

Neutral Citation No. [2010] NIQB 128

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

Delivered: 02/12/10

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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SIMMS CONSTRUCTION LIMITED

**Plaintiff;**

v.

G.R. HOMES LIMITED

**Defendant.**

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**COGHLIN LJ**

[1] In this case the plaintiff, a building contractor, claims £1,226,552.45 damages, together with interest thereon, allegedly sustained as a consequence of breaches of contract by the defendant, a development company, or alternatively due on the basis of a quantum meruit for works carried out by the plaintiff for the benefit of the defendant. The plaintiff was represented by Mr John Coyle while Mr Stuart Spence appeared for the defendant. I am grateful to both counsel for the assistance that I derived from their carefully prepared oral and written submissions.

[2] Mr Simms is a director and the principal witness on behalf of the plaintiff. During the course of the commercial relationship between the plaintiff and the defendant his main contacts with the defendant were with Mr Alan Johnston, the defendant's contracts/construction manager, and the defendant's managing director, Mr Gary Scott.

[3] In April 2004, subsequent to contact between Mr Simms and Mr Johnston, the plaintiff commenced construction of 152 dwellings at a site known as "Bluestone Hall" in the Craigavon area. These houses appear to have been completed to the satisfaction of both parties and, as a consequence,

the plaintiff was commissioned to construct a further eight dwellings at a nearby site called the Millmout Chase Development. These dwellings were commenced in February 2004 and, again, successfully completed. During this initial period Mr Simms' primary contact with the defendant was Alan Johnston. In June of 2004 a further agreement was reached between the plaintiff and the defendant for the construction of thirteen houses at Labyrinth Cottage Spa, County Down and in January 2005 the plaintiff was commissioned to construct approximately 188 dwellings at Orchard Meadows, Portadown. In August of the same year the plaintiff agreed with the defendant to construct a very high specification house at Howth, County Dublin for Mr Adam Scott, one of the directors of the defendant company and the father of Gary Scott. In September 2005 the plaintiff started work upon the construction of approximately 370 dwellings for the defendant at Carnreagh Village, Craigavon and continued to work on that site until the relationship with the defendant came to an end in or about October 2006.

[4] It appears that the parties did not commit themselves to any written form of contract/contracts during the relevant period and the commercial relationship between them seems to have been, to say the least, fairly fluid. According to Mr Simms a quantity surveyor named William Clegg was initially engaged by the plaintiff to prepare documents setting out the rates at which the plaintiff was prepared to work. Mr Simms described these documents as somewhere "between a schedule and a Bill of Quantities." The defendant required an "open book" policy from those with whom they contracted and, as a consequence, the defendant was given access to all the relevant documents and data upon the basis of which the plaintiff calculated its prices, rates and quantities. In general, the houses to be constructed by the plaintiff were of a fairly repetitive design which enabled the defendant to make payments to the plaintiff on a staged basis. Usually there were five stages per house. It appears that there were regular meetings on site between Mr Simms and Mr Johnston after which Mr Simms would furnish the defendant with an invoice/valuation. The commercial relationship seems to have proceeded upon a satisfactory basis as far as both parties were concerned until the autumn of 2006. Mr Simms was at pains to point out that he enjoyed a warm relationship with Mr Johnston whom he described as "very busy, affable and straight down the line."

[5] There is some dispute as to the circumstances in which the relationship between the plaintiff and the defendant terminated towards the end of September 2006. The plaintiff's case is that the defendant unjustifiably failed to make payment on a valuation of some £350,000 as a consequence of which cheques that had issued to its own sub contractors were not honoured by the bank and it was compelled to enter into a creditors' voluntary administration. On the other hand the defendant maintains that the plaintiff was going through financial difficulties for quite independent reasons and that, on a

number of occasions, Mr Simms had approached the defendant seeking assistance with his cash flow problems, upon occasions almost in tears.

### **The questions to be determined by the court**

[6] For the purposes of this hearing the plaintiff sought to establish the following breaches of contract on the part of the defendant:

- (i) Failing to comply with an agreement reached in or about April 2004 that there would be an annual uplift in the plaintiff's rates for building houses of 10% with the first such uplift being due in the spring of 2005.
- (ii) Failing to comply with an agreement that the plaintiff would receive a 10% increase in the rates for site development works to come into effect in or about April 2005.
- (iii) Failing to comply with an agreement made in or about April 2004 that the plaintiff would receive a "handling fee" in relation not only to white goods but also to include fireplaces and other materials the installation of which had to be supervised by the plaintiff.

