Neutral Citation [2013] NIQB 121

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

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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Between:

FRIENDS LIFE COMPANY LIMITED

(formerly AXA SUN LIFE plc)

Plaintiff

-v-

GILBERT JOHN GEORGE HALLIDAY GRUMMETT

Defendants

_____

WEATHERUP J

[1] On 25 November 2010 Axa Sun Life plc, as predecessor of the plaintiff, entered into a written contract with the defendant for the sale to the defendant of 20 Lower Windsor Avenue Belfast. At the date of the contract the property was subject to an election under section 10 of the Value Added Tax Act 1994 whereby the property was removed from the exemption from liability for VAT. Accordingly the sale of the interest in the premises gave rise to liability to pay VAT on the consideration for the sale. The plaintiff claims the amount of the VAT being £46,375. Mr McLaughlin appeared for the plaintiff and Mr Colmer for the defendant.

[2] The title to the property derived from a lease of 26 April 1949 for 10,000 years commencing 1 April 1949, the date for completion was to be 17 December 2010 and the Law Society General Conditions of Sale applied. The Memorandum of Sale, signed by the defendant on 30 September 2010 and on behalf of the plaintiff on 25 November 2010, stated –

> "Agreed price (for the property) this price is exclusive of VAT £265,000".

[3] By Indenture dated 16 December 2010 the plaintiff assigned to the defendant the premises for the residue of the lease. In the recitals it was stated -

> "The Vendor has agreed to sell the premises to the Purchaser at the price of £265,000".

[4] After completion, on 10 February 2011, a VAT invoice was supplied to the defendant in the sum of £46,375, being VAT at 17.5% on the price. The defendant refused to pay this sum.

[5] The plaintiff contended that the Deed did not accurately reflect the agreement made by the parties in respect of the consideration for the sale of the premises. The true agreement was said to be as recorded in the written contract, namely a consideration of £265,000 exclusive of VAT, by which the plaintiff understood that VAT would be paid by the defendant on the sum of £265,000. Thus the plaintiff contended that there was an error on the face of the Deed by reason of mutual mistake in not including VAT in the consideration for the sale and the plaintiff sought an order for rectification of the Deed.

[6] By amended Defence and Counterclaim it was denied that the defendant agreed to pay VAT on the offer and that it was a term of the contract that VAT was to be paid on the sale price. The defendant contended that in May 2010 the plaintiff and the defendant reached agreement for the sale of the premises at £265,000, which agreement was concluded between the defendant and the plaintiff's estate agent, Greg Henry of BTW Shields. The oral agreement was said to be reflected in a letter sent by Mr Henry to the defendant on 16 May 2010 which confirmed agreed terms of sale at £265,000.

[7] Further, the defendant contended that the memorandum of sale did not accurately reflect the agreement to the extent that the words "this price is exclusive of VAT" indicated that VAT was agreed or payable by the defendant on the sum of £265,000.

[8] In addition the defendant contended that at completion on 16 December 2010 the plaintiff did not supply a VAT invoice and this failure amounted to a breach of clause 15.8 of the conditions of contract such that the plaintiff was not entitled to claim VAT on any subsequent invoice.

[9] The defendant also contended that the title to the premises was conveyed by the plaintiff to the defendant by the Deed of 16 December 2010 which stated the price as £265,000; upon completion the contract for the sale merged in the Deed and any claim based on the wording of the written contract was lost; thus the plaintiff

was estopped from claiming rectification of the Deed. The defendant counterclaimed for rectification of the memorandum of sale to delete the reference to the price of £265,000 being exclusive of VAT.

[10] It is not in dispute that VAT was payable on the sale. That liability does not usually arise on residential sales but may arise on commercial sales. On 1 October 1994 a previous owner of the premises obtained a certificate of registration for VAT. On 12 April 1996 the premises were sold to Holmes Lawson, a partnership of loss assessors. On 30 October 1998 Holmes Lawson sold the premises to the plaintiff as part of a plan for pension provision. By a VAT exemption form dated 7 July 1998 issued by the plaintiff, Holmes Lawson requested that an election to waive exemption be made in respect of the property. By letter from the plaintiff to HM Customs and Excise dated 5 November 1998 the plaintiff elected, pursuant to schedule 10 of the Value Added Tax Act 1994, to waive exemption in respect of the property. A letter from HM Customs and Excise to the plaintiff dated 13 November 1998 acknowledged receipt of the letter notifying the election to waive exemption with effect from 25 October 1998.

