

Neutral Citation No. [2013] NIQB 98

Ref: **WEA8961**

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

Delivered: **07/08/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

H & J MARTIN LIMITED

Plaintiff

-v-

BOARD OF GOVERNORS OF ASSUMPTION GRAMMAR SCHOOL

and

TRUSTEES OF ASSUMPTION GRAMMAR SCHOOL

Defendants

and

DEPARTMENT OF EDUCATION FOR NORTHERN IRELAND

Third Party

WEATHERUP J

[1] This is an appeal from a decision of the Master of 10 June 2013 refusing summary judgment to the plaintiff for the sum of £200,000 payable to the plaintiff as contractor on foot of a certificate issued by a contract Architect. The defendants dispute the validity of the certificate in the circumstances. Mr Humphries QC appeared on behalf of the plaintiff and Mr Brannigan QC on behalf of the defendants.

[2] The plaintiff's grounding affidavit indicates that the plaintiff is a building contractor based in Belfast and the defendants are sued as representatives of

Assumption Grammar School in Ballynahinch, County Down. By an agreement between the plaintiff as contractor and the defendants as employer the plaintiff agreed to build a new classroom block, sports hall and dining room along with alterations to and demolition of parts of the existing school in accordance with the JCT98 Standard Form of Contract private with quantities as amended. The work was undertaken with grant aid from the Department of Education.

[3] The standard form of building contract provides for interim certificates to be issued by the Architect. The Architect duly issued interim certificate 53 on 17 September 2012 in the sum of £200,000. The certificate stated the gross valuation of the completed contract works at the date of valuation to be (using round figures) £15,487,000, the retention at that date to be £145,000 giving a subtotal of £15,341,000 and with the deduction of the total amount previously certified being the sum of £15,141,000, the net amount for payment was £200,000. An invoice was issued on 17 September 2012 by which the plaintiff sought payment of that amount. No payment has been received by the plaintiff in respect of that certificate and the plaintiff claims the £200,000 in these proceedings.

[4] Interim certificate 53 related to a claim for loss and expense which had been submitted by the plaintiff as a result of alleged delay and disruption in the completion of the contract works. The Architect made an interim assessment of the loss and expense claim in the sum of £200,000 and issued interim certificate 53 accordingly. The final measurement of the loss and expense claim has not been undertaken by the Architect.

The defendants' grounds for resisting summary judgment.

[5] The defendants' replying affidavit sworn by James Turner of O'Reilly Stewart, solicitors for the defendants, sets out a number of grounds on which it is sought to resist the application for summary judgment. The first ground concerns a claim for an implied term that any payment in respect of the plaintiff's claim for loss and expense was dependent on the Department having the necessary information to assess the claim and agree the payment. The affidavit states that the defendants do not have the resources to pay any judgment in respect of the interim certificate and without the defendants recovering from the Department there would be a real and substantial risk of grave financial hardship.

[6] The role of the Department is set out in the Voluntary Schools Building Grant Regulations (Northern Ireland) 1993. Regulation 6 provides for the payment of grants in respect of permitted expenditure as follows -

“(1) Except as provided for in paragraphs (2) and (3) no payment of grant shall be made in respect of expenditure incurred for the provision or alteration of the premises of a school without the prior approval of the Department or where works in relation to those

premises have not been completed to the satisfaction of the Department.

(2) Where such expenditure has been incurred without the prior approval of the Department the payment of the grant in respect of that expenditure may be reduced by such amount as the Department considers equitable in the circumstances.

(3) The Department may make payments of grant by instalments but the final instalment will not be paid until all the work has been completed to the satisfaction of the Department and any defects and liability period prescribed in any contract entered into by the applicants has expired."

[7] On 6 December 2011 the Department approved grant aid up to a maximum of £15,208,000. The Department has not approved any expenditure in respect of the plaintiff's claim for loss and expense. The defendants contend that the plaintiff knew of the role of the Department and that funding for the works was by grant aid and thus that it was an implied term that any payment would be subject to approval by the Department. The Department questioned the plaintiff's loss and expense claim and as the Department did not approve payment the defendants joined the Department as a Third Party to these proceedings by Notice of 7 June 2013.

