Neutral Citation No: [2010] NIQB 134 | *Ref:* **WEA8018**

Judgment: approved by the Court for handing down | *Delivered:* **14/12/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (COMMERCIAL)

_____

BETWEEN:

LISBURN CITY CENTRE MANAGEMENT LIMITED

Plaintiff;

-and-

RICHARD KEAG

Defendant.

_____

WEATHERUP J

[1] The plaintiff claims £23,358.89 together with interest thereon as repayment of part of a grant paid by the plaintiff to the defendant on foot of an agreement dated 11 November 2002 relating to the refurbishment of the defendant's premises at 61 Bridge Street, Lisburn. Mr Brangam QC and Mr Shields appeared for the plaintiff and the defendant appeared in person.

[2] The plaintiff, formerly Lisburn Development Limited, administered the payment of grants for the renovation of premises at Bridge Street, Lisburn, under a scheme known as the Bridge Street Townscape Heritage Initiative Scheme, supported by the Trustees of the National Heritage Memorial Fund.

[3] In 2002 the defendant was the owner of the premises at 61 Bridge Street, Lisburn. By the agreement in writing dated 11 November 2002 between the plaintiff as grantor and the defendant as grantee the plaintiff agreed to pay to the defendant a grant of up to £36,007.36 towards the total project costs of £67,151.25 and fees at 12% (a total of £75,209.40) upon completion of the works at 61 Bridge Street.

[4] The payment of the grant was subject to conditions that included -

(a) The defendant would use the grant only to carry out the eligible works to the property.

(b) The defendant would commence the eligible works as soon possible and complete by 30 April 2003, unless otherwise agreed in writing.

(c) If the eligible works were completed for less than the cost estimate on which the grant offer was based the defendant would return to the plaintiff any grant received and unspent. The grant would not be increased if there was an overspend.

(d) Claims for payment of the grant would be made in arrears on production of the Certificate of Practical Completion and received by the plaintiff by 30 April 2003.

(e) Without prejudice to any pre-existing breach, the terms and conditions of the agreement were to cease to be enforceable by either party on the expiry of the period of ten years from the date of the agreement..

[5] In particular the agreement contained what was described as a clawback provision to operate in the event of a sale of the property by the defendant during the ten year currency of the agreement -

> "13(A) If you decide to sell, or otherwise transfer ownership of your entire interest in all the Property (a 'sale'), you must notify Lisburn Development Limited immediately and on completion of the sale pay to Lisburn Development Limited a proportion of any increase in the value of your interest in the property subsequent to undertaking the Project, the sum repayable to be calculated as follows.
>
> $$\frac{G}{V1+C} \times V2 - (V1 + (C - G))$$
>
> Where –
>
> G = Grant

C= Actual Cost of the project

V1 = Open market value of your entire interest in all the Property before commencing the Project

V2 = Open market value of your entire interest in all the Property immediately prior to the sale or disposal

Any increase in value agreed by Lisburn Development Limited to be attributable to improvements undertaken at your expense subsequent to completion of the project may be deducted from V2.

13(B) For the purposes of this calculation, V1 is agreed to be a £100,000 (including value of licence).

13(E) For the purposes of a sale Lisburn Development Limited may require V2 to be assessed by the District Valuer/a qualified independent valuer approved by Lisburn Development Limited if it considers the sale not to have been made demonstrably at open market value (as defined by the Royal Institution of Chartered Surveyors). For the purposes of a disposal, V2 shall be so assessed unless Lisburn Development Limited agrees otherwise."

[6] Tender documents were issued to five building contractors and tenders were received from three contractors. The lowest tender was £57,150 excluding VAT. The total project cost of £67,151.25 (plus fees at 12% to a total of £75,209.40) that is stated in the agreement represented the total tender price of £57,150 plus VAT. Only certain items of work were grant aided and different percentages of grant applied to different items of work. Prior to the agreement an exercise was carried out by the plaintiff to identify, value and fix the percentage grant payable on the items of work making up the lowest tender. The permitted items of work and related fees were described in the agreement as "eligible works". The plaintiff examined the breakdown of the tender at £57,150 and produced a total value of grant aided works at £52,130. With the addition of fees and VAT the total cost of eligible works was £68,603.08. The defendant signed the Project Application Form on 11 September 2002. The plaintiff issued the agreement on 11 November 2002 and the defendant signed the form of acceptance of the agreement on 12 November 2002. The successful tenderer completed the works.

