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Don't get the contract signed without checking that it says what was agreed!

By Peter Susman QC

In *AML Global Ltd v. ExxonMobil Petroleum & Chemical bvba* [2018] EWHC 3321 (TCC), decided by Waksman J on 22 November 2018, subsequent to a 4 day trial, the parties had made 2 consecutive annual framework trading agreements under which AML agreed to negotiate supplies by ExxonMobil of aviation fuel. Very many supplies of aviation fuel for scheduled international flights departing from a state within the EU are zero-rated for VAT. Under each of these 2 successive framework agreements, AML was designated as "Buyer's Agent". As a result, AML was not liable for VAT in relation to zero-rated supplies (as it would have been if acting as principal Buyer for resale, in which case it would not have been able to recover the VAT from the end user airline), and did not need to register for VAT (or set up an office to deal with VAT) in any jurisdiction. The advantage for ExxonMobil was a greater volume of supplies, and without having to give credit (since AML agreed to pay on invoice).

AML's case was that when the representatives of the parties agreed to negotiate a renewal of the framework agreement for the third successive year, they agreed orally to do so on the same terms. ExxonMobil produced the written agreement, and sent it to AML for signature, when it was signed on behalf of AML by someone authorised to do so, who did not read the agreement. Even if he had done so, he would not have realised that its form had been changed so as to designate AML as a Buyer acting as principal and for resale, making AML liable for VAT. It was not until after the third year framework trading agreement had eventually expired that VAT was invoiced to AML, or

paid by AML, but then HMRC undertook an inquiry, and AML realised for the first time that the form of framework trading agreement had been changed. ExxonMobil's case was in essence that the change had been a deliberate policy decision on the part of its legal department, and that signature on behalf of AML in that form constituted a concluded agreement.

AML sued for rectification of the third year trading agreement on alternative grounds. Its primary case was that an oral agreement to renew the third year agreement in the same form as previously had been concluded orally, and the changed written form signed by a mistake common to both parties. Alternatively it had been signed on behalf of AML by AML's unilateral mistake, and ExxonMobil had taken unfair advantage of that mistake. However, in closing argument AML recognised that ExxonMobil's former employee who had made the oral agreement and passed on the written agreement in changed form (and who had declined to give evidence for either side), must also have failed to read the form of agreement produced by the legal department before forwarding it to AML for signature, and AML therefore abandoned its case based on unilateral mistake.

Waksman J upheld the case of common mistake, applying the common thread discernible from the otherwise disparate and difficult to reconcile judgments of the Court of Appeal in *Daventry DC v. Daventry & District Housing Ltd* [2012] 1 WLR 1333, ordered rectification of the third year framework trading agreement as sought by AML, and dismissed ExxonMobil's counterclaim for back VAT.

The moral is clear. The way to avoid the risk of incurring the costs of a contested High Court action is that even on the renewal of an agreement, at least one party, and preferably both parties, should read the written agreement to ensure that it accurately records what has orally been agreed.

Peter Susman QC appeared for the successful Claimant AML Global Ltd, instructed by Messrs Adams & Remers, Lewes