



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 105

CA85/20

OPINION OF LORD ERICHT

In the cause

INTEGRI CONSULTANTS LIMITED

Pursuer

against

MIDLOTHIAN COUNCIL

Defender

**Pursuer: McShane; Thorley Stephenson SSC
Defender: McCall QC; Anderson Strathern LLP**

20 October 2021

Introduction

[1] The pursuer raised an action in the Court of Session against the defender, a local authority, for payment of sums due under contracts for services. The cause called before me for debate on two issues. Firstly, whether by lodging defences and a Rule 22 Note in a previous Sheriff Court action contesting the jurisdiction of the Sheriff Court, the defender had now approbated the contracts so that it was barred from contesting the validity of the contracts in the Court of Session action. Secondly, whether the defender's averments of collusion in the tendering process were sufficiently specific to give proper notice of fraud.

Contractual structure

[2] During the course of 2019, the defender sought tenders for development and commercial management services in relation to commercial, development and construction projects. The appointment was structured so that following appointment the successful tenderer would be engaged on a term contract for a fixed term and thereafter would be appointed to advise on specific projects on “call off” contracts as required.

[3] Clause 20.6 of the Term Contract provided that:

“20.6... Any dispute or difference arising out of or in connection with this Term Contract Agreement, including any question regarding its existence, validity or termination, shall be determined by the appointment of a single arbitrator to be agreed between the Parties...”

[4] The call off contract, as set out in the style in the tender documentation, contained the following clause:

“19.2...All disputes, claims or proceedings between the parties relating to this Agreement or the validity, construction or performance thereof shall be subject to the exclusive jurisdiction of the Court of Session, to which the parties hereto irrevocably submit.”

Approbate and reprobate

Facts

[5] The pursuer raised an action for payment against the defender in Edinburgh Sheriff Court. The defender lodged defences. The first plea-in-law in the defences was that the action should be sisted for arbitration. The second plea-in-law was that the Sheriff Court, not having the jurisdiction to determine the dispute, the action should be dismissed.

[6] In answer to the pursuer’s averments as to jurisdiction in Article 1 of condescendence, the defenders averred:

“Explained and averred that the Term Contract between the parties contains an arbitration clause, which applies to ‘any dispute’. To the extent that the instant action is founded upon the Term Contract, as it appears to be in terms of the current pleadings, the action should therefore be sisted for arbitration. To the extent that the instant action is based on each individual ‘call off’ contract as opposed to the Term Contract, the parties’ prorogated jurisdiction to the Court of Session.”

[7] The defender lodged a Rule 22 Note which stated that it insisted on its preliminary pleas on the following basis:

“Whilst the contractual basis for the Pursuers’ claim is entirely unclear, it must be a claim either under the Term Contract between the parties, or one or more of the ‘call off’ contracts. The Term Contract between the parties contains an arbitration clause, which applies to ‘any dispute’. Each of the call off contracts prorogate jurisdiction to the “Court of Session.” On either view, this court does not have jurisdiction and the pursuers’ preliminary pleas 1 or 2 should be sustained.”

[8] The Sheriff Court action did not proceed further and instead the pursuer brought this action in the Court of Session. Both parties were content that the dispute be dealt with by the Court of Session and neither insisted on the arbitration clause in the Term Contract.

Submissions

[9] Counsel for the pursuer submitted that the defender relied upon and therefore approbated the validity of the Term Contract and call off contracts in the Sheriff Court action and were therefore barred from reprobating their validity in the Court of Session action. He argued that there were few clearer or more unequivocal examples of relying on the validity and effect of a contract than pleading it in your defence without it being accompanied by the traditional qualifications of the pleader which reserved the position on validity (e.g. the formulation “*esto* the contract is valid, which is denied”). He referred to Bell, *Commentaries* II II 140 ff, *Highlands and Islands Airports Ltd v Shetland Islands* [2012] CSOH 12, *Twinsectra Ltd v Lloyds Bank Plc* [2018] EWHC 672 (Ch).

[10] Senior counsel for the defender, on the other hand, submitted that pleading a defence to a case advanced upon a particular basis in a court action did not amount to approbation of the underlying factual position being advanced in that court action. Moreover, the issue of the underlying validity of the Term Contract did not require to be addressed at all in the Sheriff Court action, given that it was being advanced on an irrelevant basis and in a court which did not have jurisdiction to hear the dispute. In the circumstances of this case, the doctrine of approbate and reprobate was not engaged: these were not acts adopting the contract in a strong and express nature that would be required in order for the doctrine to apply (*Erskine Institutes* III 3 48 Bell, *Commentaries* II II 141).

Analysis and decision

[11] Under the doctrine of approbate and reprobate a party may not both accept and reject a contract (Bell *Comm.* II II 141). Where there are two inconsistent courses of action, he must choose between them.