[7] The defendant's architect issued the certificates for payments and practical completion under a standard form building contract. The actual cost

of the works was £56,177, as certified by the defendant's architect on 31 March 2003. The final value of the eligible works was calculated at £51,157, which together with VAT and fees provided the basis for a final grant of £34,249.

[8] By letter dated 2 May 2003 the defendant's architect requested payment of the full grant stated in the agreement, namely £36,007. 36, on the basis that the defendant had expended a total of £101,322 on the premises. This was refused by the plaintiff.

[9] The defendant used the premises as a men's barber shop until he sold the premises for £260,000 on 11 October 2007 and moved his business to 14 Bridge Street, Lisburn.

[10] The plaintiff claims under the clawback provision the sum of £23,358.89, calculated according to the clawback formula in paragraph 13A of the agreement using the following figures:

> G = grant = £34,249
>
> C = actual cost of the project = £73,928.93
>
> V1 = open market value of the property before commencing the project = £100,000
>
> V2 = open market value of the property immediately prior to the sale = £256,474.37

[11] The defendant disputes liability to repay the amount claimed as follows –

> 1. Alan Jeffers, an employee of the plaintiff, told the defendant in November 2002 that the clawback clause would not be used against bona fide owner occupiers and therefore the clawback action by the plaintiff was in breach of that assurance.
>
> 2. The limitation period for clawback of ten years was onerous and unfair as it was too lengthy and did not provide a sliding scale.
>
> 3. The agreement was void by reason of the ambiguity of the definitions in the clawback provision in relation to the actual cost of the project and the open market value of the property.

4. The plaintiff's calculations of the amount of the clawback were erroneous.

1. *The assurance that the clawback provision would not apply to the defendant.*

[12] The defendant's evidence was that before he signed the written agreement of 11 November 2002 he telephoned Alan Jeffers, manager of the plaintiff and spoke to him about the clawback provision. According to the defendant the conversation involved Mr Jeffers advising the defendant that the clawback provision was intended to prevent property developers using Lottery Funds and it would not be applied to owner occupiers and that the defendant would not have to repay a part of the grant. On the other hand Mr Jeffers denied that he had told the defendant that the clawback provision would not apply to owner occupiers or that he gave any assurance to the defendant that the clawback provision would not apply to him. Clawback payments are not retained by the plaintiff but returned to Lottery funds. Mr Jeffers stated that he was not in a position to authorise the non recovery of clawback from the defendant.

[13] It appears from the correspondence that there may be circumstances where the clawback provisions would not be applied although I accept that any such approach would have to be approved by the Lottery Fund and that the Lottery Fund gave no such approval in the case of the defendant.

[14] Patricia Elliott succeeded Mr Jeffers as manager of the plaintiff in December 2006, he having left the previous August. When she later observed that the defendant was leaving 51 Bridge Street, she checked the files and discovered that the defendant had received a grant. Ms Elliott then contacted the defendant in relation to the application of the clawback provision. By letter dated 26 October 2007 the defendant wrote to Ms Elliott to set out his understanding of the clawback payment due. The letter proceeded on the basis of a value immediately prior to sale of £200,000. A 'Lisneys Market Valuation Report' was enclosed. The defendant's letter did not disclose the sale price. The letter appealed for a waiver or discount of the clawback for what were stated to be exceptional reasons. The reasons were that he had been an owner occupier for five years and was not a speculator, that he was moving to another property in Bridge Street in which he had made a significant investment and that he had only sold 61 Bridge Street to release equity to enable him to undertake a tourism infrastructure project supported by the local Council and of potential economic benefit to Lisburn. The letter did not refer to any assurance given by Mr Jeffers that the defendant would not be subject to the clawback provision.

