Neutral citation No. [2015] NIQB 40

Ref: **WEA9594**

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

Delivered: **25/03/2015**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEENS BENCH DIVISION (COMMERCIAL)

JOHN GRAHAM CONSTRUCTION LIMITED

Plaintiff

-v-

FK LOWRY PILING LIMITED

Defendant

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WEATHERUP J

[1] This is another instance of the battle of the forms. Did the parties enter a contract on the plaintiff's standard terms and conditions or on the defendant's standard terms and conditions? Mr Humphreys QC appeared on behalf of the plaintiff and Ms Day QC on behalf of the defendant.

[2] The plaintiff is a construction contractor and the defendant a piling contractor. A main contract in the form of the JCT Design and Build Contract 2005 Edition, Revision 2, incorporating a schedule of amendments, was entered into on 21 May 2012 between the University of Sheffield as employer and the plaintiff as main contractor. The defendant was engaged by the plaintiff to complete the piling works.

[3] Preliminary issues have been raised as follows -

(a) What were the terms and conditions of the sub-contract formed between the plaintiff and the defendant for the provision of the piling works?

(b) In light of the terms and conditions found to be incorporated within the contract are the heads of losses sought to be claimed by the plaintiff recoverable.

(c) Did the defendant cause the losses.

[4] Under the main contract the plaintiff agreed to demolish an existing single storey laboratory building and construct a seven storey building linked to the university's existing buildings. The plaintiff was to commence work on 7 May 2012 and complete on 16 August 2013. The University of Sheffield could levy liquidated damages at £10,000 a week for work beyond the completion date. Part of the main contract comprised the design and installation of a pile foundation system with adequate load bearing capacity for the building.

The evidence for the plaintiff

[5] The plaintiff invited tenders for the performance of the piling work under a sub-contract with the plaintiff and issued a tender enquiry document on 29 March 2012. The piling works were scheduled to take place over three weeks between 18 June and 6 July 2012 and the form of sub-contract was stated to be the plaintiff's standard sub-contract document. The defendant submitted a tender on 11 April 2012 and on 21 May 2012 the plaintiff indicated that the defendant was the preferred bidder.

[6] A meeting on 28 May 2012, described by the plaintiff as the sub-contract negotiation meeting, involved Ronan Hughes and Eddie Kelly for the plaintiff and Douglas Cook for the defendant. The purpose of the meeting was said by the plaintiff to be to discuss the proposed works and the nature of the sub-contract and the sub-contract terms and conditions. According to the evidence of Mr Hughes and Mr Kelly for the plaintiff it was agreed at the meeting that the defendant would carry out the piling works on the plaintiff's standard sub-contract and that the contents of the tender enquiry document dated 29 March 2012 were to form the basis of the work to be completed for the sum of £88,997 less a main contractor's discount of 5%. The minute of the meeting stated that the commencement of a part of the sub-contract works on the site prior to the execution of the formal sub-contract was to be deemed by the plaintiff as contractual acceptance of the plaintiff's standard sub-contract.

[7] On 2 July the plaintiff sent to the defendant the plaintiff's standard form sub-contract. On 6 July the defendant commenced the piling works on site. The piling failed. The plaintiff contends that the defendant was in breach of contract and negligent in relation to the design and installation of the piles. The plaintiff undertook remedial works and the main contract works were delayed beyond the completion date by a total period of 14 weeks and four days which resulted in the plaintiff incurring additional costs. By the present proceedings the plaintiff seeks recovery of such losses in the sum of approximately £1m.

The evidence for the defendant

[8] The evidence on behalf of the defendant was that in November 2011 the plaintiff had issued an initial sub-contract enquiry and in December 2011 the defendant had submitted an initial tender expressly specifying that the defendant's terms and conditions, a copy of which had been enclosed, would apply to the sub-contract. On 29 March 2012 the plaintiff issued a further sub-contract enquiry and the defendant submitted a tender with attached standard terms and conditions. On 11 April 2012 the defendant sent the plaintiff a revised tender based on the defendant's terms and conditions which were again attached. On 20 April 2012 the defendant sent to the plaintiff a further revised tender based on revised pile loadings and again relied on the defendant's terms and conditions.