[11] The 2010 sale of the premises was brought about by the dissolution of the Holmes Lawson partnership. A valuation of property was obtained at £250,000. Conduct of the sale on the ground was carried out by Mr Holmes on behalf of the plaintiff. Mr Holmes was well aware of the VAT position in relation to the sale. Greg Henry of BTW Shields acted as agents in respect of the sale. Mr Henry was informed by Mr Holmes that VAT was payable on the sale. Mr Henry agreed that he had been informed about the position in relation to the VAT on the sale.

[12] BTW Shields produced a sales brochure for the premises. The brochure referred to the location, a description, the accommodation available and then –

> "Price
>
> Offers in the region of £250,000 exclusive.
>
> Value Added Tax
>
> The price quoted is exclusive of, but may be liable to,
> Value Added Tax."

[13] Mr Holmes was not content that the wording of the brochure properly conveyed the position in relation to VAT and he queried with Mr Henry whether the wording of the brochure should be changed. He was reassured by Mr Henry that "that is the way it is done" and that is the way it was left. Mr Henry described the wording as "a caveat that goes in on all property". He did not want to change the standard form of dealing with VAT. It should be noted that the brochure did not state that VAT was payable. It stated that the price may be liable to VAT.

[14] There was a meeting between Mr Henry and the defendant at the property. According to Mr Henry the defendant was the first to view the premises. At the viewing Mr Henry gave the defendant a copy of the brochure as they stood outside the premises. The defendant asked what it would take to buy the property and Mr Henry asked for an offer. Mr Henry's evidence was that he moved to the VAT position and stated what the brochure meant. There was some discussion about freehold or leasehold and there was no further discussion of VAT.

[15] The defendant's evidence was that there was no discussion about VAT at the first meeting on site. He stated that Mr Henry brought the brochure, that he took it and looked at the measurements which was what he was interested in and he scanned the rest of the brochure but he did not absorb its contents. He read the VAT reference at home some time later but it did not register with him that the wording meant that there was VAT payable on the purchase. His evidence was that had VAT arisen he would have been warned off; £250,000 was a bit more than he wanted to pay; he offered £215,000 at first; he did not raise the issue of VAT; VAT was never a consideration.

[16] Mr Holmes was also a bidder. Mr Holmes asked Mr Henry if the other bidders knew about VAT being payable. Mr Henry agreed that that question had been asked of him and that he confirmed that he had replied that bidders knew that VAT was payable. Mr Henry did record the bids in his 'bid book'. The bid book recorded each bid but made no reference to VAT and the amount recorded for each bid did not include the amount of any VAT. Mr Henry said that the method of recording the amount of each bid was routine and that he would not add or include in the bid book any reference to VAT.

[17] Eventually, there was an agreement by the plaintiff to accept the defendant's bid of £265,000. On the plaintiff's case the defendant was also liable to pay VAT on the amount of the offer. On the defendant's case there was no agreement to pay, and no liability on the defendant to pay, VAT.

[18] A letter written on 16 May 2010 by the agent to the defendant stated –

> "I write to confirm that I have agreed terms in relation to the above unit with yourself at £265,000."

The letter contained no reference to VAT. The letter was not relied on as amounting to a sufficient note or memorandum in writing.

[19] Mr Henry drew up what were called Proposed Heads of Terms dated 23 June 2010. The consideration was stated in the first draft to be £265,000 with no reference to VAT. The Proposed Heads of Terms were issued to Mr Holmes. Mr Holmes noticed the absence of a reference to VAT and queried it with Mr Henry. Mr Henry

changed the Proposed Heads of Agreement which were then re-issued to Mr Holmes and stated the consideration as £265,000 plus VAT. The document was not sent to the defendant, nor the defendant's solicitor, nor the plaintiff's solicitor.

[20] The plaintiff's solicitor, George Farrell, was not told by anyone that VAT was payable. It appears that instructions about the sale were informal in that AXA were not directly involved in instructing the solicitor as they were leaving that to Mr Holmes and he obtained approval for and engaged Mr Farrell to act for the plaintiff. The plaintiff's solicitor received no instructions about VAT, was not told about VAT by the estate agent, by solicitors for the plaintiff in Bristol or by the managing agents for the plaintiff, Lambert Smith Hampton. I accept that Mr Farrell never thought of VAT being included in the sale. Similarly the defendant's solicitor, Gavin Pantridge of Hewitt and Gilpin, was not informed by anyone that VAT was relevant to the purchase.

