

**Neutral Citation No. [2011] NIQB 72**

*Ref:* **WEA8215**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

*Delivered:* **30/06/2011**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (COMMERCIAL)**

**THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMUEL  
STEPHENSON, DECEASED**

**and**

**LOUIS McLAUGHLIN**

**Plaintiffs;**

**-v-**

**DEPARTMENT FOR SOCIAL DEVELOPMENT**

**Defendant.**

**WEATHERUP I**

[1] The plaintiffs claim as developers against the defendant for breach of contract, breach of duty of care and breach of statutory duty in relation to the plaintiffs' proposals made in 1998 for the development of a site at Foyle Street, Londonderry. Mr Lavery QC and Mr M Lavery appeared for the plaintiffs and Mr Hanna QC and Mr Scoffield appeared for the defendant.

*The parties to the proceedings*

[2] The first plaintiff is the personal representative of the estate of Samuel Stephenson deceased, an architect and developer. The second plaintiff is a businessman and developer. The plaintiffs acted as agents of Westmont

Development Inc which is involved in the development and operation of hotels. In 2005 Westmont assigned to the plaintiffs all rights and interests relating to the matters giving rise to these proceedings.

[3] No grant of representation has been taken out in the estate of Samuel Stephenson deceased. The second plaintiff claims all the rights and interests of the estate of Samuel Stephenson deceased by survivorship. The second plaintiff undertakes to indemnify the estate against any claims in respect of any right or interest or process in these proceedings.

[4] The defendant is the successor in title of the Department of the Environment for Northern Ireland. While the identities of those involved in the events giving rise to these proceedings have changed, as referred to above, I shall refer to the participants as the plaintiffs and the defendant.

*The defendant's 1998 invitation to submit proposals for development of the site.*

[5] By notice published in newspapers on 15 May 1998 the defendant invited proposals in respect of the development of the site. The plaintiffs submitted a development proposal for the site by the closing date of 16 November 1998 and offered a premium of £1.2m. A meeting occurred between the plaintiffs and the defendant on 7 December 1998.

[6] On 16 December 1998 the plaintiffs became aware that their development proposal was the one favoured by the defendant, there having been four proposals made to the defendant. However the defendant gave no notice to the plaintiffs in this regard. In exchanges between the plaintiffs and the defendant the defendant did not notify the plaintiffs of any decision made in respect of the development proposal. Eventually on 27 April 2004 the plaintiff made an application for leave to apply for judicial review of the failure of the defendant to issue a decision in respect of the 1998 proposals. On 14 January 2005 the defendant notified the plaintiffs of a decision not to proceed with any 1998 development proposals.

*The involvement of City Hotel (Derry) Ltd*

[7] To complete the background to this development site it is necessary to introduce the City Hotel (Derry) Limited. On 20 December 1996 an agreement was entered into between City and the Department whereby City was granted a licence to occupy the site for the purpose of constructing a hotel. This agreement and licence remained in existence when the defendant advertised for development proposals for the site on 15 May 1998. Arbitration proceedings in the Lands Tribunal were undertaken between the defendant and City. In May 2001 the Lands Tribunal determined that a notice

of re-entry served by the defendant on City was not valid and that City was entitled to an extension of time to construct a hotel on the site, being 19 months from September 2002. Negotiations as to the future of the site proceeded between the defendant and City. The future of the site remained unresolved when the defendant informed the plaintiffs on 14 January 2005 that it would not proceed with the 1998 development proposals.

*The implied terms relied on by the plaintiffs*

[8] The plaintiffs claim that by inviting the development proposals on 15 May 1998 the defendant impliedly agreed:-

- (a) That the plaintiffs would be treated with fairness and good faith.
- (b) That the plaintiffs would be notified promptly if the defendant would not or might not proceed to award a contract in respect of the development of the site.
- (c) That the plaintiffs would not be encouraged to believe that a contract would or might be awarded.

[9] The plaintiffs claim that the submission of the development proposals in 1998 gave rise to a contract between the plaintiffs and the defendant of which the above matters were implied terms. Further the plaintiffs claim that the defendant, having preferred the plaintiffs' development proposal and being aware that the plaintiffs knew that they had submitted the preferred development proposal, owed a duty of care to the plaintiffs to act in accordance with the above matters, to which they had impliedly agreed. In addition the plaintiffs claim that the defendant owed a statutory duty to the plaintiffs under section 2(1) of the European Communities Act 1972 to comply with the principle of transparency by acting in accordance with the above matters, to which they had impliedly agreed.