[9] The evidence of Mr Cook for the defendant was that at the meeting of 28 May 2012 agreement was not reached as alleged by the plaintiff. The meeting was described as simply part of the negotiations leading to a revised tender which the defendant submitted on 1 June 2012. The minutes of the meeting were said not to be an accurate representation of what was discussed at the meeting. Rather it was made clear at the meeting by Mr Cook that any works carried out would be on the defendant's terms and conditions. Where Mr Cook purported to have the minutes signed on his behalf, he had not done so nor authorised the same. Further it was alleged that the contract price of £88,997 had not been offered by the defendant by 28 May and did not emerge until the defendant's offer of 1 June 2012 and therefore the minute of the meeting which stated the contract price as £88,997 on 28 May 2012 could not be accurate and the contract price must have been inserted after 1 June 2012.

The rival contentions

[10] The plaintiff contends that its terms and conditions applied as they were attached to the invitation to tender, agreed at the preliminary meeting and forwarded again to the defendant prior to the commencement of the sub-contract works.

[11] The defendant contends that having made the tender offer of 1 June 2012 and that offer having been accepted by the plaintiff, the defendant delivered plant to the site on 28 June 2012, started work on 2 July 2012 by making up the rig and started the piling work on 6 July 2012 under the defendant's terms and conditions attached to the tender offer letter.

[12] It is further said by the defendant that when the plaintiff sent to the defendant, by letter dated 2 July 2012, the plaintiff's terms and conditions, received by the defendant on 6 July 2012, the plaintiff was too late to incorporate its terms and conditions as the sub-contract had already been entered into between the parties on the defendant's terms and conditions.

[13] The significance of the applicable terms and conditions is evident from a consideration of the operation of the respective terms and conditions in relation to the losses claimed to have been incurred as a result of failings in the sub-contract works.

[14] The plaintiff's terms include clause 3(d) by which the defendant was to be liable for and fully indemnify the plaintiff from and against any liability, loss, claim or demands (including, without limitation, liquidated damages levied by the employer and/or other liabilities arising against the plaintiff pursuant to the main contract) in respect of any negligence or breach of duty or non-performance or non-observance or act or omission or default of the defendant.

[15] The defendant's terms include clause E(8) by which the liability of the defendant for negligence or any other default or breach of contract shall (except in respect of death or personal injury) be limited to the costs of replacing piles or carrying out remedial work, the cost of repairing damage to any building to the extent that such damage was solely due to such negligence or breach of contract by the defendant and any removal and alternate accommodation costs during the carrying out of such remedial work to the extent and for such period as is strictly necessary for the same.

The legal position

[16] Contract is traditionally based on ingredients that include an offer made by one party accepted by the other party. This applies equally to a battle of the forms where it translates into a consideration of whether an offer based on one party's terms has been accepted by the other party. This is not simply a matter of one party proving that it has fired the last shot. The approach was set out by Dyson LJ in Tekdata Interconnections Ltd v Amphenol Ltd (2009) EWCA Civ. 1209 -

> "24. The paradigm battle of the forms occurs where A offers to buy goods from B on its (A's) conditions and B accepts the offer but only on its own conditions. As is pointed out in *Cheshire, Fifoot & Furmston's Law of Contract* (15th ed.) at p 210, it may be possible to analyse the legal situation that results as being that there is (i) a contract on A's conditions; (ii) a contract on B's conditions; (iii) a contract on the terms that would be implied by law, but incorporating neither A's nor B's conditions; (iv) a contract incorporating some blend of both parties' conditions; or (v) no contract at all.
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> 25. In my judgment, it is not possible to lay down a general rule that will apply in all cases where there is a battle of the forms. It always depends on an

assessment of what the parties must objectively be taken to have intended. But where the facts are no more complicated than that A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, it seems to me that the correct analysis is what Longmore LJ has described as the "traditional offer and acceptance analysis", ie that there is a contract on B's conditions….

…. the rules which govern the formation of contracts have been long established and they are grounded in the concepts of offer and acceptance. So long as that continues to be the case, it seems to me that the general rule should be that the traditional offer and acceptance analysis is to be applied in battle of the forms cases. That has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships.