### **The annual increase of 10% in the rates charges by the plaintiff for construction of houses**

[7] In his direct evidence Mr Simms maintained that, in or about April 2004, he had agreed with Mr Johnston, representing the defendant, that a 10% increase in constructions rates would be payable annually with the first such increase due in April of 2005. In the statement of claim, dated 28 April 2008, it is alleged that "rates were to be increased on a 12 monthly cycle . . ." but there was no reference to 10%. In his direct evidence Mr Simms said that when he had not received a 10% uplift in the rates of construction in the spring of 2005 he had taken the matter up with Mr Johnston who said that he would "get it sorted." Mr Simms said that he had not submitted any invoices/valuations incorporating the alleged 10% increase because he wanted to confirm the agreement with Mr Johnston. He accepted that he could have put in such invoices but explained that he was a "polite, considerate" person who "liked to sit down and agree." Listening to his evidence and observing his demeanour I formed the impression that Mr Simms was doing his best but that his recall was not particularly reliable and that he felt very much more at home in the practical world of construction rather than conducting business negotiations.

[8] In cross examination Mr Simms's attention was drawn to paragraph 5 of an affidavit that he had sworn on 12 October 2006 in which, referring to house construction rates, he had said:

"5. It was agreed that after 12 months a percentage of uplift would be applied to these costs. This agreement was not honoured until 13 months after the 12 month uplift date. The uplift figure of the houses and inside cartilage (**sic**) works was 11% or 12%; and the overheads and profit on site development works to be measured as a schedule of rates was established clearly at 10%."

When questioned about the difference between the percentage rates for increase in housing construction costs referred to in the affidavit and his evidence Mr Simms said that the figures in the affidavit were "wrong" and should read 10%.

[9] Mr Alan Johnston was called as a witness on behalf of the plaintiff and he confirmed that he and Mr Simms had enjoyed a "fine relationship" in the course of which he could not remember a problem. Mr Johnston was adamant that he would not have had authority to agree a percentage increase in house construction rates and had not agreed one of 10% with Mr Simms. He accepted that he probably would have told Mr Simms there would be an annual review and noted that it was not unusual for contractors to approach the developer at the end of the tax year seeking to renegotiate an increase in rates. Mr Johnston left the employment of the defendant in March 2006.

[10] In the course of his evidence Mr Simms produced a document which he agreed was his calculation of the increase that he had sought in house price types per square foot. This document demonstrated a claimed increase from the various rates applicable to the differing house styles to an across the board rate of £41.20 per square foot. The document also indicated that Mr Simms was seeking such an uplift with effect from 21 April 2005. The average rate of increase demonstrated by these figures was in the region of 14.43%. Mr Simms was unable to explain why the figures did not support the 10% increase that he claimed had been agreed in April 2004.

### **Site development costs**

[11] In the course of his direct evidence Mr Simms said that he discussed site development costs with Mr Johnston in April 2004 and that Mr Johnston quoted the rates that the defendant had paid to another house builder, David Wright, for site development works. At various points in his direct evidence Mr Simms said that the plaintiff had been paid "estimated amounts" for site development works up to April 2005, that in April 2005 they agreed rates

which were the old 2004 rates and that “eventually” the 2005 rates were agreed at the old 2004 rates plus 10%. He said that the plaintiff did not put in detailed invoices for site development works because the rates had not been quantified. In cross examination he agreed that it would have been a simple matter to put in invoices with a 10% uplift if that had been the agreement. Mr Johnston, who was also called by Mr Simms in support of this aspect of his claim, denied that he had agreed a 10% uplift on site development charges on behalf of the defendant.

[12] The defendant relied upon the evidence of Mr Cousins and Mr Gary Scott. Mr Cousins, who had previously worked for the plaintiff, joined the defendant as a project manager assisting Mr Johnston in 2005. He confirmed that he had been aware that a general uplift on construction rates from £36 per square foot to £41.20 per square foot had been negotiated with Mr Simms but he maintained that he had never heard of any reference to a percentage increase on site development costs.

[13] Mr Gary Scott accepted that during negotiations in April 2004 the plaintiff was shown the rates charged for site development works by another contractor employed by the defendant David Wright. He also accepted that the plaintiff and the defendant agreed that the plaintiff would work at those rates. Thereafter, the plaintiff did not invoice the defendant for any increase in site development costs, 10% or otherwise. Sometime during the Summer of 2006 Mr Simms did produce a document purporting to be a calculation of 10% increase on site development costs. However, that document did not include any reference to a 10% increase in either April 2005 or April 2006. It did include a number of valuations between April 2004 and April 2005 which, even on Mr Simms’ evidence, could not have qualified for such a 10% increase.