[8] The second matter relied on by the defendants concerns the Architect's jurisdiction. The Architect, in issuing interim certificate 53, represented that it was a payment on account of the plaintiff's claim for loss and expense. An e-mail furnished by the Architect on 19 December 2012 stated -

"The draft final account has been agreed by HJM but it is (sic) has not been agreed by me or represented to the school. Furthermore it will not be presented to the school until the Department of Education have confirmed that its (sic) meets their exacting requirements. The employer would not expect anything less from his design team. Certificate number 53 £200,000 has been issued to HJM as payment on account in respect of their loss and expense claim."

[9] The defendants contend that the Architect had no jurisdiction to issue an interim certificate for a payment on account of a loss and expense claim.

[10] The third matter relied on by the defendants concerns the purported withdrawal of the interim certificate. The Architect, by letter dated 28 May 2013,

purported to withdraw interim certificate 53. It is acknowledged in Mr Turner's affidavit that in general an Architect under the standard form building contract cannot withdraw an interim certificate. However, the defendants contend that such a power existed in the present case because the parties had previously consented to the Architect withdrawing interim certificate 51.

[11] An affidavit filed on behalf of the plaintiff by Jonathan Norton, Commercial Manager, addressed the circumstances pertaining to interim certificate 51 which was issued by the Architect on 1 March 2011. By e-mail of 16 November 2011 the plaintiff received a second interim certificate 51 from the Architect which purported to revise the first certificate to a lesser sum, based on a stated increase in the retention monies. The response from the plaintiff at that time was to contend that it was not permissible to reissue an interim certificate eight months after the issue of the original and the plaintiff therefore treated the original interim certificate 51 issued on 1 March 2011 as the authentic certificate. However, the affidavit of Mr Norton concluded by stating that for the avoidance of unnecessary and lengthy litigation and the long delay in payment the plaintiff had not sought to enforce its legal rights in respect of interim certificate 51. The plaintiff therefore issued a credit note to cancel the original invoice for the amount of the original interim certificate 51 and issued a revised invoice on 25 January 2012.

[12] The fourth matter referred to in the defendants' affidavit concerns the validity of the plaintiff's loss and expense claim. It is stated in the affidavit that the Department clearly had major issues with the plaintiff's loss and expense claim. The Architect referred the claim to the Department and enquiries were directed towards verifying the makeup of the claim.

[13] By a further affidavit Mr Turner introduced a fifth ground of objection to summary judgment. On 25 July 2013 the Architect issued interim certificate 54 stating the amount due to the plaintiff as minus £200,000. By letter dated 2 August 2013 the Architect stated that further to his letter of 28 May 2013 withdrawing certificate number 53 he had issued interim certificate 54 "regularising the monies due".

The JCT contract terms.

[14] Clause 26 of the JCT contract deals with loss and expense claims. It provides that if a claim is made for direct loss and expense then "the Architect from time to time thereafter shall ascertain, or shall instruct the Quantity Surveyor to ascertain, the amount of such loss and/or expense which has been or is being incurred by the Contractor." Thus the Architect's obligation is to "ascertain" the contractor's loss and expense.

[15] Clause 30 deals with interim certificates. By clause 30.1.1 the Architect shall issue interim certificates stating the amount due to the contractor from the employer

and the final date for payment on the interim certificate shall be 14 days from the date of each interim certificate.

[16] Clause 30.1.1. also deals with notice provisions in respect of the payment under interim certificates. Clause 30.1.1.3 provides that not later than 5 days after the issue of an interim certificate the employer shall give written notice specifying the amount of the payment proposed to be made. Clause 30.1.1.4 provides that not later than five days before the final date for payment the employer may give written notice specifying any amount proposed to be withheld or deducted. Clause 30.1.1.5 provides that where the employer does not give written notice as above the employer shall pay the contractor the amount due under the certificate. No such notices were issued in the present case.

[17] Clause 30.2 deals with the amount stated as due in the interim certificates. The amount stated shall be the gross valuation less the retention, any reimbursements and the total amount due in interim certificates previously issued. The gross valuation includes certain items that are subject to retention and certain items that are not subject to retention. The latter includes at clause 30.2.2.2 any amount ascertained under clause 26.1, that is any sum due on a loss and expense claim.