[10] The plaintiffs claim that by reason of the breach of contract and breach of duty of care and breach of statutory duty of the defendant the plaintiffs suffered loss and damage by the loss of the chance to complete the proposed development and by being induced into not undertaking alternative developments. The quantum of the plaintiffs' losses has been reserved for further determination.

*Whether there was a contract between the plaintiffs and the defendant*

[11] The plaintiffs contend that the submission of the development proposal in 1998 gave rise to a contract between the plaintiffs and the defendant. The plaintiffs compare their position to that of a contractor who submits a tender to an employer where a contractual relationship will arise with implied terms that the employer will act in fairness and in good faith. In Gerard Martin Scott & Others v. Belfast Education and Library Board [2007] NUICH 4 the position was stated as follows –

“[4] In essence the plaintiffs argue for an implied contract between tenderers and prospective employers which it is said has developed at common law and has emerged in parallel with legislation on the domestic and European scene in relation to public service contracts and the public interest in relation to the management of public service contracts. A number of cases have discussed the development of implied contracts during tendering and the plaintiffs rely in particular on an extensive judgment of Judge Humphrey Lloyd QC in the Technology and Construction Court in England and Wales in Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons [1999] All ER (D) 1178 and the decision of the Privy Council in Pratt Contractors Ltd v Transit New Zealand [2003] UKPC 83.

[5] On the other hand the defendant rejects any implied contract arising out of all tendering processes and rejects any basis for an implied contract in the present case and any intention to create legal relations. It is argued that the authorities are fact specific and that the Pratt decision proceeded by way of concession by the defendant that there was an implied contract.

[6] Having considered all of the authorities and without reviewing them for the purposes of this present ruling I would state as follows. First of all, I am satisfied that an implied contract can arise from the submission of a tender. It may arise by inference from the scheme of the tendering process and the presumed intention of the parties. Secondly, I am satisfied that an implied contract may arise from a tendering process for a public works contract, even though the particular contract is below the financial level of the Regulations that apply in relation to public works contracts. The parties to such a public works contract as the present are parties to an elaborate tendering process

which is designed to achieve best value for the provision of public services. An implied contract arises in the present case. Thirdly, I am satisfied that the implied terms of such an implied contract extend to the implied term of fairness and good faith.”

[12] The defendant contends that the position in the present case should be contrasted with that of a tenderer and a prospective employer. In the present case it is said that there was no tender submitted by the plaintiffs. The advertisement of 2 July 1998 stated:

“The Department does not bind itself to accept any proposals submitted.”

These words were repeated in paragraph 8.6 of the defendant’s development brief. Thus it is said that the scheme did not involve a procurement exercise. It was not an invitation to submit tenders.

[13] According to the development brief issued by the defendant proposals were sought for development of the site on the basis that “prospective developers should provide four copies of a short proposal document with supporting drawing. Costly design work should not be undertaken at the initial stage.” (paragraph 8.1). When a developer had been selected an announcement would be made and work would then proceed on plans and contract documents and detailed preparation of the building agreement and the lease (paragraph 8.5). The development would be carried out under a building agreement followed by the sale of the site in fee simple to the selected developer (paragraph 7.1). A building agreement would be entered into before access to the site was permitted and the conveyance/transfer would be executed only on completion of the terms of the building agreement and all the works to the satisfaction of the Department (paragraph 7.3).

[14] I am satisfied that the scheme undertaken by the defendant was an exercise in identifying the tenderer for a proposed development. The Department was not bound to accept any proposal. If and when a potential developer had been selected that selection was to be announced by the defendant. At that stage work would proceed on plans and contract documents. The nature of the scheme does not lead to the inference that a contract arose between the parties nor can that be presumed to have been the intention of the parties. Accordingly I conclude that the consideration of proposals for development was a pre contract stage. There was no contractual relationship between the plaintiffs and the defendant. Had a potential developer been selected the parties would then have entered negotiations to determine if contractual relations would be established between them in relation to a development of the site.

*The implied terms of any contract between the plaintiffs and the defendant*

[15] If, contrary to the above finding, there was a contract between the plaintiffs and the defendant, the terms to be implied into the contract are those that represent the implicit intention of the parties and those that it is necessary to adopt to give business efficacy to the contract. The common intention of the parties is to be ascertained objectively as measured by the view of the officious bystander. The efficacy of a contract relies on the necessity of implying the term in question. On the other hand a term ought not to be implied unless in all the circumstances it is equitable and reasonable. A term will not be implied if it is contrary to the express terms.

