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Judgment: approved by the Court for handing down | *Delivered:* **07/04/06**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

GERARD HIGGINS

Plaintiff;

and

HOMEFIRST COMMUNITY TRUST

Defendant;

and

MICHAEL J HERRON LIMITED

Third Party.

COGHLIN J

[1] In this case the plaintiff is a building contractor who claims damages against the defendant for breach of contract and negligence in relation to a tender by the plaintiff for the construction of a new children's home in Magherafelt alleged to have been accepted by the defendant in or about June/July 2001. The defendant has joined the architect and administrator of the said contract as a third party alleging negligence and breach of contract. The plaintiff was represented by Mr Thompson QC and Mr Nash while Mr Lavery QC and Mr Finbar Lavery appeared on behalf of the defendant and Mr Park represented the third party. I am grateful to all of the counsel involved for the care and attention with which they conducted the litigation and delivered their oral and written submissions.

Background Facts

[2] The contract to which these proceedings relate was for the construction of a residential children's home in the grounds of the existing Homefirst facilities opposite Magherafelt hospital on Hospital Road, Magherafelt. The client was the defendant Trust and it seems that this was the first of 32 such constructions planned for Northern Ireland by the Health Minister.

[3] The defendant issued tender documents comprising specification, drawings and a Bill of Quantities to six contractors who had accepted invitations to tender. The plaintiff submitted a tender to carry out the works for the sum of £561,715 dated 22 June 2001 although, according to the defendant's documentation, the tenders appear to have been returned on 6 June 2001. The tender documents specified the form of contract as the JCT Standard Form of Building Contract Local Authorities with Quantities 1980 and the period of the contract specified at Clause 1.3 was 25 weeks.

[4] On 2 July 2001 the defendant's Chartered Surveyors wrote to the plaintiff stating that they had discovered four arithmetical errors in the bill of quantities resulting in an overprice of £1,663.70. They asked the plaintiff if he was willing to stand over the tender sum of £561,715.00. There appears to have been a subsequent telephone conversation and by letter dated 3 July 2001 the plaintiff confirmed that he was prepared to stand by his tender figure. In their tender report to the defendant of the same date the Chartered Surveyors expressed the opinion that the tender from the plaintiff represented "a keen and competitive offer" and provided a "suitable basis for the establishment of a contract." The defendant duly passed on this report to its architect, the third party, noting that the surveyors had recommended the plaintiff as main contractor.

[5] On 6 July 2001 there was a telephone conversation between the third party and the plaintiff. According to the plaintiff during the course of this conversation the third party told the plaintiff that the surveyors had checked the bill of quantities priced by the plaintiff and that the defendant had accepted the plaintiff's tender. The plaintiff said that the third party was anxious to set up a meeting but the plaintiff informed the third party that this would not be possible until after the traditional builders' holiday. In the course of giving his evidence the third party did not positively agree that he had told the plaintiff during the telephone conversation that his tender had been accepted although he conceded that he had assumed that such acceptance would take place since the Plaintiff was the lowest tenderer. Mr Lyness, who was the defendant's Assistant Director of Estate Services, stated that the third party would not have had authority to confirm acceptance of the plaintiff's tender. On the balance of probabilities, I am satisfied that the third party did communicate acceptance to the plaintiff during that telephone conversation. The letter from the third party to the plaintiff of 6 July 2001 notifying him of a pre-contract meeting and requesting the provision of a health and safety plan, relevant insurance documentation, a programme of work for 25 weeks together with bank details was quite consistent with acceptance having been communicated. I am also satisfied that the plaintiff's evidence relating to the telephone call with the third party is consistent with Mr Lyness' report on tenders dated 9 July 2001 which confirmed acceptance of the plaintiff's tender and enclosed a copy thereof for administrative

processing and preparation of contract. This was an internal document as far as the defendant was concerned and would not have been seen by the plaintiff. However I am satisfied, again on the balance of probabilities, that the third party had ostensible authority to communicate acceptance to the plaintiff. In any event, Mr Lyness conceded in evidence that, by the date of the meeting on 23 July, there was no doubt that the plaintiff's tender had been accepted.