[15] In a further letter of 6 November 2007 the defendant referred to further matters, namely that items had been purchased by the defendant outside the contract, that there had been a prior claim for additional grant related to a total expenditure of £101,322 (which additional grant had not been awarded) and that there should be a reduction in the market value of £200,000 by reason of improvements undertaken since the completion of the project. Again there was no mention of an assurance from Mr Jeffers that the clawback provision would not be applied to the defendant.

[16] Further correspondence was exchanged between the plaintiff and the defendant. The plaintiff claimed a clawback payment of £13,693 based on a valuation immediately prior to completion of sale of £200,000. The defendant proposed a clawback payment of £497.42 based on a total expenditure of £101,332 and a value immediately before sale of £170,000, based on the figure of £200,000 in Lisneys report, less £30,000 as the proposed value of improvements undertaken by the defendant subsequent to the completion of the project.

[17] I am satisfied that Mr Jeffers did not give any assurance to the defendant that the clawback provision would not be applied to the defendant; that Mr Jeffers had no authority to give such an assurance without approval from the Lottery Fund; that he did not seek any such approval and the Lottery Fund did not give any such approval. Had such an assurance been given to the defendant he would have been expected to refer to that assurance when the issue of clawback was first raised by Ms Elliott. That the defendant did not refer to any such assurance is indicative that he did not then believe that such an assurance had been given.

2. *The clawback provision was an unfair contract term.*

[18] The defendant claims that the clawback provision was an unfair term, imposing as it did a requirement for repayment of the grant in the event of a sale within 10 years and in the absence of provision for a sliding scale of repayment. The defendant referred to other schemes involving larger payments of grants with shorter recovery periods and sliding scales being applied. The payment of the grant in the present case was in effect made by the Heritage Lottery Fund for the renovation of a particular area of Lisburn that it was considered required financial support to effect improvements. The clawback provision was a standard clawback provision applied to all recipients of Heritage Lottery grants. The use of a clawback provision was entirely reasonable if there was increased value arising from a resale of the renovated property. There are many variations on the clawback provision that might have been adopted and that one scheme is more generous to owners than another scheme is to be expected. I am satisfied that the clawback provision in the present agreement was fair and reasonable, having

regard to the circumstances that were or ought to have been known to or in the contemplation of the parties when the agreement was made.

3. *The clawback provision was void for ambiguity.*

[19] The defendant contends that some of the expressions used in the clawback provision are void for ambiguity, namely "actual cost of the project" and "open market value". The terms of an agreement may be so vague that it is not possible to ascertain the mechanism to operate the agreement. On the other hand the terms may provide a mechanism for operating the agreement by setting out a means for ascertaining how an outcome is to be achieved. Thus a contract may provide a mechanism for the value of an item to be established. While it will be unclear what that value will be, until the mechanism is applied, the contract would be capable of operation if there is a means of ascertaining what the value should be. Did the agreement provide a mechanism for ascertaining the values that determined the amount of the clawback payment?

[20] The "actual cost of the project" had to be determined. The "project" involved the work described in the defendant's application. The "total project cost" was stated in the agreement to be £67,151.25 plus fees at 12% a total of £75,209.40. The figure stated in the agreement represented the full tender price of £57,150 plus VAT. The items of work making up the full tender price were available. There was a distinction between the total project cost and the cost of the eligible works, the former being the value of all the work included in the tender price and the latter being the value of the items of work that were grant aided, the items of work that were eligible for grant. The actual cost of the project was the expenditure on all the items of work included in the successful tender. The actual cost of the project was not whatever the owner might chose to spend on the property, it was the actual cost of the work included in the successful tender. The actual cost of the project was established by the certificate of the defendant's architect. The expression 'actual cost of the project' is not void for uncertainty, nor does it render any part of the agreement void for uncertainty.

[21] The "open market value" had to be determined. This is a common and familiar expression. It is generally understood as being the price of exchange between a willing buyer and a willing seller. The Royal Institution of Chartered Surveyors Valuation Standards (2000) provided a more extended definition to similar effect but which included the clause "that no account is taken of any additional bid by a prospective purchaser with a special interest". The definition recognised that a "special purchaser" was in almost every case the owner of either (1) an interest in land which had or could have had a particular relationship with the property concerned, for example the owner of an interest in a nearby or adjacent property, or (2) another interest in

the property being valued, for example a superior landlord or an under tenant.