[12] The doctrine of approbate and reprobate does not apply in the facts or circumstances of the current case. Firstly, there is no inconsistency between the defender's position in the Sheriff Court case and this Court of Session action. In the Court of Session action, the defender maintains that the Term and call off contracts are invalid. In the Sheriff Court action, it maintained that the Sheriff Court had no jurisdiction. This was undoubtedly correct, as the jurisdiction clauses in the Term and call off contracts provide respectively for arbitration and for the exclusive jurisdiction of the Court of Session. All that the defender was doing in the Sheriff Court was attempting to ensure that the dispute as to validity was held in the correct forum. That does not amount to an acceptance that the contracts were valid: far from it, it amounts to an assertion of the right to contest validity in the correct

forum. When contesting jurisdiction, it is not necessary for parties to plead an *esto* case on the merits: it would defeat the point of a prorogation of jurisdiction clause or an arbitration clause if, notwithstanding the existence of the clause, the parties had to enter into extensive pleadings on the merits in a forum which had no jurisdiction to come to a decision on the merits.

[13] Further and in any event, the facts and the circumstances of this case do not meet the high test for approbation. Lord Menzies said in *Highlands and Islands Airports Ltd v Shetland Islands Council*,

“[60] Finally, it must be remembered that the test for approbation is high. As *Erskine* puts it, ‘the approbatory acts must be so strong and express, that no reasonable construction can be put on them, other than that they were performed by the party from his approbation of the deed homologated.’ As Bell puts it:

‘In order to give the same effect to the approbatory act as to the full original consent it is necessary, (1) that the assent be clear and indisputable, applying directly and unequivocally to the contract, conveyance or settlement said to be homologated...and, (3) it must be an act that can be fairly ascribed to no other purpose than that of giving sanction to the deed or contract in question.’”

[14] That test is not met in this case. The acts of lodging the defences and Rule 22 Note in the Sheriff Court action can be fairly subscribed to another purpose than that of giving sanction to the contract: the purpose was to ensure that the question of the validity of the contracts was dealt with in the proper forum, as agreed by the parties in the contracts themselves. That does not amount to approbation.

[15] Although the main focus of the debate on approbate and reprobate was in relation to the Sheriff Court action, counsel for the pursuer also touched upon an issue as to whether the purported termination of the call off contracts in 2019 constituted approbation. In my

view that is an issue best dealt with after proof when the court will be fully aware of the full facts and circumstances surrounding the purported termination.

Collusion

Pleadings

[16] Counsel for the pursuer invited me to exclude the following of the defender's averments in Answer 2 from probation, apart from the words which I have placed in square brackets:

““Explained and averred that the pursuer was the successful tenderer in relation to the term contract having acted in a collusive manner which did not comply with the tendering provisions. The principals of the pursuer (Ron McKinnon) had been employed by the defender as a quantity surveyor in the period to March 2018. From April 2018, Mr McKinnon provided quantity surveying services to the defender through the pursuer. Another employee of the pursuer (Darren Imrie) had been providing services to the defender through another company (JCS Scotland Limited) since 31 March 2017. The tender process in relation to the term contract was not taken forward in an independent and impartial manner. Rather, it was approached by Mr McKinnon on the basis that, as a result of his close relationship with individuals within the defender's organisation (and, in particular, his relationship with Garry Sheret, the defender's former Head of Service, Property & Facilities Management), the tender would be awarded to the pursuer. Further, Mr McKinnon and Mr Imrie were involved in the drafting of documents used by the defender in the procurement process (a matter which gave the pursuer an improper advantage and was not disclosed in the tender process). A list of these documents is appended as Appendix A. Mr McKinnon and Mr Imrie also had access to the defender's internal information relating to the tender process (which gave the pursuer an improper advantage and was not disclosed in the tender process). Both Mr McKinnon and Mr Imrie had unrestricted IT access to the defender's computer systems relating to all Construction Project Files under taken by defender's Construction Team (including historic, current and future projects). These files held information and documents, including draft documents, relating to the tendering process for these contracts and subsequent work carried out. A search of downloaded documents from the laptops used by Mr McKinnon and Mr Imrie identified a document (*MID19-12 (Procurement team Ref) Call for Competition*) in draft format with track changes from the previous Procurement Manager. This draft document was created and amended on 29 January 2019. A later version of this same document created on 25 April 2019 and without tracked changes is held in the C455 Development & Commercial Manager Services file. No other versions of the document are held in this file. The version of the document held by Mr McKinnon

and Mr Imrie was, however, absent from the defender's file. In these circumstances, the defender reasonably infers that either (a) the earlier version was deleted from the Construction Team file, which demonstrates those acting for the pursuer were accessing and downloading the files during the tendering process; or (b) someone with access to Procurement files provided the pursuer with a copy of the document in a collusive manner. For the avoidance of doubt, Mr Vetriciano did not give permission to the pursuer's officers to access tender documentation by way of the defender's computer systems for the purpose of submitting a tender. [In these circumstances, the award of the term contract was obtained by the pursuer] on an improper and collusive basis and [on the basis of misrepresentations that they had tendered properly and without any conflicts of interest]"

Submissions

[17] Counsel for the pursuer referred to McBryde, *Law of Contract in Scotland*

paragraph 14-41 to 43, *Royal Bank of Scotland v Holmes* 1999 SLT 563. There was no fair notice of what factual misrepresentation was made during the course of the tendering procedure.