[21] There were pre-contract enquiries. In commercial transactions the contract enquiries are raised by the purchaser's solicitor but in this case they were raised by Mr Farrell as the vendor's solicitor. He used a residential form for pre-contract enquiries provided by the Law Society. There is no commercial form issued by the Law Society and solicitors use their own versions. Forms for commercial pre-contract enquiries may provide for VAT.

[22] The memorandum of sale was also issued by Mr Farrell and he typed out the description of the property. Mr Pantridge completed in handwriting the price and completion date. I am satisfied that neither solicitor believed that VAT applied to the transaction. The memorandum of sale was in a standard form and set out the price for the property, stated to be exclusive of VAT in the standard form.

[23] There were suggestions that there were steps that some of those involved ought to have taken in relation to VAT. This case is about the interpretation of the agreement that was reached by the parties. It is not about what others might have done.

[24] I am satisfied that the defendant did not intend to bid £265,000 plus VAT. He intended to bid £265,000. I am not satisfied that it was brought to his attention that VAT had to be paid on the bid. Mr Henry's evidence was that there was a mention of VAT at the first meeting on site. I am satisfied that such mention as occurred was not in a manner that conveyed to the defendant that VAT would have to be paid on a bid on the property. Further, I am satisfied that the brochure was not sufficient to convey to the defendant that VAT would have to be paid on the bid.

[25] In the unusual circumstances of VAT being payable on the purchase price of the premises there was remarkable lack of attention to this issue by all concerned. There may have been clues about potential liability for VAT but nothing seems to have alerted anyone to the need to investigate the VAT issue. Mr Holmes and

Mr Henry knew of the VAT liability but Mr Farrell and Mr Pantridge did not and I am satisfied that the defendant did not. The documents of title referred to the tax exemption and that was not sufficient to alert anyone that there was a VAT issue. If the solicitors involved were not alerted by anything that suggested to them that VAT was an issue, it is difficult to see why the defendant might have been so alerted. As stated I find that he was not so alerted by Mr Henry.

[26] I am satisfied that when it was believed that agreement had been reached between the plaintiff's agent and the defendant the parties were not *ad idem*. The plaintiff was accepting an offer that was thought to be £265,000 plus VAT and the defendant was making an offer of £265,000 that did not include VAT.

[27] The enforceable agreement was the written memorandum of sale. The transfer of title was given effect by the Deed. The plaintiff claims rectification of the Deed to include reference to VAT being payable. The defendant claims rectification of the written contract to delete the reference to VAT.

[28] The interpretation of the documents is the first step. Rectification may arise as a second step. The approach to interpretation and to rectification will differ.

> "1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> 2. The background …. includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> 3. The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear but this is not the occasion on which to explore them."
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> (Lord Hoffman in Investor's Compensation Scheme Limited v West Bromwich Building Society (1998) 1 WLR 896 at 912G)

> "However, the court will, inevitably, not adopt precisely the same approach to a rectification claim as it adopts to an interpretation issue. Three differences are relevant for present purposes. First, in a rectification claim, the antecedent negotiations are admissible: indeed they are normally of central relevance. Secondly, even in relation to written contracts, some subjective evidence of intention or understanding is not merely admissible, but is normally required in a rectification claim: the party seeking rectification must show that he indeed made the relevant mistake when he entered into the contract. Thirdly … rectification is an equitable remedy and therefore is subject to somewhat different rules from interpretation."
>
> (Lord Neuberger in Daventry DC v Daventry & District Housing [2012 1WLR 1333)

[29] The written contract must be read objectively, against the permitted background information. The agreed price for the property was stated to be exclusive of VAT £265,000. It was not stated that VAT was payable. It was stated that the price was exclusive of VAT. The form of words in the contract is that used whether VAT is payable or not. The contract does not state whether VAT was payable. It cannot be read as the defendant having agreed to pay VAT nor that VAT was payable by the defendant. The plaintiff sought to establish the liability of the defendant to pay VAT by reference to clause 15.8.

