Neutral Citation No: [2012] NIQB 73

Ref: **COG8609**

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

Delivered: 12/10/12

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

SIMMS CONSTRUCTION LIMITED

Plaintiff;

-and-

G R HOMES LIMITED

Defendant.

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COGHLIN LJ

[1] At the invitation of the parties I gave judgment in this case in respect of a number of matters on 2 December 2010 at the conclusion of which I invited the parties to proceed with their deliberations in the light of my rulings on the assumption that the parties would return to court if they required further guidance. The defendant appealed those rulings to the Court of Appeal which, in turn, has remitted the matter to me to determine some outstanding issues in relation to the contractual arrangements that existed between the parties up to September 2006 together with the consequences that flow from any such arrangements. Prior to the long vacation I gave a number of directions to the parties who provided written submissions. In the interests of efficiency, in terms of time and costs, I also directed the parties to use the vacation for the purpose of obtaining any expert evidence upon which they might wish to rely and, if possible, agreeing as much of the same as might be possible in the circumstances. For reasons that have yet to be disclosed, when the case came on again for hearing on 28 September 2012 only the plaintiff had obtained relevant expert evidence and no attempt had been made to secure any agreement in relation thereto. However, in accordance with the wishes of the parties I agreed to determine any outstanding legal issues.

[2] For the purposes of the hearing on 28 September 2012 the plaintiff was again represented by Mr Coyle while Mr Spence appeared on behalf of the defendant. I am grateful to both counsel for their detailed written and oral submissions.

The factual background to the commercial relationship

[3] I dealt with the factual background to the commercial relationship in some detail in the course of my original judgment and I refer, in particular, to paragraphs [3], [4], [9], [10], [16] and [21] to [25].

[4] I found that the initial agreement between the parties was that their commercial relationship should proceed in accordance with an "open book" policy in accordance with which the defendant was given access to all the relevant documents and data upon the basis of which the plaintiff calculated its rates, prices and quantities. When the relationship was initiated in 2004 the plaintiff employed a quantity surveyor, Mr Clegg, to prepare the relevant documents which he described as being "between a Bill of Quantities and a Schedule". Payments were made to the plaintiff on a 'staged' basis in accordance with the progress of house construction at the various sites, with different rates applicable to different types of house, and there were regular meetings between the plaintiff and, initially, Mr Johnston, the Defendant's representative, to consider the basis upon which such payments should be made. It was recognised that the prevailing rates might change over time and Mr Johnston accepted that the system allowed for contractors to negotiate for increases in rates towards the end of the tax year. He accepted that such negotiation might result in either an increase or decrease in rates and that construction of different types of houses might warrant different rates of increase. He emphasised that, in order to achieve an increase in rates, the relevant contractor would have to produce supporting evidence.

[5] In April 2006, Mr Johnston having left the employment of the defendant in the meantime, the plaintiff sought an increase in housing construction rates per square foot and entered into negotiation with Mr Gary Scott. An agreement was reached on 27 April 2006 that the rate should be increased, paid upon an 'across the board' basis and back-dated to cover any house started from April 2005. It is clear that during the course of that negotiation there was discussion about other aspects of the works performed by the plaintiff and Gary Scott himself appears to have raised the possibility of looking again at the then current rates for site development and handling charges. The rates in respect of both types of work had originally been agreed with Mr Johnson in April 2004 and were consistent with rates paid to other contractors. A flat fee of £100.00 was paid limited to handling 'white goods.' During a further meeting between the plaintiff and Gary Scott in September 2006 the plaintiff produced figures to support a percentage increase in site development charges together with a percentage increase and extension of the handling charges. There is a clear inference that he did so as a consequence of the suggestions made by Gary Scott at the April meeting. However, as recorded in my judgment, despite

undertaking to 'get it sorted' Gary Scott did not enter into any further discussion and, instead, peremptorily terminated the contract.

[6] In summary, the commercial relationship was agreed and conducted in accordance with the 'open book' policy with the option for contractors to renegotiate relevant rates usually upon an annual basis. Any such claims were required to be supported by evidence but, provided that such evidence was forthcoming, agreement would be reached on a reasonable increase. The defendant recognised and, in the case of the plaintiff, accepted that in certain circumstances, depending upon the evidence, such reasonable increases could be back dated up to, at least, periods of one year.

The relevant law

[7] Mr Spence on behalf of the defendant relied upon the long established proposition that contractual terms require certainty in order to be binding, citing in support the cases of Hillas and Company Limited v Arcos Limited [1932] 147 LT and Courtney and Fairbairn Limited v Tolaini Brothers (Hotels) Limited [1975] 1 WLR 297. He submitted that a mere agreement to negotiate could not impose any obligation to negotiate or to use best endeavours to reach agreement or to accept proposals that, with hindsight, appeared to be reasonable. In the event of negotiations breaking down, Mr Spence drew attention to the complete absence of any independent mechanism for fixing a reasonable rate, such as determination by an identified process of arbitration or mediation.