[6] At the completion of the trade holiday the plaintiff wrote to the third party on 23 July 2001 enclosing some of the documentation sought in the letter of 6 July and on the same day he attended a meeting at the defendant's premises at which a number of others were also present including Mr Lyness and the third party together with representatives from the surveyors and sub-contractors. The plaintiff was accompanied by Mr Boyd, an associate member of the Chartered Institute of Builders with 25 years' experience, whose task was to price contracts and prepare tenders and bills of quantities on behalf of the plaintiff. During this meeting there was a discussion about the contract period of 25 weeks which both the plaintiff and Mr Boyd categorised as being "very tight" and they suggested that a period of 40 weeks was more realistic. Despite the request made in the third party's letter of 6 July 2001 neither Mr Boyd nor Mr Higgins had brought a programme of work to the meeting and Mr Boyd stated that the alternative 40 week period was based simply upon his experience in the industry.

[7] Subsequent to the meeting on 23 July 2001 a further telephone conversation appears to have taken place between the plaintiff and the third party and on the following day the third party wrote to the plaintiff asking him to reconsider the revised contract period of 40 weeks. The third party pointed out that the plaintiff had not raised any question about the contract period when completing the tender documents and went on to say:

> "This came as a great surprise to my client and myself at the pre-contract meeting and to be fair and reasonable to the other contractors, this could be classified as a re-negotiation of your tender. Under the terms of the contract procedure for tendering, you either confirm you wish to stand over 25 weeks or withdraw."

The plaintiff did not respond immediately to this letter and a further telephone conversation seems to have taken place after which the third party again wrote to the plaintiff on 27 July 2001 in the following terms:

> "Further to our telephone conversation today when you confirmed you had sight of our letter

> dated 24 July 2001, I note you agreed to forward a reply letter to our office with regard to its contents.
>
> Could you please provide by 4.00pm of Monday 30 July.
>
> If we do not receive by the due date, we will have no alternative but to approach to second lowest tenderer."

The plaintiff replied to this letter on 30 July 2001 expressing the view that too much emphasis was being placed on the time factor but maintaining that he was not attempting to renegotiate the contract. He emphasised his interest in providing a high quality building for the defendant and requested that further consideration should be given to the question of whether this could be achieved over a 25 week contract period. The plaintiff enclosed a Health and Safety Construction Stage Plan and a proposed 40 week programme of work. On the same date the third party responded by letter acknowledging the plaintiff's letter with enclosures and stating that:

> "I note that you have stipulated that you still require 40 weeks to complete the project.
>
> Please be advised that we cannot accept this and would like to thank you for your time and effort in your tender proposal."

The letter also cancelled the proposed sod-cutting ceremony. The plaintiff replied by letter dated 1 August 2001 reminding the third party that he had not withdrawn his tender and requesting that his tender should be further considered in the hope that "an accommodation suitable to both parties can be achieved." The third party replied by letter dated 6 August indicating that as a result of the plaintiff's requirement for 40 weeks to complete the works the defendant had no alternative but to reject the tender. During the course of a conversation with the plaintiff on 8 August the third party again asked him to withdraw but he stated that he would not and that he would not have the work completed within 25 weeks. On 9 August 2001 the plaintiff wrote to the third party noting the rejection of his tender and stating that:

> "The 25 week period included in the Tender Documents appears to have been inserted purely to suit a programme for public spending and no consideration given if this period could procure the project of quality and quantity was reasonable.

> As expressed at the pre-contract meeting we could have agreed to the terms and conditions and after commencement applied for extension of time for every occurrence that may arise. We felt it was only fair to both yourself and the client that our approach was more practicable and therefore feel we are being treated unfairly.
>
> I will be giving this matter further consideration and will watch with interest progress on site. If the 25 weeks period is exceeded without justifiable reason I may pursue this matter further."

[8] It appears that the alternative contractor to whom the contract was ultimately awarded completed the contract over a period of 38 weeks or 35 weeks, after deducting holidays. That contractor, Bradley Construction, had produced a programme of work over 25 weeks.