### **Handling charges**

[14] Mr Simms gave evidence that he had agreed with Mr Johnston for the payment of “handling charges” relating to the supply and installation of various items to be incorporated in the houses including fireplaces and white goods. Initially he said that he had originally agreed these charges with Mr Johnston at the “standard rate of the other contractors”. In cross examination he accepted that he had agreed a standard fee of £100 per house in respect of white goods but was unsure of the date of that agreement. At paragraph 5 of the statement of claim it is alleged that, as a result of negotiations in April 2006, the defendant agreed that it would pay handling charges, “an amount in addition for supplying various goods to the properties under construction across all extant and continuing contracts.”

[15] At one stage during his cross examination Mr Simms confirmed that the original agreement in respect of the handling charges had been 10% of the value of the materials but that “. . . in practical terms it turned out to be £100

per house". He said that such fees were recoverable for "any materials that the plaintiff obtained from sub contractors and were hard to handle" including white goods and other similar goods such as fireplaces. He then went on to refer to a document in respect of which he had calculated that the £100 was 11.43% of the value of goods delivered by Lisnasure (white goods) and that, consequently, handling charges should thereafter be measured at 11.43%. Mr Simms did not confirm that there had been any detailed agreement between himself and any representative of the defendant that the plaintiff should receive 11.43% of the value of all goods subject to handling charges. He did accept that there was no invoice or other document submitted by the plaintiff to the defendant for handling charges prior to the document presented at the meeting in September 2006.

[16] The plaintiff again called Mr Johnston in relation to the alleged agreement about handling charges. He was able to recall another contractor negotiating such charges with the defendant in relation to a development in Mersey Street, Belfast in or about 2002/3. That was a "turnkey" development and such charges were limited only to white goods. In that context Mr Johnston was satisfied that a similar agreement would have been reached with Mr Simms, namely, a flat rate of charge limited to white goods. Mr Cousins, the defendant's witness, confirmed Mr Johnston's evidence as to the nature of any such agreement.

### **The evidence of Mr Gary Scott**

[17] Mr Gary Scott has been the managing director of the defendant company since its incorporation in 1986. Mr Scott contradicted the evidence of Mr Simms in a number of important respects and, in such circumstances, it is necessary to refer to the manner in which he dealt with one specific topic in some detail.

[18] When Mr Johnston was employed by the defendant his practice was to record invoices/valuations received from a building contractor in a "chitty book" before entering the figures into spreadsheets which, in turn, were used as the basic data for the production of the defendant company's accounts. In his direct evidence Mr Johnston was asked about records in his "chitty book" dated 13 December 2005 which purported to show increases of £3,000 per house in the Orchard Meadow development payable to the plaintiff. Such increases were allocated to 14 houses with an additional £1,219 allocated to a further site. Mr Johnston accepted that these sums of £3,000 were really expended on the house being constructed by the plaintiff company for Mr Scott's father at Howth but were to be shown as recorded as being expended in respect of the houses at Orchard Meadow. He confirmed to the court that he knew that those entries in the "chitty book" were false and that he had been asked to make them by Gary Scott to reduce the amount shown to be attributable for the house at Howth. Mr Johnston was unable to give a reason

as to why he had been asked to make these entries and was anxious to point out that they had subsequently been corrected and transferred in their correct form to spreadsheets and, ultimately, to the defendant's accounts.

[19] In the course of his own evidence Mr Gary Scott accepted that a number of payments of £3,000 had been wrongly attributed amounting, in total, to some £171,600. He also emphasised that this had been done "internally" in the "chitty book" and that the "error" had been corrected prior to the submission of the audited accounts. In cross examination Mr Gary Scott accepted that he had instructed Mr Johnston to make the entries which were "very difficult to explain". He had "no idea" why he had given such instructions and simply "could not comment". Mr Scott rejected suggestions that this was an attempt to hide the expense of constructing the house at Howth or of avoiding tax and described the entries as "errors" which had come to light when preparing the draft accounts.

[20] While it is essentially a matter of speculation, as Mr Scott himself accepted, it is very difficult to explain why he gave instructions to Mr Johnston to make these false entries in the "chitty book" and I cannot accept that he has "no idea" why it was done. In my view examination and cross examination of Mr Scott in relation to this topic raised very real doubts about his credibility and, accordingly, I approached the rest of his evidence with considerable caution seeking, where possible, some degree of independent support.