[8] On behalf of the plaintiff Mr Coyle, while conceding the need for certainty, emphasised the importance of giving effect to commercial relationships which had clearly functioned effectively for some time and, in the course of which, work and services had been performed on the part of one party for the benefit of the other party with the expectation of reasonable reimbursement.

[9] A careful and helpful analysis of the authorities and legal principles applicable in the relevant area of contract law was carried out by Rix J in Rafsanjan Pistachio Producers Co-Operative v Kaufman's Limited [1997] WL 1103567 in the course of giving judgment in which he observed at pages 13/14:

> "There is in my judgment a tension to be discerned in the authorities between two principles of equal validity and importance. The first is that the law should be the upholder and not the destroyer of bargains which parties have intended to make. The second is that the law is unwilling to give legally binding force to agreements which are too uncertain, and in this connection agreements to agree are viewed as an archetypical case of uncertainty … Of course both principles involve a process of

> construction; and the principles need not be in tension, for the uncertainty of what has been agreed or left unagreed may tend to the conclusion that the parties never really intended to be legally bound without further agreement …. In other cases, however, there can be a real tension between the two principles, and the authorities indicate that sometimes one principle and sometimes the other gains the upper hand."

[10] The same learned judge subsequently developed his analysis when, as Rix LJ, giving judgment in the Court of Appeal in Mamidoil-Jetoil Greek Petroleum SA v Okta Crude Oil Refinery AD [2001] 2 Lloyds Rep. 76, after again considering the relevant jurisprudence, he set out a number of relevant principles at paragraph 69:

> "69. In my judgment the following principles relevant to the present case can be deduced from these authorities, but this is intended to be in no way an exhaustive list:
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> (*i*) Each case must be decided on its own facts and on the construction of its own agreement. Subject to that,
>
> (*ii*) Where no contract exists, the use of an expression such as 'to be agreed' in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the principle that 'you cannot agree to agree'.
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> (*iii*) Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty.
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> (*iv*) However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms, where that is possible, to enable the contract to be carried out.

(*v*) Where a contract has once come into existence, even the expression 'to be agreed' in relation to future executory obligations is not necessarily fatal to its continued existence.

(*vi*) Particularly in the case of contracts for future performance over a period, while the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. Certum est quod certum reddi potest.

(*vii*) This is particularly the case where one party has either already had the advantage of some performance which reflects the parties agreement on a long term relationship, or has had to make an investment premised on that agreement.

(*viii*) For these purposes, an expressed stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the courts are prepared to imply an obligation in terms of what is reasonable.

(*ix*) Such implications are reflected but not exhausted by the statutory provision for the implication of a reasonable price now to be found in Section 8(2) of the Sales of Goods Act 1979 (and, in the case of services, in Section 15(1) of the Supply of Goods and Services Act 1882).

(*x*) The presence of an arbitration clause may assist the courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute."

[11] In this case, as in many contractual disputes, construction must involve a careful analysis of the factual context. There is no doubt that, prior to the discussions

in April and September 2006, the parties had carried on a mutually satisfactory and productive commercial relationship in accordance with the "open book policy". Both parties were familiar with the trade and, for at least two years, both parties acted in the belief that they had a binding contract. Both parties were aware that, in practice, the open book policy incorporated the possibility of an annual review of the prevailing rates currently being paid by the defendant to its various contractors. The review carried out by the plaintiff and Mr Scott in April 2006 resulted in a decision that it was more reasonable to reimburse the plaintiff in respect of house construction costs on the basis of a cross-board rate rather than the distinct rates payable in respect of different house types. That decision also clearly recognised that, in the particular circumstances, it was reasonable that such a rate should be applied retrospectively to April 2005. It follows that there was agreement that, in the absence of such retrospectivity, the defendant would have been unjustly enriched. At the same meeting Mr Scott referred the plaintiff to the rates that he was then receiving in respect of site development and handling charges. At that time the plaintiff was concerned about his cash flow. I am satisfied that is the context in which Mr Scott drew the plaintiff's attention to the rates that he had been receiving in respect of site development costs and handling materials and that he did so as possible sources of increase in those rates. The plaintiff was thereby encouraged to produce documentation to support increases in those areas of his work and did so for the meeting with Mr Scott in September 2006. I am further satisfied that such documentation was presented in accordance with the pre-existing policy and conduct of the parties with the expectation that, at least in the case of site development costs, any justified reasonable increase would be paid and, if appropriate, back dated.

[12] However, it seems to me that the plaintiff faces greater difficulty with regard to his claims in respect of handling charges. Prior to September 2006 the plaintiff had received a flat rate of £100 in respect of handling charges limited to white goods. He claimed that the rate should be altered to a percentage, 11.43%, and extended to other goods to be installed in the houses that he constructed. While such claims may or may not have succeeded after bona fide negotiations, on balance, I consider that, in the circumstances of this case, they amount to an attempt to renegotiate specific contract terms and, consequently, that part of the plaintiff's case fails for uncertainty.

[13] In the circumstances, I propose to hear the expert evidence that the plaintiff wishes to call to support his claimed reasonable increase in respect of site development costs.