The Submissions of the Parties

[9] On behalf of the plaintiff, Mr Thompson QC submitted that once it was established that the plaintiff's tender had been accepted by Mr Herron on behalf of the Trust during the telephone conversation of 6 July, thereafter a binding and enforceable contract existed between the plaintiff and the defendant. The terms and conditions of that contract were in accordance with JCT Standard Form of Building Contract 1980 Edition with Amendments. He further submitted that the evidence of the plaintiff and Mr Boyd was to be preferred to that of the defendant's witnesses in relation to what had taken place at the meeting of 23 July 2001 and that, consequent to the plaintiff's suggestion that 40 weeks was a more realistic period than 25, there had been an agreement that the plaintiff would return with a programme based on a 40 week period. Mr Thompson QC further submitted that the letter written by Mr Herron on behalf of the defendant to the plaintiff on 30 July 2001 amounted to a repudiation of the binding contract, a repudiation which was ultimately accepted by the plaintiff in accordance with his letter of 9 August 2001. According to the analysis suggested by Mr Thompson QC the legal consequence of submitting a tender based upon a contract period of 25 weeks was

(i) Allocation to the contractor of the risk of a reduction in the contract price or an obligation to pay liquidated/ascertained damages should the 25 week period be exceeded.

(ii) The fixing of liquidating damages at a sum of £1,750 per week. Mr Thompson QC emphasised that the submission and acceptance of such a tender did not amount to an agreement between the parties that the contract

should be discharged in the event of the 25 week period being exceeded and he referred to the following passage from Keating on Building Contracts (7th Edition) paragraph 6-86:

> "Delay on the part of the contractor where time is not of the essence of the contract does not amount to a repudiation unless it is such as to show that he will not, or cannot, carry out the contract."

According to his argument, once the contract had commenced delay in itself could not justify termination and, consequently, anticipating such a delay should not have a different effect. Mr Thompson QC emphasised that, despite being pressed to do so by the defendant, the plaintiff had not withdrawn his tender.

[10] On behalf of the defendant Mr Lavery QC put forward the initial argument that the plaintiff had failed to establish that his tender had been accepted and that the evidence in relation to this aspect of the case amounted, at its highest, to Mr Herron informing the plaintiff that he was the lowest tenderer and inviting him to a pre-contract meeting. There was no evidence that the third party had authority to bind the defendant. Even if acceptance of the plaintiff's tender was established in evidence, Mr Lavery QC argued that it was clear, at all stages, that the plaintiff had no intention of completing or assuming the obligation to complete the contract within the 25 week period. In his submission it mattered not whether the reason for this was because such a period was "impossible" or because it would have been unprofitable for the plaintiff. Mr Lavery QC argued that the evidence indicated that the plaintiff had not been prepared to engage upon the contract unless the original term was changed from a period of 25 to one of 40 weeks. According to Mr Lavery QC such a stance amounted to a repudiation of the contract by the plaintiff.

Conclusions

[11] As I have already indicated earlier in this judgment I am satisfied, on the balance of probabilities, that the third party did confirm to the plaintiff during the telephone conversation on 6 July 2001 that his tender had been accepted. Such an acceptance would have been consistent with the requirement for the plaintiff to provide the various materials specified in the third party's letter of 6 July 2001 at the pre-contract meeting. I am further satisfied that the third party had ostensible authority to bind the defendant and that his authority to do so was formally confirmed by the internal memorandum dated 18 July 2001 signed by the project director and the project owner/chief executive. I note that the report on tenders from the chartered surveyors dated 3 July 2001 was forwarded by the third party to Mr Lyness on 4 July 2001 and, since I think that it is highly unlikely that the third

party would have communicated acceptance of the tender to the plaintiff without obtaining authority from Mr Lyness I am also satisfied that the third party had not only ostensible authority but actual authority to accept the tender. In any event the defendant concedes that the plaintiff's tender had been accepted by 23 July. As usual the tender documentation bound the successful tenderer to execute a formal contract for the works in conformity with the tender documents. The tender also provided that, pending the execution of such a formal contract, the tender, when accepted, together with the Specification and Conditions of Contract, should form the contract between the parties. Hence the reference to a "pre-contract meeting" in the third party's letter of 6 July 2001. It is quite clear that the conditions of contract, upon the basis of which the plaintiff's tender was accepted, included a condition that the contract should be completed in 25 weeks together with a condition specifying the rate of liquidated and ascertained damages to be £1,750 per week or part of week should that period be exceeded.

[12] The evidence of the parties conflicted as to what took place at the meeting on 23 July 2001. A minute of that meeting was prepared by the third party but since it was not issued until 15 August 2001, more than three weeks after the meeting, it seems to me that the contents of this document must be viewed with some degree of caution not least because, during the interval, a flurry of telephone calls and correspondence appears to have taken place concerning, inter alia, what took place at that meeting.

