPOSED PROCEEDINGS

BETWEEN:

CUT ABOVE THE REST LIMITED (1)

ABODE WEST LIMITED (2)

Proposed Claimants

-v-

MAGNET LIMITED

Proposed Defendant

PRELIMINARY ADVICE ON MERITS

1. I am asked to advise Mr Darren Bolger who is Managing Director of both the proposed Claimants, who seeks to bring proceedings against the proposed Defendant for substantial damages for breach of contract. At this stage, I am asked to advise on a preliminary basis for the purposes of seeking funding in respect of the proposed claim.
2. The background circumstances are familiar to Mr Bolger. He believes that his companies had entered into a contract with the proposed Defendant to supply

plasterboard and other kitchen product material. The negotiations took place principally with a Mr Paul Cooper who explained that he was looking for new business for the proposed Defendant and was given 'incentive deals' for various companies to enter into an agreement with it, thereby opening an account and continuing to trade with it. After initial discussions which progressed productively, Mr Bolger and one of his employees, a Mr Jon Clements agreed to open an account with the proposed Defendant and orally agreed to enter into a contract with the proposed Defendant. Mr Cooper informed both men that he had been allowed to make the deals by his management and had authority to sign the company's headed notepaper.

3. In the circumstances, it is the proposed Claimants' case that a binding oral agreement was entered into by the parties which was supported by a signed document on Magnet Trade notepaper which sets out its prices. Mr Bolger drafted the following:

All prices below agreed for twelve months from 18 April 2008 as condition of account in name of Cut Above The Rest Limited being opened as goodwill gesture. No limit of goods or area covered.

The document was signed by Mr Bolger, Mr Clements and Mr Cooper where it expressly states 'Agreed on behalf of Magnet'. In the circumstances an account was opened by Cut Above The Rest Limited with Magnet. The opening of the account is confirmed in a letter dated 25th April 2008 from Magnet Limited.

4. Once the agreement had been entered into, the proposed first Claimant began work. Mr Bolger and Mr Clements prepared cutting lists of the proposed materials for the jobs being quoted by a third company, CC Developments Limited.

5. Mr Cooper subsequently informed Mr Bolger that he had been given additional beneficial offers on behalf of Magnet and in the circumstances a further agreement was entered into orally, again evidenced by Mr Bolger writing on a Magnet Trade price list dated 21st May 2008:

Cut Above The Rest Limited. Reference 18th April 2008. This is agreed as previous terms written at top of paper.

Again the document was signed by Mr Bolger, Mr Clements and Mr Cooper.

6. Mr Cooper also informed Mr Bolger that he had additional materials which 'had just been agreed by my management' and encouraged Mr Bolger to choose to enter into a contract with Magnet with a second company, the proposed second Claimant. As a further incentive to open that account, Magnet would add a further two years to the contract duration. This agreement was also evidenced by the same parties as follows:

This agreement is incentive for Abode West Limited to open account with Magnet. Costs below are for noted and signed/agreed period. Free delivery anywhere in UK... twenty-four months from 27th May 2008.

Abode West Limited also opened an account with Magnet on 29th May 2008

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7. Mr Bolger was concerned that he did not have a clear written agreement and asked Mr Cooper to supply one. Eventually after some procrastination Mr Cooper signed a document dated 30th May 2008 on headed notepaper as follows:

Cut Above The Rest: Encon/Magnet will not charge delivery on full loads, but will charge for small loads for example one to two pallets will be charged for at a minimum cost of £50.

8. In the circumstances the proposed Claimants believed they had entered into a clear agreement with the proposed Defendant and proceeded to involve other parties in relation to the delivery of raw materials in particular the plasterboard.

9. Subsequently about a week later a further document was signed again on Magnet Trade price lists which stated

In addition to the previously agreed discounted goods supplied by Magnet, I state that all products have been agreed firstly by the Magnet management and agreed here in addition.

It was signed by the same parties.

10. Thereafter unfortunately relations between the parties deteriorated. Mr Clements was informed that there was concern about ‘undervaluing his product’ by a company director of the proposed Defendant. Mr Cooper subsequently sought to reassure Mr Bolger that a contract still existed between the parties. However that reassurance proved futile and later that day the proposed Defendant confirmed that they would not do any further business with the proposed Claimants.
11. As a result, the proposed Claimants suffered substantial losses in terms of honouring existing contracts which had arisen as a result of the agreement, wasted expenditure and loss of profits. A very provisional valuation of loss puts the proposed claim in the millions of pounds. Clearly that valuation will need to be very carefully reviewed, particularly bearing in mind the parties’ duty to take reasonable steps to mitigate their loss.
12. On the basis of the documents provided, I advise that there appears to be sufficient evidence to show a contract was entered into between the parties which was subsequently reneged on by the proposed Defendant. A very provisional estimation of prospects of success is **60%** although that figure may need to be revised in either direction depending on what emerges after the Letter of Claim has been responded to. Given the potentially large valuation of the claim and the merits at this stage, I would advise a prospective funder that it would be a reasonable expenditure to commence funding of the claim to

permit the appropriate Letter of Claim to be drafted and to obtain full instructions in relation to the proposed claim and thereafter to review the merits once the proposed Defendant had responded. There may be an early desire from the proposed Defendant to seek to settle the claim by means of mediation or otherwise. Clearly in due course a full valuation of the proposed claim would need to be undertaken by forensic accountants. If I can be of any further assistance at this stage, my instructing solicitors should not hesitate to contact me at Chambers.

1st July 2009

ANTHONY METZER

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