30. …. The question of whose conditions were intended to apply must be determined objectively on the basis of the proper interpretation of the documents which comprise the contract viewed objectively in their context. The focus must always be on what the parties must be taken, objectively, to have intended at the time when the contract was made."

[17] A recent instance of the outworking of this approach is to be found in Transformers & Rectifiers Ltd v Needs Ltd [2015] EWHC 269 TCC. The plaintiff relied on its terms and conditions printed on the reverse of a purchase order for goods. The defendant relied on its terms and conditions referred to on its acknowledgement of order. There was a history of orders from the plaintiff either by post, fax or email. The order in question had been by email when the plaintiff did not transmit the reverse side of the purchase order containing the terms and conditions. A party seeking to rely on terms and conditions must make it clear that they are doing so and enclose those terms and conditions with every purchase. The plaintiff did not do what was necessary to incorporate its terms and conditions. The defendant, while referring to its terms and conditions on the acknowledgement, did not provide a copy of the terms and conditions. A party making a counter offer must at least refer to the terms and conditions on the face of the acknowledgement and provide a copy of the terms and conditions unless they are the standard terms of the relevant industry. The defendant did not do what was necessary to incorporate its terms and conditions.

[18] Thus it is an essential part of the application of offer and acceptance to a battle of the forms that the terms relied on by a party are notified to the other party. However that is not a failing in the present case. The respective terms and conditions were notified to the other party. The issue in each instance is whether the respective terms and conditions are to be treated as having been accepted by the other party.

The defendant's terms and conditions

[19] I start by considering whether the defendant's terms and conditions applied as the defendant contends. The defendant submitted the tender offer letter dated 1 June 2012 with the defendant's terms and conditions attached.

> Clause B(1) provides "The Tender Offer Letter is open for acceptance by the Customer for a period of 1 calendar month from the date of the Tender Offer Letter. In the event that the Acceptance is not received by the Company within the said calendar month period the Tender Offer Letter shall be treated as having been withdrawn. This period for acceptance by the Customer may be extended only by written consent of the Company."
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> Clause B(2) provides "No contract will be deemed to have been entered into between the Company and the Customer until the issue by the Company of the Confirmation."
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> The definitions in clause A provide that "the Acceptance" means the written acceptance from the Customer to the Company and "the Confirmation" means the written confirmation of the Company issued following receipt of the Acceptance by the Customer.
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> Clause B (3a) provides "Should the Customer require commencement on site before the execution of an agreed contract between the Company and the Customer, the acceptance of the Company's plant or materials on site will be deemed to be acceptance of the Conditions".

[20] Under clause B there may be acceptance in writing under clause B(1) or acceptance by conduct under clause B(3a).

[21] As to clause B(1), there was no written acceptance. There was no confirmation. There was no extension of the one month period. Thus there was no contract by acceptance in writing under clause B(1).

[22] Under clause B(3a) there may be acceptance by conduct by the acceptance of plant on site. Clause B (3a) provides that acceptance of the defendant's plant on site amounts to acceptance of the "conditions". Mr Humphreys pointed out that the clause does not refer to acceptance of the "tender letter offer" or of the "contract". An unexecuted contract on the defendant's terms and conditions is stated to be the

effect of acceptance of the defendant's plant on site. I do not find that it aids the argument to seek to distinguish between the use in this clause of the word "conditions" as opposed to the words "tender letter offer" or "contract".

[23] The clause refers to the acceptance of plant on site. Ms Day contends that the one month limit from 1 June 2012 before the tender offer is to be treated as having been withdrawn does not apply if plant goes on site. She says that a contract will have come into existence if the plant is on site and that, although the one month period might have expired, acceptance of the plant is nevertheless acceptance of the defendant's conditions. It is correct that if the defendant's plant is accepted on site by the plaintiff there will be a contract in place but do the defendant's conditions apply if the one month period has expired? Under clause B(1) it is provided that after one month the tender offer letter shall be treated as having been withdrawn. That period expired on 1 July 2012. If the tender offer letter must be treated as having been withdrawn the terms and conditions attached to the letter must also be treated as having been withdrawn. There will no longer be an offer and there will no longer be terms and conditions that attach to that offer or to which that offer attaches. I am satisfied that clause B(3a) cannot apply after a period of one month from the letter of offer.