### **The termination of the commercial relationship**

[21] It would appear that there were no difficulties with the commercial relationship from April 2004 to at least March/April 2006. Mr Simms gave evidence that in or about April 2006, subsequent to Mr Johnston leaving the employment of the defendant, he approached Mr Gary Scott with a view to reaching an agreement as to the way forward. He claimed that during two meetings, on 6 and 26 April 2006, he had placed before Mr Scott his claims for an increase in production costs, site development charges and handling costs. Mr Gary Scott agreed that, at the meeting on 7 April 2006, agreement was reached on the payment of an increased rate for construction of £41.20 per square foot and that there was also a general discussion which included handling and site development charges. According to Mr Scott, it was he who first mentioned the latter charges. Mr Scott stated that no final agreement was reached apart from the increase in house constructions rates. The documents, dated 5 April 2006, prepared by Mr Simms for the meeting with Mr Scott on 6 April 2006 refer to an increase in housing construction rates across the board to a rate of £41.20 per square foot and not to 10%. It seems clear that in April 2006 Mr Simms was suffering from cash flow problems since the covering note was headed "cash flow" and included phrases such as ". . . to get me safely to end of month and keep supplier and labour paid" and ". . . this brings me up to date on 14 April and allows me to manage my cash flow to end of month".

[22] A further meeting took place between Mr Simms and Mr Scott during the week of 4 September 2006 and it seems that it was upon that occasion that Mr Simms first produced the valuation documents setting out details of the extension of the handling charges and the claimed increases in both handling charges and site development costs. According to Mr Simms Mr Scott said that he would get the matter "sorted out" but no payments were received. Mr Simms gave evidence that on 20 September 2006 he wrote a note in his car which he subsequently handed to Mr Scott's father, Adam Scott, for onwards transmission. That note read as follows:

"Dear Gary,

When Mr Scott, yourself and I met week before last I was frank and sincere regarding handling charges plus 10% on site development works and associated items (both as summaries and make-ups) leaving me in a position where I can properly function - and this is so.

I fully acknowledge and appreciate speed of all payments you make to me; and time is of importance to me regarding the above mentioned items - I need to bring supplier accounts up to date at this time and maintain labour and sub-contractor payments to retain my reputation."

After delivering the note Mr Simms said that he made a payment to his sub - contractors of some £160,000. The cheques payable to the sub-contractors required to be cleared by the following Monday and, in the absence of any further payment from Mr Scott, Mr Simms again called at the defendant's premises on the 25 of September. He said that he saw Mr Scott and asked for a payment in response to which Mr Scott said he would "get it sorted". As a consequence, Mr Simms felt reassured but, that afternoon, he said that he received a telephone call from Mr Scott stating that the money would not be paid without providing any explanation for his failure to do so. Mr Scott maintained that when the documents detailing the claimed extension of handling charges and increase on site development works were presented to him by Mr Simms in the first week of September he expressed the view that such claims were without justification and was not prepared to agree that any such sums should be paid. Mr Scott said that he maintained that attitude when he saw Mr Simms again on 25 September 2006. Mr Scott gave evidence that he received telephone calls from a number of the plaintiff's sub contractors stating that they were no longer prepared to come on site since they had not been paid on invoices submitted and that he heard that Mr Simms was auctioning plant at Wilson's Auctions in Portadown. He said that, in such circumstances, the



defendant was unable to continue his relationship with the plaintiff company and terminated the contract.

[23] There is thus a virtually complete contradiction between the evidence of Mr Simms and that of Mr Scott about Mr Scott's reaction to the proposals put forward by Mr Simms. For the reasons set out above, in the absence of any supporting independent evidence, I prefer the evidence of Mr Simms. It is common case that site development costs and handling charges, which extended beyond only white goods, were discussed during the meeting in April at a time when Mr Simms was encountering some degree of cash flow difficulties and I have no doubt that such discussions involved the possibility of increased payments. It is simply not credible that Mr Simms would have couched the note of the 20 September 2006 in the terms that he chose if Mr Scott's assertion that he had rejected the suggested increases at the first September meeting was true. Furthermore, the absence of any immediate response to that note by Mr Scott reminding Mr Simms that his proposals had already been firmly rejected as unjustifiable about two weeks earlier is also quite inconsistent with Mr Scott's evidence. Whilst, in the absence of concrete figures, it may have involved something of a gamble, it is not credible that Mr Simms would have drawn the cheques in favour of his subcontractors if his proposals had received the robust rejection with which Mr Scott testified they were treated in the first week of September. It then becomes necessary to consider whether the evidence of Mr Simms, including the letter of 20 September 2006, is sufficiently clear to establish a firm agreement on the part of Mr Scott to pay the claimed increases. "Getting payment sorted out" was clearly interpreted by Mr Simms, given the previous history of negotiation and payment between the parties, as indicating that agreement in principle had been reached that he could expect some payment of the proposed increases. I also accept that Mr Simms felt that he had received further reassurance in similar terms on the morning of 25 September. At that point, having issued the contractors' cheques amounting to £160,000, he is likely to have been very anxious for any reassurance. Mr Simms himself accepted in cross-examination that the plaintiff was in financial difficulties without the claimed £350,000. That additional sum was being sought within the context of three invoices submitted to the defendant by the plaintiff company on 15 September 2006, totalling in all some £192,000, all of which had been paid.