[16] The plaintiffs seek to imply a term that the defendant would treat the plaintiffs with fairness and in good faith. If a contract existed between the plaintiffs and the defendant I am satisfied that the officious bystander would have concluded that it would be an implied term of that contract that the defendant would act with fairness and in good faith.

[17] Further the plaintiffs rely on the implied term that the defendant would notify the plaintiffs promptly of a decision on the proposals for development. There may be a multitude of reasons why the defendant would not want to be committed to a prompt decision on the proposals for development or prompt notice of any decision on the proposals. I am not satisfied that the officious bystander would conclude that there should be an implied term in any contract requiring prompt notice nor was such an implied term necessary to give business efficacy to any contract.

[18] In addition the plaintiffs rely on the implied term that the defendant would not encourage the plaintiffs to believe that a contract would or might be awarded. There is no basis for a belief that a development contract might be awarded as an outcome of the exercise in which the plaintiffs were engaged. The terms of the development brief were clear that the exercise involved the possible identification of a party with whom the defendant would enter discussions to ascertain if a development contract would be entered into with that party. Even if that initial process involved a contractual relationship, it does not follow that any party selected by the defendant at that initial stage would be awarded any development contract. Again I am not satisfied that the officious bystander would conclude that there should be such an implied term in any contract that came into existence as a result of this exercise nor was such an implied term necessary to give business efficacy to any contract.

*The conduct of the parties between 1998 and 2005.*

[19] The plaintiffs attended a meeting with the defendant on 7 December 1998 together with representatives from Alliance Hotellerie, Ulster Bank,

Holiday Inns and the Northern Ireland Tourist Board. Initially the defendant intended to make a decision on the proposed development as soon as possible and so informed the plaintiff on 18 December 1998. On 25 February 1999 the representative of Holiday Inns confirmed their strong interest in having a Holiday Inn in Derry to be developed by their major franchisee Alliance Hoteliers and expressed the understanding that their previous franchisee, City Hotels Limited, had relinquished the site.

[20] In a further letter on behalf of Holiday Inns on 4 August 2000 a request was made to be informed of the latest position, given that a new hotel to be called City Hotel had been approved close to the Foyle Street site. By letter dated 5 October 2000 the defendant responded that the site was the subject of a dispute with a developer, that legal proceedings were pending and that it was anticipated that it would be some time before the proceedings were resolved.

[21] By further letter on behalf of Holiday Inns of 23 May 2001 a request was made for a meeting to discuss the impact that the new hotel would have on the proposed Holiday Inn development. In a response dated 12 June 2001 the defendant indicated that as the site was the subject of legal proceedings it was considered improper to enter into discussions.

[22] On 9 April 2003 a solicitor's letter was sent on behalf of the plaintiffs indicating that there had been speculation in the local press regarding a planning application by another company in respect of the site and that as the legal proceedings in the Lands Tribunal had concluded a request was made for information in relation to the development proposals of 1998. By letter dated 7 July 2003 the defendant indicated that the legal proceedings had not been concluded and that the defendant was unable to provide a substantive reply but hoped to do so by the end of August 2003. By letter dated 12 November 2003 the defendant indicated that the company holding the licence to develop the site continued to resist attempts to repossess the site and that the defendant would be in contact when the matter was fully resolved.

[23] A further solicitor's letter on behalf of the plaintiffs of 10 February 2004 indicated that there had been local press quoting the defendant as stating that if the defendant recovered possession of the site it intended to have a further tender process. It was further indicated that Samuel Stevenson was in the process of issuing winding up proceedings against City Hotel (Derry) Limited for non payment of architect's fees and that this step should facilitate the defendant in repossession of the site. The letter raised the prospect of legal proceedings.

[24] An application for leave to apply for judicial review of the defendant's failure to issue a decision on the 1998 development proposals was made in 2004. By letter dated 14 January 2005 the defendant issued its decision that it was not considered appropriate to proceed with the 1998 development

competition. It was stated that the competition had been initiated and conducted in the belief that the Department would be able to obtain possession of the site within a reasonable period. Arbitration proceedings before the Lands Tribunal to secure possession of the site had only concluded on 16 August 2002 when the arbitrator refused to grant possession of the site to the defendant and granted extensions to the developer to April 2004 to complete obligations under contract. The developer failed to carry out any works of substance but continued to refuse to give up possession of the site. Thus the defendant would not have been able to offer vacant possession of the site to any candidate in the 1988 competition or to enter into any agreement. The letter referred to the significant developments in Derry city centre since the commencement of the 1998 development competition which were stated by the defendant to have had a substantial impact on the proposed developments submitted in 1998. In addition the Government had established an urban regeneration company which was tasked with producing a new regeneration strategy for the Derry City Council area. These changes had led the defendant to conclude that it would not be appropriate to proceed with the 1998 development competition.