[18] Clause 30.8 deals with the final certificate. The Architect shall issue the final certificate within certain time limits and the final certificate shall state certain sums, and a final sum shall be expressed in the certificate as a balance due to the contractor from the employer or to the employer from the contractor as the case may be.

The Implied Term.

[19] First, on the issue of an implied term that the Department will approve payment. The contract provides the terms of the relationship between the plaintiff and the defendants and does not involve the approval of the Department. The contract is between the employer and the contractor and there is a different relationship between the school and the Department that governs the arrangements for the payment of the grant to which the school is entitled under the statutory scheme. There is no basis for a term to be implied into the contract between the plaintiff and the defendants that would require the consent of the Department to payments to the plaintiff.

The Jurisdiction of the Architect.

[20] Secondly, the issue of the jurisdiction of the Architect to issue an interim certificate on account of the loss and expense claim. The Architect must “ascertain” the amount of the loss and expense incurred. This requires an accurate assessment of the actual value of the claim and not a general assessment. In Alfred McAlpine Homes North Limited v Property and Land Contractors Limited 76 BLR 59 HH Judge Lloyd QC stated that “to ascertain” in clause 26.1 of the JCT conditions means

“to find out for certain”, relying on the Oxford English Dictionary. The commentary in The Building Law Reports stated that this may seem self-evident but it was stated to be of considerable practical importance to have this clearly stated since it was sometimes apparently the belief of some parties and their advisors that an estimate of loss and expense was good enough, when that was not the case .

[21] In Alfred McAlpine Homes Ltd the contractor made a claim for loss and expense that included a claim for the costs of plant and equipment. While the contractor owned the plant and equipment, the Arbitrator assessed the loss and expense claim by reference to hiring charges. His Honour Judge Lloyd QC rejected that approach as not representing the actual loss and expense incurred by the contractor. The duty under the contract to “ascertain” the amount of the loss and expense was a duty to determine the actual loss and expense. The question of law on the appeal was answered that “.... the actual loss or expense incurred by the contractor must be ascertained and not any hypothetical loss or expense that might have been incurred whether by way of assumed or typical hire charges or otherwise.”

[22] *Hudson’s Building and Engineering Contracts* 12th Edition at 6-069 states that generally the certifier must establish the true amount of the loss or expense or cost incurred by the contractor, referring to the JCT obligation to “ascertain” the amount and citing Alfred McAlpine Homes Ltd and also that the loss must be direct to fall within the first rule in Hadley v Baxendale.

[23] The issue in the present case is whether the Architect may issue an interim certificate which contains a payment on account for the loss and expense claim. Ultimately the Architect must ascertain an accurate figure as representing the actual loss and expense incurred. However, interim certificates are estimates of the payments due, pending the determination of the final amount. An interim certificate contains a gross valuation that may include a payment for loss and expense, as appears from clause 30.2.2.2. The clause refers to the inclusion of any such payment that has been “ascertained”. Is it required that the Architect must establish the final figure for actual loss and expense before an interim certificate may issue that includes an amount for loss and expense? Alfred McAlpine established that the measure of loss and expense should be represented by the actual loss and expense incurred. It did not establish that an interim valuation of the actual loss and expense incurred could not be determined. I am satisfied that an interim certificate may include an interim payment for loss and expense that has been ascertained by the Architect as an assessment of the actual loss and expense incurred. I am satisfied that an interim loss and expense payment may be an estimate of the actual value of the claim just as the interim certificate may include an estimate of the actual value of work done. Of course the final payment on the loss and expense claim must be an accurate determination of the actual loss and expense incurred by the contractor.

[24] Was there a genuine valuation on an interim basis of an amount due for the loss and expense actually incurred when the Architect issued interim certificate 53?

I have no reason to doubt that that was the case. When the Architect issued interim certificate 53 there does not seem to have been a question mark over the fact that he was making a genuine attempt to address the outstanding loss and expense claim. He was persuaded that he should make an interim payment. That he did so on an interim basis does not detract from the genuine estimate that he made. I am satisfied that the Architect had jurisdiction to issue interim certificate 53 as a genuine estimate on an interim basis of the amount of loss and expense actually incurred.

[25] The Architect must not abdicate to the Department the decision-making on the loss and expense claim. It is the Architect who must “ascertain” the loss and expense incurred. Of course the grant payable under the statutory scheme for funding education will engage the school and the Department and the Architect will wish to consult with others, including the Department, about the process. Ultimately it is for the Architect to make the decision on the claim. However, no final decision has yet been made because the necessary information is not available.