[22] The RICS Valuation Standards (2000) have been revised and the term open market value is no longer used. The current expression is "market value" defined as "the estimated amount from which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arms length transaction after proper marketing wherein the parties have each acted knowledgeably, prudently and without compulsion." The current definition of "special purchaser" is "a purchaser to whom a particular asset has special value because of advantages arising from its ownership that would not be available to general purchasers in the market."

[23] The open market value need not be the same as the actual sale price of a property, although the sale price may be evidence of that value. The open market value of the defendants property was not to be determined by a qualified independent valuer under clause 13(E) of the agreement as this was not an instance of the plaintiff considering that the sale was not made demonstrably at an open market value. The concept of a special purchaser was also relied on by the defendant to contend for adjustment of the actual sale price, a matter discussed further below.

[24] The expression 'open market value' was a basis for ascertaining the value of the premises. The expression is not void for uncertainty, nor does it render any part of the agreement void for uncertainty.

4. The calculation of the clawback payment was erroneous.

[25] The amount of the grant was agreed at £34,249.

[26] The amount of the actual cost of the project was in dispute. The plaintiff claimed that the figure was £73,928.93. The plaintiff's figure was based on the value of the approved works certified by the defendant's architect in the sum of £56,177 together with VAT at 17½% plus 12% for fees, giving the total of £73,928.93. The defendant's figure for the actual cost of the work was £101,322, being the total amount the plaintiff claimed to have expended on the re-development works to the property. The actual cost of the project was not the amount of total expenditure by the owner. Rather it was the amount expended on the items of work included in the successful tender. Accordingly the figure adopted by the defendant was incorrect. The actual cost of the project was £73,928.93.

[27] The open market value of the property at commencement of the project was agreed at £100,000.

[28] The amount of the open market value of the premises immediately prior to the sale was in dispute. The plaintiff calculated the open market value immediately prior to the sale at £256,474.37, being the sale price of £260,000 less the expenses of sale. The defendant claimed that the open market value immediately prior to the sale was £200,000. In so doing the defendant relied on the report from Lisneys, Chartered Surveyors, dated 30 March 2007. Lisneys report was not a valuation but a marketing report. The report recommended marketing the property seeking offers around £200,000 and made a series of marketing recommendations.

[29] Tom McClelland of McClelland Salter, in a report for the plaintiff dated 22 October 2010, was of the opinion that the sale price of £260,000 represented the market value of the premises at the date of sale. It was Mr McClelland's evidence that the sale of the property by the defendant was undertaken at the peak of the market. Mark McAlpine of McAlpine Estate Agents, who acted in the sale of the defendant's premises, valued the premises at £190,000 to £200,000. The property had been placed on the market for sale at £265,000 in anticipation that a special purchaser would buy the premises, namely another hairdresser.

[30] The defendant contended that out of the total sale price of £260,000, there were two items making up £60,000 of the sale price which related to the value of the business rather than the value of the property. One item was the value of fixtures and fittings and the other item was the premium said to have been paid by a special purchaser of the premises, the latter being in effect the value of the goodwill of the hairdressing business. The defendant raised this issue in the course of discussions with the plaintiff's representatives in relation to the clawback and was requested to furnish documentation to verify the claims for fixtures and fittings and buyers premium. The defendant did not do so and claimed that it was not possible to do so.

[31] The defendant contended that there was a goodwill aspect or buyer's premium attaching to the purchase of a gents' hairdressers. The plaintiff questioned the value to be attached to any buyer's premium or any goodwill when the defendant was moving his business along the same street. The purchaser of the defendant's premises was indeed another hairdresser and the defendant described how the purchaser had concealed the nature of their business in the course of negotiations for the purchase of the defendant's premises. The defendant described the nature of the fixtures and fittings in the premises. No valuation evidence was available in relation to either the fixtures and fittings or the buyer's premium.

[32] On balance I am satisfied that the sale of the defendant's premises probably included an element for the fixtures and fittings of a hairdressers business and probably included an element for a buyer's premium for an

established hairdressing business. I am left to estimate the value of those elements.