[13] I am satisfied that, despite having signed tender documents which clearly bound him to a contract period of 25 weeks, the plaintiff at all relevant times believed that, realistically, his tender for the contract could not be completed within such a period of time. This was conceded in cross-examination by Mr Boyd, who was employed by the plaintiff part-time to price contracts. Mr Boyd accepted that, when he was originally pricing the contract, he appreciated that it could not be achieved in 25 weeks and informed the plaintiff of that fact. Mr Boyd said that his experience, acquired over 25 years, indicated that this was a 40 week contract. I am further satisfied, again on the balance of probabilities, that the plaintiff signed the tender documents and attended the meeting on 23 July 2001 with the intention of trying to persuade the defendant to adopt a 40 week rather than a 25 week period for the contract. I accept that, at the meeting, the plaintiff and Mr Boyd did explain to Mr Lyness and Mr Herron that, if the 25 week period was retained, the plaintiff would be claiming for "any extension that could be justified under the contract" which would involve a lot more work, correspondence etc. In my opinion the plaintiff, having achieved acceptance of his tender by undertaking to perform the contract within a period which he believed to be quite unrealistic, sought to use the meeting of 23 July 2001 for the purpose of persuading the defendant to alter that term of the contract. I have no doubt that, in order to do so, the plaintiff and Mr Boyd raised the spectre of consequential claims for extensions. I am not satisfied that either

the plaintiff or Mr Boyd raised the question of health and safety in relation to the 25 week period and I believe that this was a matter subsequently introduced in evidence when the plaintiff appreciated the difficulty of his position in signing a tender which he believed to be unrealistic simply in order to gain an opportunity to persuade the defendant to change the period.

{14} I have already noted that the document that was eventually circulated by the defendant as the minute of the meeting on 23 July 2001 should be considered with caution because of the events that took place during the intervening period. This document was circulated under cover of a letter dated 21 August 2001 and the document itself bears the date 15 August 2001.

[15] In addition its late appearance, it appears that Mr Herron annotated two further versions of the minute. On a pro-forma minute dated 23 July 2001 Mr Herron recorded, inter alia, "40 weeks?", "tight as programme", "critical path programme," and "critical path." On a pro-forma upon which the typed date 8 August 2001 has been amended in manuscript to 23 July 2001 Mr Herron added in manuscript…"Mr Herron requested a programme based on 25 weeks"…"It was noted that the contractors Mr Boyd stated that they required 40 weeks in which to complete the works"…" Mr Lyness stated that it was a 25 week contract and asked them to prepare a programme and reconsider their 40 weeks"…."the contractor reiterated they needed 40 weeks." At some stage Mr Herron subsequently deleted the words "reconsider their 40 weeks." When recalled at my request Mr Herron stated that the second document was annotated in August to assist a new secretary who was to type the minute and to help him to recall what had taken place. Mr Herron said that he referred to the earlier document when creating the later and that the later notes were more detailed and more legible. He felt that this would assist the typist. Neither of the annotated drafts specifically referred to the addendum attached to the circulated document. I considered Mr Herron's explanation of the circumstances under which the minute came to be produced to be lacking in credibility and to provide a further reason as to why I should observe extreme caution before accepting the evidence of the defendant and the third party as to the meeting of 23 July

[16] I accept that the representatives of the defendant at the meeting on 23 July 2001 were taken by surprise at the insistence of the plaintiff and Mr Boyd that the 25 week period was unrealistic and should be changed to one of 40 weeks. I am also satisfied that the defendant's representatives had not prepared a programme of work themselves. While the defendants' period of 25 weeks may have been reached with the assistance of a design team, that team did not include a builder. I also accept that they did inform the plaintiff and Mr Boyd that one of the reasons why 25 weeks had been chosen was in order to be acceptable to a Health Minister who was a "get up and go" minister mainly interested in results on the ground and that any period longer than 25 weeks might have prejudiced the funding. I do not accept that

