CASE IN BRIEF

ERITH V MURPHY: ORAL CONTRACTS AND KNOWING WHO YOU ARE CONTRACTING WITH

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In *Erith Holdings Limited v Murphy* ([2017] EWHC 1364 (TCC)) the High Court held that an oral contract for waste removal services had been entered into by a company and not by the company's owner in his personal capacity. The waste removal company, which had provided its services to a company that had gone into liquidation, was therefore unable to recover outstanding sums payable to it.

Facts

The claimant (**Erith**) was a group of companies which provide enabling services to the construction industry, including waste removal and haulage services. Erith was owned by Mr Darsey. The defendant (**Mr Murphy**) was the owner of a site located on the east side of Horn Link Way, Greenwich, operated by his company, Murphy's Waste Limited (**MWL**) (now in liquidation), which operated as a waste collection and transfer station.

Erith contended that in August and September 2014 Murphy entered into an oral agreement with Erith that Erith would supply waste clearance services for which Murphy would pay or indemnify the Erith group (referred to in the proceedings as the 'works agreement'). This was in conjunction with the parties entering into negotiations for Erith to purchase the site and MWL. No specific price was agreed for Erith's services, but Erith estimated that the costs would amount to approximately £500,000 based on Darsey's visual assessment of the quantity of waste. In October 2014 MWL paid £109,507.17 in respect of the services provided by Erith (using funds provided by Murphy) following invoices received by MWL from Erith. Erith did not issue any further invoices on the understanding that further waste removal costs incurred by Erith would be reflected in the price for the site and MWL.

Erith asserted that between November 2014 and January 2015 the parties entered into a revised agreement (referred to in the proceedings as the 'revised works agreement') under which Erith agreed to provide further waste clearance services (up to a value of £1 million), for which Murphy would pay. Erith contended that the agreement had been that payment for these services would be deferred and treated as part of the purchase price and that in event that the sale did not proceed, Murphy would be personally liable.

Ultimately, the sale of the site and MWL to Erith did not proceed, as the parties were unable to agree terms. Shortly thereafter MWL went into liquidation. The sum outstanding for the services provided by Erith was £630,053.82. Erith stated that additionally, it had made a loan of £85,000 to Murphy for staff costs, for which it was entitled to be repaid.

Murphy disputed Erith's claim on the basis that the works agreement was made between Erith and MWL (not Murphy in his personal capacity). He stated that there was no revised works agreement and no indemnity or enforceable guarantee, and that the loan of £85,000 was made to MWL and not to Murphy in his personal capacity.

Issues

The agreed list of issues between the parties was as follows:

- Was the works agreement made by Erith with MWL or with Murphy (in a personal capacity)?
- Did the parties enter into a revised works agreement?
- Did Murphy agree to be personally liable to pay for the services and, if so, was such agreement enforceable?
- Was the loan of £85,000 made by Erith to MWL or to Murphy and did it fall within the scope of any indemnity or guarantee by Murphy?
- Did Murphy's solicitors, on his behalf, acknowledge and admit in correspondence with Erith's solicitors that he personally owed any, and if so what, sums to Erith?
- Was Erith entitled to recover the sums claimed from Murphy:
    - under, or for breach of, any of the agreements;
    - pursuant to the alleged indemnity or guarantee; or
    - by way of a claim for unjust enrichment?

Decision

Works agreement

The court found that the works agreement was entered into by Darsey on behalf of Erith and by Murphy on behalf of MWL. The court concluded that the fact that the invoices submitted in October 2014 by Erith in respect of the services provided were made out to MWL was "strong evidence" that both parties considered the agreement to be with MWL (not Murphy). This was despite the fact that the funds paid out to Erith from MWL were funds provided by Murphy which had been deposited into MWL's account. Further, Darsey had accepted in cross-examination that the initial agreement for waste removal services was with MWL.

Erith had relied on the terms of the sale and purchase proposal sent by Darsey to Murphy on October 27 2014 as evidence that Murphy accepted personal responsibility for payment. Erith stated that as owner of the site and the business, Murphy would have all purchase moneys paid to him. There was a provision in this proposal for £600,000 to be deferred for 12 months as a contingency against sums owed to Erith in respect of the waste removal services. Erith argued that the inclusion of such contingency in respect of sums otherwise payable to Murphy indicated that Murphy would be liable for such sums. If, as anticipated by the parties at that time, the sale and purchase agreement was concluded, the costs of the waste removal would be deducted from the contingency. If the transaction did not proceed, Murphy would pay the sums due in respect of those services.