The prior involvement of a tenderer is conceptually distinct from a conflict of interest (*Public Contracts (Scotland) Regulations 2015* SSI 446, regulations 25, 42). No questions were asked

about the tendering procedure or about access by officers and employees of the pursuer to procurement documentation. There were no express averments that the involvement of

council officers distorted competition. The tenderer was under no obligations to reveal their

prior involvement. There is no general duty of disclosure in respect of pre-contractual

representation (*Royal Bank of Scotland v O'Donnell* 2015 SC 258 at paragraph 24). The

pursuer's averments regarding failure to disclose prior involvement of the pursuer's officers

did not amount to misrepresentation and were irrelevant. Further, there was no notice of a

relevant case of conflict of interest causative with the award of the term contract. For any

conflict to be of relevance, there must be a causative relationship between the conflict and

award of the contract (*Counted4 Community Interest Company v Sunderland City Council* [2015]

EWHC 3898 TCC) at 31-33. Further, averments as to the presence on the laptop of the

29 January 2019 draft does not indicate collusion or improper tendering, further the averment as to the absence of the draft called For Competition dated 29 January 2019 was irrelevant as only the use of information could distort competition. Further, even if the provisions of the 2015 Regulations have been breached, the effect is that the contract is to be terminated (regulation 73) and it is not treated as invalid *ab initio* (regulation 73(2)). The pursuer also referred to *Heather Capital Limited (in liquidation) v Levy & McRae* 2017 SLT 376 and *Trustees of Scottish Solicitors Pension Fund v Pattison and Sim* 2016 SC 284.

[18] Senior counsel for the defender submitted, that read as a whole, the defender's averments provided ample specification of the nature of the misrepresentations made and the nature of the conflict of interest that undermine the validity of the pursuer's tender. The 2015 Regulations did not cut across the common law defence pleaded by the defender: the defender offered to prove that the pursuer obtained the award of the contract on an improper and collusive basis and on the basis of a misrepresentation that they had tendered properly and without any conflicts of interest.

Analysis and decision

[19] Counsel for the pursuer drew my attention to the definition of collusion in *Jowitt's*

Dictionary of English Law:

"1. To unite in the same play or game, and thus to unite for the purposes of fraud or deception. An agreement or compact between two or more persons to do some act in order to prejudice a third person, or for some improper purpose.

2. In a commercial context, collusion is the cooperation of market rivals for mutual benefit, usually in manipulating market price by eliminating competition. Cartels are a special case of explicit collusion. Collusion is largely illegal in most of the EU due to competition law (also known as antitrust law), but it can still occur in the form of implicit collusion. Examples of implicit collusion include price leadership and other forms of tacit understandings."

[20] During the discussion at the debate it became apparent that the pursuer and the defender were at cross purposes as to what the defender meant by “collusion”. Counsel for the pursuer understood that to be an averment of fraud. He focussed on the first sentence of paragraph 1 in the Jowitt definition: “unite for the purposes of fraud or deception.”

However senior counsel for the defender explained that the averments as to collusion were not intended to be averments of fraud. I accept the defender’s position. As can be seen in the definition in *Jowitt*, collusion may involve fraud but does not necessarily do so. The defender was using the word “collusion” in the sense used in the *Oxford English Dictionary* of “underhand scheming or working with another.” That being the case, the pursuer’s argument as to fraud not being pled to the requisite standard falls away.

[21] What remains for me to consider is whether the defender has pled enough to allow his case to go to a proof before answer. In my opinion, he has. The test for excluding answers from probation is a high one. The defender has set out its position in averments which are sufficiently detailed for the purposes of a commercial action. The court will order witness statements to be lodged in advance of proof in the normal way. The averments together with the witness statements will give fair notice to the pursuer. The dispute between the parties in relation to collusion can only be properly decided upon after the court hears evidence.

Order

[22] I shall repel the pursuer’s third plea-in-law (approbation and reprobation), and uphold the defender’s general plea-in-law number one as to relevancy in respect of approbation and reprobation, but in each case only in respect of the defender’s actings in relation to the Sheriff Court action. I shall allow a proof before answer on all other matters,

including, for the avoidance of doubt, the issue of approbation and reprobation in respect of the purported termination of the contracts. I shall put the case out by order for discussion of the timetabling of the proof before answer.