

Before His Honour Judge MacKay, Liverpool County Court, Claim No. 4LV90232. 6th December 2004.

This case concerned an unsuccessful application for enforcement of an adjudicator's decision which determined that certain sums were due under a construction contract.

His Honour Judge MacKay delivered an ex-tempore judgement in open court, choosing not to publish it. The transcript has not been taken up and is hence not available.

The defendant resisted enforcement on the grounds that :-

- 1 The adjudicator did not have jurisdiction because the contract was not a contract in writing as required by s107 HGCRA 1996.
- 2 Whilst the award was made against Rus Hall Construction, t/a Cornelius Maloney the notice of adjudication named additional persons as trading as Rus Hall Construction. Hence the award was against the wrong person(s).

The Claimant's Case.

- 1) a) The S107(4)HGCRA 1996 requirement that a contract be in writing includes the subsequent recording of an initially oral contract.
 - i) **RJT Consulting Engineers Limited v DM Engineering (Northern Ireland) Limited [2002] 1WLR 2344** established that an oral contract will be enforceable where all material terms are sufficiently recorded in writing. A subsequent fax, a quote and a letter confirming the terms of the agreement preceded the commencement of work and together these were sufficient to satisfy s107 – and amounts to an exchange of communications.
 - ii) The defendant did not contradict the content of the confirmation letter implying agreement with its content.
 - iii) Once an agreement evidenced in writing is established, it is common ground between the parties that oral variations are enforceable.
 - iv) The bar on adjudication of oral contracts does not extend to oral variations.
 - b) S107(5) HGCRA 1996 where one party asserts an oral contract and the other does not deny it that constitutes an agreement in writing. Assertion that the CA in **RJT** declined to confirm the contrary decision of **Grovedeck Limited v Capital Demolition Limited [2000] BLR 181**. The defendant admits there was an oral agreement.
- 2) The Adjudicator's award is against Rus Hall Construction. Mr. Maloney gave evidence that he is a sole trader, trading as Rus Hall Construction. Mr. Maloney cannot avoid liability on the basis that two of his employees, namely a Mr. Pearce and a Mr. Cousins were also named as responding parties. Mr Maloney was not prejudiced by this at the adjudication because he was named and since the others were not named in enforcement proceedings they do not have a problem. **Total M & E Services Limited v ABB Building Technologies Limited [2002] EWHC 248** supports this proposition.

The Defendant's Case.

- 1) a) It is common ground that the matter before the adjudicator is governed by the Scheme which does not accord jurisdiction over jurisdiction to the adjudicator.
- b) The question as to whether or not there was a written contract is a jurisdictional matter. The adjudicator reached a non-binding conclusion and determined to continue in the face of the jurisdictional challenge, without prejudice to the defendant's right to subsequently challenge jurisdiction.
- c) The twin basis of enforcement are i) that the defendant has no real prospect of success on the jurisdictional issues; and ii) that there is no other compelling reason why the case should be disposed of at a trial. CPR 24.2
- d) The various assertions as to the terms of the contract put forward by the claimant – as extracted from various faxes, letters and attachments - were not accepted by the adjudicator. Whilst the adjudicator determined for his own purposes that the contract was sufficiently evidenced in

writing he did not determine what those terms were. He specifically found that the contract was not on Dom/1 or Dom/2 terms or the claimant's standard terms and conditions.

- e) There was and continues to be a dispute and a triable issue as to the actual scope of the contract.
- 2)
- a) In the Notice of Adjudication the respondent parties to the contract were named as Mr Cornelius Moloney and/or Mr Roger Pearce and/or Mr Shaun Cousins either individually or collectively trading as Rus Hall Construction.
 - b) The defendant asserted that the contracting parties were the claimant and Mr Cornelius Moloney trading as Rus Hall Construction and invited the claimant to amend the Notice to omit the names of Mr Roger Pearce and Mr Shaun Cousins, who were not parties to the contract. The claimant declined to do so and accordingly a jurisdictional issue arose as to the identity of the contracting parties.
 - c) The adjudicator concluded that: *"The identity of who trades as Rus Hall Construction is not a matter I need concern myself with were I to find a contract in writing exists between that entity and [the Claimant]."*
 - d) The adjudicator referred to *"Rus Hall Construction"* as the Responding Party in his decision, notwithstanding that this was not the party named in the notice. He initially ordered *"Cornelius Moloney trading as Rus Hall Construction to pay ..."* but subsequently amended the decision deleting the words *"Cornelius Moloney trading as"*.
 - e) Rus Hall Construction is not a legal entity and consequently no award can be enforced against it. There is a dispute as to who trades as Rus Hall. Moloney is not identified in the decision and even if Moloney concedes that he trades as Rus Hall Construction, that is not sufficient to make the decision enforceable. This is a legal question of contract and statute and it makes no difference that no injustice would be done by enforcement.

The court found for the defendants on both grounds. Thus, on the facts the contract terms were not sufficiently or clearly enough evidenced in writing and the defendant was not identified in the decision/award as the liable person.

Richard Bradley instructed by C.E. Law, Birkenhead for the claimant.

Duncan McCall instructed by Knowles Solicitors for the defendant.