[24] The issue turns on what happened on 28 June 2012 which was within the one month period. Undoubtedly there was an attempted delivery of some items of plant to the site. The evidence for the plaintiff was that unnecessary welfare plant arrived at the site on that day. The evidence for the defendant was that certain necessary stores arrived at the site on that day. In either event it is clear that the items that were sought to be delivered to the site on 28 June 2012 were not accepted on site by the plaintiff on that day. Rather, the items were turned away by the plaintiff and removed to an alternative venue by the defendant.

[25] The defendant contends that the plaintiff was not entitled to reject the items that were delivered on that day and that the site should have been ready as the conditions required. The defendant's schedule at clause 7 provided for full and free access on to site upon commencement of the works. There was no commencement of the sub-contract works by 28 June 2012, nor was it intended that the piling works would commence on that date.

[26] I am satisfied that there was no acceptance of plant on site by the plaintiff on 28 June 2012. The plant came to the site and was turned away. There was no deemed acceptance of the defendant's terms and conditions.

[27] In any event clause B(3a) only applies where the plaintiff *requires* commencement on site before the execution of an agreed contract. Did the plaintiff require the defendant to commence on site prior to 1 July 2012? I interpret the requirement as involving a commencement *of the sub-contract works* on site. That requirement seems to imply that the defendant is not ready, willing or able to commence on site but has been required to do so by the plaintiff without an

executed contract. The defendant contends that there was an arrangement for plant to be delivered to site as agreed with Mr Brown the plaintiff's representative on site. Mr Brown disputed any such arrangement. He had a diary for July 2012 but could not produce his diary for June. There was a question mark over what had happened to the June diary and he gave an explanation for the disappearance of the June diary. I am satisfied that there was no arrangement between the plaintiff and the defendant for the delivery of plant to the site on 28 June 2012. I am satisfied that the plaintiff did not require that the sub-contract works would commence prior to 2 July 2012. I am satisfied that the sub-contract works did not commence prior to 2 July 2012.

[28] Further, there was a dispute as to the nature of the plant arriving on site on 28 June. I am satisfied that the items delivered were considered by the defendant to be necessary for the works and had the plant been accepted on site, whether it was judged by the plaintiff to be necessary plant or not, it would have amounted to acceptance of the defendant's plant for the purposes of clause B(3a).

[29] The defendant commenced work before a written contract was executed. Initially the main contract arrangements contemplated that the sub-contract works would begin in June 2012. That timing was deferred because of problems on the site with another contractor and eventually the start was arranged for 2 July 2012, an arrangement that I am satisfied must have been made before 1 July 2012. That arrangement was made within the one month period of the offer of 1 June 2012, although commencement of the sub-contract works on site actually occurred on 6 July, after the one month period had elapsed. Arguably the commencement was on 2 July when the defendant was assembling the rig delivered on site that day but that was also after the expiry of the one month period. There was no acceptance of plant within the required time and therefore no application of clause B(3a) by which the plaintiff would have been deemed to have accepted the defendant's terms and conditions.

[30] As a result there was no acceptance of the defendant's offer, either in writing or by conduct, and the defendant's terms and conditions did not apply.

The plaintiff's terms and conditions

[31] I turn to whether the plaintiff's terms and conditions applied. The plaintiff issued tender terms on 29 March 2012 and the plaintiff's terms and conditions were included. The defendant issued counter terms with the tender and revised tenders. The plaintiff relies on the plaintiff's standard form Sub-Contract Negotiation Meeting Minute. The form described the purpose of the meeting as to fully discuss the proposed sub-contract works and to agree mutually acceptable terms and conditions in relation to the execution of the sub-contract works. It was stated that should acceptable terms and conditions be negotiated the minutes would form part of any sub-contract formally issued subsequent to the sub-contract negotiation meeting. The minute refers to commencement of any part of the sub-contract works

being deemed by the plaintiff as contractual acceptance of the plaintiff's sub-contract conditions by the defendant.

[32] Mr Cook for the defendant signed the part of the minutes to make certain declarations related to the works. There followed a pre printed statement accepting that the details contained in the document accurately reflected the issues discussed and agreed at the meeting and further agreeing that the document should form part of any formal sub-contract that may be entered into. In the box for signature below appeared in handwriting "pp DA Cook". Although Mr Cook had signed the declarations above this section, he denied that he or anyone on his behalf had made the handwritten entry in the box.