The Withdrawal of an Interim Certificate.

[26] Thirdly, on the issue of interim certificate 53 being withdrawn, I am satisfied that in the present circumstances the Architect did not have power to withdraw the interim certificate unilaterally, as he purported to do. The parties may agree to vary the terms of the contract to provide for the interim certificate not to have effect and that is what happened with interim certificate 51. I do not accept that the plaintiff must be taken to have consented to the withdrawal of interim certificate 53 on the basis that a general waiver was introduced by the alteration of interim certificate 51.

Interim Certificate 54.

[27] Fourthly, there is the issue of the effect of interim certificate 54. The Architect purported to effect a reversal of interim certificate 53 by withdrawing that certificate and replacing it with interim certificate 54. The Architect stated that he wished to “regularise the monies due”. I interpret his approach to have been that he wished to withdraw his previous interim certificate on the basis that he did not have power to make a payment on account of the loss and expense claim. As I find that interim certificate 53 was issued within jurisdiction as a genuine interim estimate of the amount of loss and expense incurred by the plaintiff, the Architect was not justified in seeking to reverse that decision to regularise the monies due. Therefore interim certificate 54 was not issued for a proper purpose.

[28] In any event I may say that the Architect did not actually achieve what he intended. Interim certificate 54 stated the gross valuation less retention at £15,141,000, a reduction of £200,000 on the previous certificate. The amount previously certified was stated to be £15,341,000, thus including the amount certified on the interim certificate that the Architect had purported to withdraw. If interim certificate 53 was withdrawn there was no need for interim certificate 54 in order to cancel the payment of £200,000.

Negative Interim Certificates.

[29] Fifthly, there was an issue about negative interim certificates. The contractual scheme provides for payment by the employer to the contractor and for interim certificates to state the amount payable by the employer to the contractor. The interim certificate does not provide for payment by the contractor to the employer. The final certificate may provide for payment by the contractor to the employer. That is not to say that an interim certificate cannot state a negative amount. However, no sum is payable to the employer on foot of an interim certificate that states a negative amount. If, for example, the Architect decides that an earlier interim certificate had overstated the gross valuation or understated the retention, the next interim certificate may adjust the amounts and produce a negative sum but no amount is payable by the contractor on foot that negative certificate.

[30] If an interim certificate was an overvalue or an undervalue the Architect would reflect that in the next interim certificate. Accordingly, the amount of a prior overvaluation would be taken into account and the amount certified for payment in a subsequent certificate would vary accordingly, which might result in a negative interim certificate but would not involve a repayment by the contractor on that certificate. Similarly, the amount of a prior undervaluation would be taken into account and the amount certified for payment in a subsequent certificate would be increased accordingly. The interim certificates would be no less valid because of what subsequently was found to be an overvalue or an undervalue.

The Defendants' Hardship.

[31] The defendants referred to hardship arising when the Department will not pay a grant in respect of the plaintiff's loss and expense claim until they are satisfied that it is justified. The Architect will have to be so satisfied before payment falls due. However, the issue between the school and the Department is separate from the issue between the contractor and the school. In the correspondence with the Department, the concern is not to deny that there may be further payments to be made by way of grant in respect of a loss and expense claim, even though this exceeds the budget when the initial grant was approved. The Department's solicitors' letters are clear in seeking to examine the plaintiff's claim rather than deny a payment that may be found to be properly due. This calls for an examination of the causes of delay and disruption. This may create tensions because some of the delay and disruption is attributed to the design team. Clearly there is a need for all parties to address immediately the plaintiff's loss and expense claim. Ultimately the value of the loss and expense claim will be ascertained by the Architect and the Department will determine whether any such sum will be recovered from the Department by way of grant. If no sum is due to the plaintiff for loss and expense, then the final certificate will state the overpayment to the plaintiff and require

repayment. The outlay by the school will be temporary because it will either be refunded by the Department or repaid by the plaintiff.

[32] The defendants have no sustainable defence to the plaintiff's claim. The result is that there will be judgment for the plaintiff for £200,000, being the amount stated to be due to the plaintiff in the interim certificate.