[24] Taking into account all the evidence I am persuaded on the balance of probabilities that a sufficiently certain agreement had been reached that sums would be paid in respect of the claimed increases although the exact amounts might require further discussion and adjustment. I have little doubt but that Mr Scott's rejection of the proposals without reason in the telephone call of the afternoon of the 25 of September was cynically calculated and timed in a bid to financially embarrass Mr Simms whose cash-flow problems were becoming tiresome.

## Discussion

[25] Perhaps the most striking feature of the relationship between the plaintiff and the defendant companies is that it continued to exist for approximately 2½ years upon an apparently relatively satisfactory and productive basis despite the almost total absence of any formal contractual structure. To some extent the fact that the parties permitted it to do so may reflect the dominant position enjoyed by developers during the “years of plenty” but it really should have been self evident that to conduct business as a construction company engaged upon multiple sites in the absence of written contracts, terms of agreement, agreed written records of site and business meetings, variations of agreement and similar documentation so familiar to experienced contractors was likely to be a recipe for disaster ending in litigation. I derived the clear impression from listening to the evidence of Mr Simms that he was anxious not to “rock the boat” with regard to positively concluding negotiations and establishing clear and commonly accepted terms of agreement including uplifts, variations, etc. No doubt he was influenced by acquiring the opportunity to work on multiple sites during a rising market while regularly receiving substantial payments on account. However, while the requirements should not be applied too strictly, it is important to recognise the need for some degree of certainty even in the course of working commercial relationships. I bear in mind the frequently quoted words of Lord Wright in Hillas and Company Limited v. Arcos Limited [1932] 147 LT 503 at page 514:

“Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but on the contrary the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut reas magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as they are appropriate implications of law.”

[24] The onus remains upon the plaintiff to prove its claims upon the balance of probabilities. Bearing in mind the evidence and the general legal principles I have reached the following conclusions:

- (i) I reject the claim made by Mr Simms that he agreed with Mr Johnston in April 2004 that there would be an

annual 10% uplift in building costs. That claim was rejected by Mr Johnston himself, who was called as a witness in support of the plaintiff's case and who was referred to by the plaintiff as being a man who was "straight down the line." I accept that Mr Simms did negotiate an across the board increase in building costs to £41.20 per square foot with Mr Scott in or about April 2006, that such an increase was made retrospective to April 2005 and was fully paid to the plaintiff company.

- (ii) For the same reason I reject Mr Simms's claim that he agreed with Mr Johnston that there would be a 10% annual uplift in site development costs. That proposition was also rejected by Mr Johnston.
- (iii) In my opinion any agreement between Mr Simms and Mr Johnston relating to handling charges was limited to a fixed figure of £100 in respect of white goods only.
- (iv) I am satisfied that the exchanges that took place between Mr Simms and Mr Scott in April 2006 with regard to the manner in which the plaintiff's business was being conducted included some reference to both handling charges and a potential uplift in site development costs. That discussion took place at a time when Mr Simms was concerned about managing his cash flow and such difficulties may well have existed prior to that date. It is therefore quite understandable that the discussion would have resulted in Mr Simms turning his attention to such matters. It seems that Mr Simms subsequently prepared documentation to support claims for a 10% increase in site development costs and an 11.43% general handling charge. That documentation was presented to Mr Scott as a valuation at the meeting in the early part of September 2006. As indicated above I have reached the conclusion that general agreement was reached that there should be some increases but that no payments were made and Mr Scott subsequently reneged on his agreement without providing Mr Simms with any justification.

[25] The parties should now proceed with their deliberations in the light of these rulings.