[33] The handwriting was examined and it is accepted that the second entry is not in Mr Cook's handwriting. I am satisfied that he did not sign or authorise the pp signature. Mr Cook knew of the plaintiff's practice of producing these standard form minutes of meetings and he had signed the box containing the disputed signature on a previous occasion in relation to a different contract, although he stated that he would not do so. I am also satisfied that it was Mr Kelly who retained the minutes of the meeting and it must have been he or someone on his behalf who purported to sign on behalf of Mr Cook.

[34] The value of the sub-contract works was stated in the minutes to be £88,997. The defendant contested this entry on the basis that the offer of £88,997 was not made by the defendant until 1 June 2012 and therefore could not have been included in the minutes on 28 May 2012 and must have been inserted later. The plaintiff contended that the offer was made on 21 May 2012 and produced an email from Mr Kelly to Mr Cook dated 21 May 2012 which referred to a purchase order and a revised quotation further to a telecommunication of 17 May 2012. The purchase order was also produced and was dated 21 May 2012 and was in the sum of £88,997.

[35] The defendant contends that the email and the purchase order must have been created later than 21 May 2012. The purchase order had a print date of 15 June 2012 but I do not think that advances the matter as it only tells us that the copy was printed on that date or the original of which this was a copy was printed on that date. The purchase order was not sent to the defendant until after the start of the works. On 1 June 2012 the defendant did submit a revised offer in writing in the sum of £88,997, stated to be based on construction issue drawings. According to the plaintiff the email offer of 1 June was a repetition of what had earlier been agreed further to a telephone call on 17 May and referred to in the email and stated in the purchase order of 21 May 2012.

[36] I am satisfied that there was no acceptance of the plaintiff's terms and conditions by the defendant at the meeting of 28 May. I am not prepared to accept the accuracy of the minutes of meeting which were not signed or authorised by Mr Cook and probably pp signed by Mr Kelly or someone on his behalf. I have not been satisfied that the defendant agreed the plaintiff's terms and conditions at the

preliminary meeting. On the contrary MR Cook's failure to sign the second box must have been deliberate and he was thereby refusing to acknowledge the application of the plaintiff's terms and conditions.

[37] I am satisfied that the stated contract price of £88,997 probably was known at the meeting on 28 May 2012 and that it probably had been generated earlier as a result of exchanges on 17 May and 21 May and confirmed later by an e-mail on 1 June 2012.

[38] I am satisfied that the plaintiff's letter of 2 July 2012 containing the plaintiff's terms and conditions was not received by the defendant until after the sub-contract had come into existence by the defendant having commenced the sub-contract works. The defendant went on site on 2 July and commenced the assembly of the rig on that date and commenced the piling on 6 July. A sub-contract had come into existence, certainly by the commencement of the piling works, and the plaintiff has not established that the plaintiff's terms and conditions were received by the defendant in advance of the commencement, nor that the defendant accepted the plaintiff's terms and conditions. The plaintiff's terms and conditions did not apply to the sub-contract.

Course of dealing

[39] A further issue arose as to whether the course of dealing between the parties might have been such that the terms and conditions of one or other party could be said to have become applicable. That there was a course of dealing between the parties was apparent. In some instances the defendant had accepted the plaintiff's terms and in other cases the plaintiff had accepted the defendant's terms. The approach of the parties changed from time to time depending upon the nature of the risk that existed at a particular time in the course of the contractual relations. I do not consider that the course of dealing between the parties followed a consistent pattern that informs how the present case might be approached.

Outcome

[40] Neither the defendant's terms and conditions nor the plaintiff's terms and conditions applied to the sub-contract between the parties.

[41] On the interpretation of the defendant's exclusion clause, had I been required to apply its terms, I am satisfied that I do not have enough detail of the make-up of the losses to determine how the clause would have applied to the plaintiff's claim. Nor do I have sufficient detail to determine whether the actions of the defendant were the cause of the losses claimed.

[42] It now remains to be determined what terms and conditions did apply to the contract that existed between the parties for the completion of the piling sub-contract works.