

CONSTRUCTION : BULLETIN

When is an Oral Construction Contract Formed?

2011 brought with it the long awaited amendments to the Housing Grants, Construction and Regeneration Act 1996. One of the most significant changes was that the definition of a “construction contract” was extended to include oral contracts, making it possible to refer a dispute arising under an oral contract to adjudication.

In the recent case of *Purton (t/a Richwood Interiors) v Kilker Projects Ltd*, the court considered whether an oral contract had been formed, and if so, whether it is necessary to be able to accurately identify the terms of the oral contract to be able to adjudicate.

Background

Mr Purton, operating under the trading name Richwood Interiors, had carried out substantial joinery works for Kilker Projects Ltd (“Kilker”) at the Dorchester Hotel. When Mr Purton submitted his final account seeking payment of £147,223, Kilker failed to issue a pay less notice in response, so Mr Purton commenced an adjudication claiming payment of the sum he had applied for. Kilker contended that there was no contract between the parties and therefore the adjudicator did not have jurisdiction, but the adjudicator found that there was a contract and awarded Mr Purton the full amount applied for. When Kilker failed to pay, Mr Purton proceeded to make an application to the court to enforce the adjudicator’s decision.

Alleged formation of an oral contract

Mr Purton’s case was that he had entered into the contract with Kilker at a meeting on or around the week commencing 9 June 2014 and that the parties had agreed a contract price of £350,000 and a list of items forming the scope of work.

Mr Purton said the contract had then been informally varied so as to encompass further work for additional payment.

Kilker contended that no meeting had taken place around 9 June 2014 and that no contract price had been agreed but that there was an agreed budget of circa £550,000 to £600,000.

It was a fact that Mr Purton had carried out the joinery works over a period of several months and Kilker had previously paid him around £650,000 for the work carried out.

Was there an oral contract?

The court found that it was “*clear beyond argument that there was a contract*” and stated that it was a stretch too far to suggest that the parties had had an ad hoc agreement to carry out works which Kilker paid for despite not being contractually obliged to do so. The court noted that there was correspondence between the parties acknowledging an initially agreed scope of work and an agreed price of £350,000. The court also pointed out that if Mr Purton had simply failed to turn up at site one day, Kilker would probably have been very unimpressed and this theoretical example strongly indicated that the parties were contractually obligated to one another. It was unrealistic to suggest the parties had not intended to create legal relations.

Did the dispute referred to adjudication have to relate to the right contract terms?

Having lost its argument that there was no contract, Kilker went on to argue that the adjudicator’s decision could only be enforced if the contract terms contended for by Mr Purton



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were indeed the terms of the contract. If Mr Purton failed to establish any element of the terms he alleged to form part of the contract (for example, if the contract price was found to be different to what Mr Purton contended), the decision could not be enforced. Kilker's argument was based on the principle that a claimant in enforcement proceedings cannot go beyond the matters it relied on in the adjudication.

Again, the court disagreed with Kilker, noting that all that section 108 of the Construction Act requires is that there is a construction contract and a dispute arising under it. The court stated that the right to adjudicate is not dependent upon identifying each and every contract term with complete accuracy. Insisting on a completely accurate description of the contract terms is not in keeping with the intention of adjudication, which is to provide quick and effective remedies for contracting parties.

The court also pointed to the fact that a different description of the terms of the contract would still have led to the same result because, regardless of the agreed scope of work and contract price, the Scheme for Construction Contracts still applied in relation to payment and Kilker had failed to serve a pay less notice. In a case where the adjudication would still have had the same outcome even if the terms of the contract on which the adjudicator's jurisdiction is founded are incorrectly described, the court will not shut out a claimant who seeks enforcement of the adjudicator's decision.

Analysis

Although oral construction contracts now have the same status as written contracts as far as adjudication and payment is concerned, this certainly does not mean that entering into an oral contract is a good idea. As this case demonstrates, an oral contract can create a good deal of uncertainty which can be very expensive to resolve. It is essential to ensure that proper written contracts are entered into at all times.

However, the commercial reality of business is that oral contracts will

sometimes be created and the good news that comes out of this case is that, whilst it is theoretically possible for parties to carry out works and make and receive payments without having entered into a contract, it will be very rare for a court to find that such an arrangement does not create a legally binding relationship. Even if there is no agreed price, the court is more likely to find that there is a contract for payment on a quantum meruit basis than that there is no contract at all. This means that people who do find themselves in the difficult position of having carried out work (or paid for work) with no written contract can at least take comfort from the fact that they are likely to be found to have entered into an oral contract.

Perhaps even more importantly, the decision in this case confirms that a failure to accurately identify the terms of an oral contract does not affect the ability to adjudicate provided that an oral contract does in fact exist and the outcome of the adjudication would have been the same in any event. This is encouraging because it can be very difficult to pinpoint the exact terms of an oral contract and it would be very worrying indeed if the right to adjudicate was dependent on being able to do so.

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