[30] Clause 15.8 of the Memorandum of Sale reads –

> "Where Value Added Tax is due to be paid on the consideration -
>
> (a) The Vendor shall supply on completion a VAT invoice showing the Vendor's VAT Registration Number and any other details required from time to time by law.
>
> (b) The Purchaser shall upon receipt of the VAT invoice or on the date of completion, whichever is the later, pay to the Vendor or his solicitor the appropriate amount of VAT.
>
> (c) The Vendor should provide to the Purchaser a VAT receipt for the amount so paid.

(d) Interest at the rate provided for in Condition 16.1(a) shall run on any Value Added Tax outstanding from the date of the completion to the date of supply or delivery of the VAT invoice (whichever shall be later)."

[31] Clause 15.8 applies where VAT is due to be paid. It does not create the liability to pay VAT. The contract does not establish any liability on the defendant to pay VAT. I interpret the written contract as providing for the defendant to pay £265,000 and not to pay VAT.

[32] In the light of the finding on the interpretation of the written contract it is not necessary to consider the defendant's claim for rectification of the contract.

[33] The plaintiff seeks rectification of the Deed. At completion neither solicitor thought that VAT was an issue. No reference was made to VAT at completion and no VAT invoice was issued at that time. The Deed of 16 December 2010 stated the price to be £265,000 and in respect of that consideration the plaintiff assigned the residue of the term created by the lease.

[34] The contract merges in the Deed. The Deed did not provide that the defendant should pay VAT. Two relevant propositions emerge from Wylie's Irish Conveyancing Law 3rd Edition –

> "The general rule is that on completion the contract for sale merges in the conveyance and the parties therefore lose the remedies they had for enforcement of the contract and must therefore rely upon remedies available under the conveyance" (paragraph 21.02).

> "It is important to recognise the limits of the doctrine of merger in this context. The doctrine is based upon the presumed intention of the parties and must therefore give way to an express or implied indication that no merger is to take place" (paragraph 21.03).

[35] The plaintiff contended that there was a term in the contract which amounted to an express or implied indication that no merger was to take place. The term was clause 22 which reads -

> "Notwithstanding the completion by the purchaser any part of the contract to which effect is not given by the assurance and which is capable of taking effect after completion shall remain in full force and effect."

[36] The plaintiff contended that the defendant's liability to pay VAT was not given effect by the assurance and was capable of taking effect after completion. However, the defendant's liability to pay VAT was not part of the contract. Therefore this is not an instance of a part of the contract not being given effect by the Deed because, as I find to be the case, no liability to pay VAT arose under the contract. The doctrine of merger applies. The plaintiff's remedies arise under the Deed. There is no basis for rectification of the Deed. There is no remedy for the plaintiff under the Deed.

[37] Further, the circumstances amount to a unilateral mistake by the plaintiff. The written contract and the Deed do not reflect what the plaintiff intended. Rectification is a discretionary remedy. The plaintiff's claim for rectification would impose on the defendant a transaction, into which he did not intend to enter. The plaintiff is in the position it is because of the actions of the plaintiff and its representatives and not by reason of the actions of the defendant. In these circumstances, if required to consider the exercise of discretion in relation to rectification of the Deed, which for the reasons stated above does not arise, I would exercise my discretion not to order rectification. I am satisfied that it is inappropriate to try and unravel this transaction.

[38] The defendant relied on clause 15.8 to contend that in any event no valid VAT invoice had been issued and on that basis the defendant could not be liable for VAT. The clause requires a VAT invoice at completion and payment of the VAT by completion. However, clause 15.8(d) appears to run contrary to what has gone before because it contemplates the delivery of the VAT invoice after completion and provides for interest from completion to the receipt of the VAT invoice after completion. Perhaps this is meant to provide for interest from the date of completion to the date of payment of the VAT but that is not what is stated. In the circumstances I cannot conclude, as I was invited to do by the defendant, that the VAT invoice was invalid because it was not issued until after completion and therefore not in accordance with the Conditions of Contract.

[39] The reality is that this was a VAT transaction. The plaintiff has paid the VAT so that Mr Holmes' pension provision is unaffected. I find that the defendant is not liable for VAT on the purchase price. I have refrained from attributing responsibility for the plaintiff's position to any individual or individuals. For the purpose of these proceedings the question concerned whether the loss to the plaintiff should fall on the defendant, to which the answer is no. I must not be understood to have suggested that the loss should fall on anybody else in particular.