ORAL CONSTRUCTION CONTRACTS: RCS CONTRACTORS LTD V CONWAY, A COSTLY AFFAIR

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Certainty in a construction contract is all the more important when adjudication is envisaged to have to take place under a demanding timetable. The adjudicator has to start with some certainty as to what are the terms of the contract. This creates some difficulty when an adjudicator is faced with an oral construction contract. Referring a dispute under an oral construction contract leaves it squarely in the hands of an adjudicator or the court (persuaded by oral evidence) to determine this issue. This was a costly lesson learned in *RCS Contractors Ltd v. Conway* [2017] EWHC 715 (TCC).

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The issue which the court was asked to decide was a simple one. Either there was one contract between the parties to cover all three sites, in which case the final account dispute was a single dispute, and the adjudicator had the necessary jurisdiction. Alternatively, there were three separate contracts, one in respect of each site, and the dispute was actually three different disputes, being a claim for the sum allegedly due under each separate contract. If that was the case the adjudicator did not have the necessary jurisdiction.

RSC carried out groundworks for Conway as a subcontractor at three sites. RSC maintained that there was one oral contract for the work at these three sites. Conway maintained that there were three separate oral contracts and, in consequence, the adjudicator lacked the necessary jurisdiction to adjudicate on all three disputes. For the purposes of the dispute, RSC was seen as the subcontractor and Conway the contractor.

On the balance of probabilities, the judge sided with RSC and found that there was one single contract between the parties concerning the three different sites. The judge reasoned as follows:

> - Mr O'Rourke for RSC was an honest and credible witness. He was clear that, in the relevant conversation, on 19 December 2012 he was told, and he agreed, that there was one contract covering all three sites. This was corroborated by the fact that later that day he arranged a payment to Conway. The documentary evidence showed that the money was paid into Conway's account the following day. This was effectively a down payment on the commission which RSC had agreed to pay Conway if he secured them work.

The issue which the court was asked to decide was a simple one: were there one or three contracts between the parties?

- Conway served both a payment and payless notice on RSC. This notice responded to RSC's single final account claim in respect of the three sites. Conway did not serve three payment notices and three separate payless notices. Again, this suggested that there was only one contract. It also ran contrary to Conway's assertion that the documents for each project were kept separate.

- Conway's previous advisers, in a letter, referred to the overall situation in this case as "a job that was sub- contracted". That was again consistent with there being a single contract.

- Conway was not an entirely satisfactory witness. He raised matters which were irrelevant. He repeatedly referred to documents which were not provided. Most important of all, he had no positive case about the conversation on which Mr O'Rourke relied so heavily. He seemed unable to recall that conversation at all.

- Conway's case amounted to no more than the assertion that, because there were three separate sites, and three separate bills of quantity and other valuation documents, there must have been three separate contracts.

- It did not follow that, because there might have been different documentation pertaining to the different sites, there were three separate contracts. That was not the burden of the authorities, neither can that be right as a matter of law. All that matters were whether the parties agreed that there was one contract or three. Mr O'Rourke's evidence on this point was accepted i.e. that, on 19 December 2012, it was agreed that there would be one single contract.

There was one contract in respect of the three sites and a single dispute about what was due under that contract. The adjudicator was to have the necessary jurisdiction to decide that claim. Since that was the only point which prevented the enforcement of the adjudicator's decision it meant that RSC was entitled now to the sum sought.

The judgment turned on the facts, the oral evidence and the credibility of the witnesses led by both parties – an expensive price to pay for not reducing the construction contract to writing in the first place. This bears relevance to the South African construction sector as well. The South African Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd. and Another v. Martell & Cie SA and Others 2003 (1) SA 11* (SCA) set out the technique generally employed by courts in resolving a factual dispute about the terms of oral agreements (whether it be construction contracts or otherwise). This general enquiry typically involved a consideration of the credibility and the court's perceived veracity of a witness; the witness' reliability; and the probability or improbability of the witness' version regarding each dispute. A costly affair indeed. To avoid this unnecessary cost and the uncertainty that ensues, parties should, in accordance with best practice, reduce their construction contracts to writing.

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