when Mr Boyd stated that the contract period should be 40 weeks Mr Lyness interjected and emphasised that no change from the 25 week period in the tender documents was permitted. I reject this evidence and I am satisfied that, after some discussion, it was agreed that the defendant would at least "look at" a 40 week programme to be produced by the plaintiff. Mr Lyness was critical of Mr Herron for allowing the meeting to continue after this point and said that he would have brought it to a conclusion if he had been in the chair. It is rather difficult to understand this evidence since, as he frequently maintained Mr Lyness was the "face" of the client Trust which had retained Mr Herron as the architect and there does not appear to be any reason why he could not himself have taken such action. After the formal meeting concluded, I am satisfied that there was a further, possibly somewhat animated, discussion between Mr Lyness and Mr Herron as a result of which they decided not to give any further consideration to the suggested 40 week period and to inform the plaintiff of this decision forthwith. Mr Lyness directed Mr Herron to write to the plaintiff requiring him to stand over the 25 week period and pointing that, if he was unable to do so, the only option was to withdraw his tender. A note to this effect was appended to the version of the minute that was dated 15 August 2001 and circulated to the parties although Mr Herron's manuscript notes on the original agenda do not seem to include a reference to any such instruction. However I am satisfied that such a further discussion and reconsideration did take place since the plaintiff confirmed that he was so informed by Mr Herron in a telephone conversation on 27 July.

[17] I am satisfied that the plaintiff believed that the contract could not be completed in 25 weeks and, on that basis, he concentrated his efforts upon trying to persuade the defendant to extend the formal contract period-that is to re-negotiate the time within which the contract had to be performed without making him liable to pay liquidated damages. The plaintiff made the case that he remained willing to sign a contract binding him to a period of 25 weeks, that he did not withdraw his tender and that he would have been willing to incur liquidated damages. Despite his assertions, I do not find that credible. While Mr Lyness and Mr Herron may well have conducted the meeting of 23 July in such a manner as to suggest a willingness to at least consider a variation, I am quite satisfied that the plaintiff learned very soon afterwards in the course of the telephone call from Mr Herron that such was not to be the case. However critical one might be of such vacillation, it was a decision that the defendant was entitled to take. Thereafter, despite the several clear opportunities that were afforded to him to do so and the fact that the contract was obviously in jeopardy as far as he was concerned, the plaintiff did not at any time indicate a willingness to execute a contract binding him to 25 weeks. When asked why he had not done so the plaintiff was unable to provide any reason.

[18] The law with regard to anticipatory breach of contract was clearly set out by Devlin J, as he then was, in Universal Cargo Carriers v Citati [1957] 2 QB 401 at p 436 when he said:

"A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renunciating must "evince an intention" not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract."

[19] In Forslind v Bechely-Crundell 1922 S.C. (H.L.) 173 the majority of the House of Lords emphasised that the real question was one of fact, depending on the view taken of the actions of the relevant party in the individual circumstances proved. The actual intention of the renunciating party is not the test but rather the effect that his conduct would be reasonably calculated to have upon a reasonable person. The facts of that case are of course different but it is to be noted that, at p182, Viscount Haldane observed that:

"But the real question was not what the respondent said, but what he did, and the inference which the appellant was entitled to draw…….The intention to carry out the contract proved in the end to be an intention to carry out what could not have been a compliance with the terms of the contract as it was entered into."

Such a person has the option of either accepting the renunciation, treating it as discharging him from further performance and suing for damages forthwith or he may wait until the time for performance arrives and then sue- see paragraph 24-021 of Chitty on Contracts 29th edition and authorities there cited.

[20] As I have already noted the plaintiff was advised by Mr Boyd at an early stage that this contract could not be completed in 25 weeks. After tendering on the basis of 25 weeks he repeatedly refused to commit himself unambiguously to such a period, although he accepted that there was no reason why he did not do so, seeking rather to persuade the defendant to extend the formal period of contract to 40 weeks. In such circumstances I cannot accept his assertion that he always intended to go on site and make every reasonable effort to complete within 25 weeks. Even if he did harbour such an intention and his conduct was the result of some high risk strategy aimed at compelling the defendant to negotiate, it seems to me that a reasonable person would have reached the reasonable conclusion from such conduct that he had no such intention. In my view the period of 25 weeks after which the client would be entitled to liquidated damages was a sufficiently fundamental condition to give rise to the right to repudiate on the

part of the defendant. There can be no doubt that the type of facility that was to be constructed has been urgently required in this jurisdiction for some time but I would simply add that, in my opinion, neither the interests of the construction industry nor those of the general public, as taxpayers, are likely to be served by specifying completion dates upon the basis of anything other than informed professional advice.

[21] Accordingly I propose to give judgement for the defendant on the issue of liability.