[33] The defendant's evidence was that he had purchased the premises for £118,000 and that £100,000 represented the value of the property and the other £18,000 represented the value of the business. There was no other oral or documentary evidence to verify that that was the case.

[34] Taking all considerations into account in relation to the property and the fixtures and fittings and the buyer's premium I would estimate the property aspect of the sale at £230,000, with the balance attributable to the other elements. From this figure will be deducted the expenses of sale.

[35] The agreement also provided for adjustment of the open market value of the premises immediately prior to the sale by making allowance for any increase in value due to additional works. The defendant claimed to have completed works to a total value of £101,322 and sought to obtain the full grant based on that expenditure. This was refused by the plaintiff. The agreement provided that any increase in the value of the property attributed to improvements undertaken "subsequent to the completion of the project" may be deducted from the open market value of the premises immediately prior to sale.

[36] While the total cost of the project based on the items of work included in the successful tender price was £73,928.93 the defendant claimed to have expended £101,322, being an additional spend of some £27,000 on the renovation of the premises. That the defendant had expended this amount was stated by the defendant's architect in correspondence to the plaintiff in 2003. Again the defendant did not produce any documentation to confirm this added expenditure. In view of the correspondence from the architect I am satisfied that the defendant probably expended additional sums on the renovation of the premises and that the expenditure probably occurred subsequent to the completion of the approved project. The make up of the expenditure is not known. I am prepared to accept that, beyond the total cost of the project of which the plaintiff was aware, there was probably some increase in the value to the premises attributable to improvements undertaken at the defendant's expense. I would estimate that increased value at £20,000.

[37] Further, the defendant referred to other works to the facade of the building, although those works appear to have been related to remedial works to the facade occasioned by defects in the renovation work. These works were not vouched to the plaintiff. I am satisfied that such remedial works would not have increased the value of the premises above the value of the other work, as such works only served to achieve the value which should have been achieved by the expenditure otherwise incurred.

[38] Accordingly the figures for the purposes of the calculation of the clawback are as follows:

G = grant = £34,249

C = actual cost of the project = £73,928. 93

V1 = open market value at commencement = £100,000

V2 = open market value immediately prior to sale = £206,474. 37

The clawback payment should be calculated accordingly.

[39] There were various other figures discussed by the parties in relation to the proposed clawback. For example the plaintiff initially claimed from the defendant the sum of £13,693. This was based on a supposed sale price of £200,000 and was altered when the actual sale price of £260,000 was disclosed. In the Writ the plaintiff claimed £25,247 based on a lower figure for the actual cost of the project which was calculated on the price for the eligible works. At the hearing the plaintiff amended that figure, quite properly, to rely on the final cost of the work as certified by the defendant's architect, thus producing the eventual claim for £23, 358.89.

[40] A particular issue concerning the defendant related to a letter dated 25 October 2005 signed by Neil Morrison of Miles Danker, Chartered Surveyors, and addressed to the defendant. On its face this letter was a response to the defendant's request to Mr Morrison for inspection of the premises with a view to potential disposal or leasing. The letter proposed that the property be placed on the market for sale inviting offers over £180,000. This letter was described by Mr McClelland for the defendant as marketing advice and not a valuation. Mr Morrison gave evidence of his engagement by the defendant and his inspection of the premises with the defendant and he produced notes of his attendance that included a handwritten description and floor areas of parts of the premises.

[41] The defendant denied that he had engaged Mr Morrison or that he had attended the premises with Mr Morrison and alleged that the letter and the visit were a fiction. Ms Eleish Allister and Ms Wendy Adams, both employed by the defendant, made statements that were put in evidence. Ms Allister stated that she certainly would have remembered Mr Keag showing any estate agent round and Ms Adams stated that there was no way Mr Keag showed any estate agent around the property.

[42] Whatever may have been the position about Mr Morrison I found the whole debate irrelevant to the issues between the parties, whether on the

credibility of the plaintiff's witnesses or the substance of the dispute as to the calculation of the clawback, which I find turns on the value of V2 and whether deductions should be made for the value of any business element in the fixtures and fittings and buyer's premium and for any additional expenditure by the defendant.

[43] There will be judgment for the plaintiff for the amount of the clawback payment, calculated as stated above.