*The aspects of the implied duty of fairness and good faith.*

[25] I have concluded above that, if there was any contract between the plaintiffs and the defendant, the contract would contain an implied term that the defendant would act with fairness and in good faith. The aspects of fairness and good faith relied on by the plaintiffs relate to the defendant being in a position to award the contract, to have been able to recover possession of the site within a reasonable time, not to negotiate with the City Hotel on their use of the site, to award the contract on the recovery of possession, to communicate any decision to retender if possession were to be recovered, not to unreasonably refuse to award a contract, to communicate that there may not be an award of a contract and to communicate that the process may be abandoned.

[25] Throughout some of the aspects of fairness and good faith relied on by the plaintiffs runs the misconception that the exercise was a tender process and that the outcome would be the award of a contract for the development of the site. Even if this initial process involved an implied contract, that does not provide any basis for asserting that the selection of a potential developer created any entitlement to the award of a contract for the development of the site. However I treat the aspects relied on by the plaintiffs as relating to the selection of the plaintiffs rather than the award of the development contract.

[26] I am satisfied that there was no absence of good faith on the part of the defendants. Any aspects relied on by the plaintiffs can only arise as aspects of fairness.



[27] At the heart of the delays and difficulties that were encountered was the dispute between the defendant and the previous licensees of the site, City Hotel. The defendant believed that it was entitled to possession of the site and published its development brief on that basis. The plaintiffs were aware from an early stage that the defendant could not obtain possession of the site. Eventually the defendant was found not to be entitled to immediate possession of the site. City Hotel was given time to prepare the development of the site and did not do so. The plaintiffs were in effect told they would have to wait and they did so, with occasional reminders until a solicitor's letter was sent on their behalf in April 2003. That letter appears to have been prompted by an application for planning permission of the site by another developer and requested notice of a decision on the 1998 proposals. The response was again to tell the plaintiffs they would have to wait and again they did so, with further reminders until a further solicitor's letter on behalf of the plaintiffs in February 2004. That letter appears to have been prompted by press reports that the site would be put out to tender and led to the proceedings for judicial review.

[28] Thus the plaintiffs knew from an early stage that the defendant was not in a position to secure possession of the site. By letter of 25 February the plaintiffs were conveying to the defendant that City Hotels Limited, stated to be the plaintiffs' previous franchisee, had relinquished the site to the defendant and the issue was then stated to be one of trespass by the builder, which they hoped would be speedily resolved. The plaintiffs waited for years while the defendant was engaged in the dispute about the site. When told by the defendant that they would have to wait for a further period they did so. The response of the plaintiffs during that period was not to contend that the delay amounted to a failure of the defendant to secure possession of the site in a reasonable period. They did not react as if the defendant's treating with City Hotel was a breach of any implied term in any contractual relationship. Nor did they react as if any proposed retendering was a breach of any such implied term. The reaction was to wait for the defendant to secure possession and to guard against any alternative proposals for the site. I regard the approach of the plaintiffs as indicating that the above matters were not considered by the plaintiffs to be aspects of any implied term of fairness and good faith. Nor do I accept that these aspects amount to any unfairness to the plaintiffs. Further I do not accept that any aspect of fairness and good faith would entitle the plaintiffs to claim for the loss of the chance of development over a period while they waited for the defendant to secure possession.

[29] Equally it must have been obvious to the plaintiffs that the defendant may not succeed in recovering possession from City Hotel. It could not have been considered necessary for the defendant to communicate to the plaintiffs that it may not be possible to select their proposal or that the defendant may have to abandon the 1998 exercise, both of which would have been necessary outcomes of any failure to recover possession. In this regard too there was no unfairness to the plaintiffs.

[30] The delay in completing the exercise, during which the plaintiffs and the defendant were compelled to wait for a number of years, necessarily led to a reappraisal of the arrangements for the development of the site. The eventual grounds for refusal of the 1998 proposals were related to the changed circumstances in 2005. After the elapse of such a period of time and the changed circumstances referred to by the defendant it was necessary to undertake a reappraisal. I am satisfied that it was reasonable in the circumstances relied on by the defendant for the defendant to refuse to adopt the proposals and to consider an alternative approach. Accordingly there was no unfairness to the plaintiffs.

[31] Even if all the matters relied on by the plaintiffs amounted to aspects of fairness and good faith I am satisfied that the defendant was not in breach of any such implied term by reason of the plaintiffs' reaction to events as set out above. There will be judgment for the defendant against the plaintiffs.