By late 2014 into early 2015, just before the parties' negotiations broke down and the sale fell through, the proposed

agreement had been that Erith would purchase only the site as Darsey had concerns about the financial condition of the business. In an email from Mr Pini of HSBC dated December 5 2014 (which was not contradicted by Erith when received), it was stated that the contingency of £600,000 would be held against the purchase price for the business only and would not affect the purchase price of the land, which was £3 million. This was also reflected in the terms of a revised proposal for the sale of the land without the business in January 2015, which remained at £3 million (ie, it was not affected by any of the site clearance costs). The court therefore disregarded this aspect of Erith's claim.

Revised works agreement

The court concluded that it was not credible that there had been an agreed increase in the waste removal costs of up to £1 million in November 2014 (to be dealt with by way of deferred consideration or direct payment by Murphy) when there was no evidence that this revision had been communicated to the funders or the solicitors conducting the negotiations. The court came to this conclusion despite the fact that he accepted that it was clear from the evidence that Darsey and Murphy conducted most of their dealings in meetings or by telephone (rather than by email or other documented means).

Indemnity/guarantee

While the court noted that Erith had sought assurance from Murphy that he would be paid for the site clearance services if the sale did not go ahead, it concluded that such assurance was given to Erith from MWL and not from Murphy in his personal capacity. All of the invoices which Erith submitted were only ever addressed to MWL and not to Murphy. Murphy may have provided the requisite funds by depositing money into MWL's account, but it was always paid out from MWL's account.

On this basis, the court stated that the arrangement amounted to a guarantee rather than an indemnity, as Murphy's liability arose only to the extent that MWL failed to pay. Guarantees must be made in writing or evidenced in writing and signed. Therefore, if there was a guarantee, it was only ever made orally and in such circumstances the court concluded that it was unenforceable.

Loan

Erith argued that Murphy had assured him that in the event that MWL was unable to pay back the £85,000 loan that he provided to alleviate MWL's cash-flow issues, Murphy would reimburse Erith personally. Murphy stated that this was not the case. Once again, there was no documentary evidence of a personal assurance from Murphy. As with the above analysis, based on the evidence before the court, it concluded that the arrangement would have amounted to a guarantee in any case and without such guarantee being in writing or evidenced in writing and signed, it was not enforceable.

Admissions

Erith asserted that the wording in the email exchanges between the parties' solicitors admitted that Murphy was personally responsible for payment of the outstanding removal costs. Erith pointed to the fact that the solicitors for Murphy had referred to the fact that their client was in the process of "raising funds to settle the costs due to your client " and "arrangements will be put in place to settle costs due to your client". However, the court noted that in the context of Murphy's financial support of MWL in 2014-2015, the arrangements could be a reference to an injection of funds into the MWL account to enable it to discharge its debts. It stated that an admission must be "clear and unambiguous" in order to bind a party. The words exchanged between the parties' solicitors therefore did not amount to an admission of personal responsibility on Murphy's behalf.

Unjust enrichment

In the alternative, Erith had argued that it had a claim for the costs of the waste removal service in unjust enrichment. In order to establish such a claim, Erith had to establish that:

- Murphy had been enriched;
- the enrichment was at the expense of Erith;
- the enrichment was unjust; and
- there were no available defences to Murphy.

The court agreed that Murphy was enriched at Erith's expense. The waste removal had enabled Murphy to benefit from the maintenance of MWL's licence (which otherwise would have been withdrawn or suspended) and the increased value of the site. However, it stated that it was common ground that a claim for unjust enrichment will not succeed where there is a subsisting, enforceable contract. In this case, there was a works agreement made between Erith and MWL in respect of the waste removal services. As such, the claim in unjust enrichment failed.

Comment

In conclusion, the court found that there was a valid contract for the waste removal services between Erith and MWL. However, Murphy was never a party to this contract in his personal capacity. Therefore, he did not undertake any personal responsibility for the costs. The court thus dismissed Erith's claims.

This case demonstrates the importance of ensuring that parties agree contractual terms in writing and document their negotiations with sufficient detail. It also indicates the importance of informing all parties involved in the negotiation of a transaction of the details of discussions or amendments to the arrangement or terms. In this case, much of the crucial detail of the evolving deal was discussed only between Darsey and Murphy, either on the telephone or in person, and there were therefore no third parties with whom to verify or corroborate the content of their negotiations at trial. It further highlights how important it is that parties ensure that they understand who the parties are with whom they are contracting; as this case demonstrates, any misunderstanding in that regard can have great adverse consequences.

**This article was originally edited by, and first published on www.internationallawoffice.com.*

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