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Judgment: approved by the Court for handing down | *Delivered:* **31/01/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

NORTHSTONE (NI) LTD
Plaintiff

v

KPF CONTRACTS LTD
Defendant

WEATHERUP J

[1] The plaintiff claims £30,057.70 for sand delivered to the defendant for use on Gaelic pitches at St Mary's GAA Club at Carrick-on-Shannon. The defendant counterclaims for £47,758 for remedial work on the playing fields on the basis that the sand was not of the specified standard. Mr Aiken appeared for the plaintiff and Mr AJS Maxwell appeared for the defendant.

[2] There are two contracts to consider. The first contract was between the GAA Club as employer and the defendant as contractor for the relaying of the pitches for the sum of €150,000 and the contract included a specification for the sand to be STRI Figure 20 sand.

[3] An email of 5 June 2009 from Chris O'Kane, the defendant's site supervisor, to Stephen Garvey, a representative of the GAA Club, quoted a tender price of €93,750, not including VAT, for the proposed works and set out various items of the agreed works that included '100 mm of sand (as fig 20 of STRI handbook for rootzones)'.

[4] A tender drawing of 1 September Figure 2009 contained 'General Notes' that included a section on the 'Extent of the Works' which provided for "75 mm of sand

supplied and spread over the pitch area - as per Figure 20 STRI Handbook for Rootzones, Sands and Top dressing materials".

[5] Negotiations between the parties concluded with a letter from the GAA Club to the defendant on 19 September 2009 indicating that "as per your tender received based on the drawings and details submitted at a cost of €150,000 inclusive of VAT. The cost provides for a sand layer of 75 mm". A letter from the defendant of 25 September 2009 to the GAA Club set out the works which included "75 mm of sand supplied and spread over pitch area - as per Figure 20 STRI Handbook for Rootzones, Sands and Top dressing materials". The letter was signed by Michael Ferrity, as Director of the defendant and by the Secretary of the defendant and by the Chairman and Secretary of the GAA Club.

[6] A building agreement was entered into between the parties in relation to the works on 30 September 2009.

[7] The reference to STRI Figure 20 is to a booklet published by the Sports Turf Research Institute which describes itself as an independent non-profit organisation whose objectives are to carry out research and provide advice and education in the sphere of sports turf. The booklet includes guidelines for sands for sports turfs. The guidelines are stated to be for grain size and uniformity and are given in the form of a grading envelope that is a set of upper and lower size limits to which sand should conform. The grading envelopes give a recommended and acceptable particle size distribution. If all the data points fit within the central band the sand would be considered to be in the recommended range for the specified application.

[8] In relation to winter games pitches it is stated that recommendations for sands for winter games pitches have largely been based on research attempting to specify materials for the rootzone layer. In general however, it is acceptable to use the criteria in specifying sand for top dressing as well. The guidelines for sand for winter games pitches state that for the sand component for use in rootzone mixes and top dressings see Figure 20.

[9] Figure 20 is described as a grading curve defining recommended and acceptable limits of sand size for soil modification and top dressing of winter games pitches. The grading curve shows, on the horizontal, sieve sizes on a grading curve from 0.063 mm through to 2 mm and on the vertical the percentage passing.

[10] The second contract was between the defendant and the plaintiff as the supplier of sand. It is the defendant's position that the sand was specified as STRI Figure 20 sand. As far as the defendant's evidence was concerned such sand was understood to be the same as Lough Neagh sand from the Toome depot, being the same as the defendant had previously ordered from another company known as Cemex. On the other hand the evidence from the plaintiff's witnesses was that the sand ordered by the defendant was not specified to be STRI Figure 20 sand but rather was to be Lough Neagh sand from Toome, such sand was not Figure 20 sand

as there is no Figure 20 sand in Lough Neagh, the Figure 20 standard could only be achieved by taking Lough Neagh sand and blending it to achieve Figure 20 sand, such a blending exercise would be several times more expensive than the standard price for Lough Neagh sand which was £3.40 per ton in this instance.

[11] Thus the question that arises is whether there was agreement between the defendant and the plaintiff for the supply of Figure 20 sand? It is clear from the tests conducted that the sand supplied was not Figure 20 compliant sand.

[12] The agreement in relation to the supply of the sand was reached between Michael Ferrity for the defendant and Gerry Keane on behalf of the plaintiff. Mr Ferrity had filed an affidavit in response to an earlier application by the plaintiff for summary judgment. In relation to the agreement his evidence was that his first contact with the plaintiff regarding sand was around March 2010. He received a phone call from Phelim Conlon, who worked for the plaintiff, and he was asked if Gerry Keane, a salesman for the plaintiff, could contact him about the defendant ordering sand from the plaintiff. At the same time he received a call from Michael Burke, a friend who owned a quarry, who asked if he would speak to Gerry Keane. Mr Ferrity's evidence was that he spoke to Gerry Keane about the supply of sand by the plaintiff to the defendant. Mr Feherty told Gerry Keane that he wanted Figure 20 STRI sand, that the defendant's sand currently came from a supplier in Toomebridge and that any sand supplied would have to come from Toomebridge, as in his experience this was the proper grade of sand. He stated that Gerry Keane told him to drop a copy of Figure 20 to Michael Burke and he would collect it. He sent a copy of Figure 20 to Gerry Keane and another copy to Phelim Conlon. A few days later he got a call back from Gerry Keane who told him that the plaintiff's sand met the Figure 20 specification and that the sand was known as Zone 4 sand. A price was agreed at £3.40 per tonne. An email was sent confirming agreement and thereafter the sand was delivered.

[13] Mr Ferrity amplified his affidavit evidence to the Court where he stated that he was familiar with Figure 20 sand and had attended a course with STRI in Leeds. He had googled the plaintiff and saw on their site a reference to the STRI criteria for sand supplied by the plaintiff. He stated that it was Gerry Keane who had asked him for a copy of the Figure 20 specification. He instructed the girl in the office to take a copy of Figure 20 from the Handbook and make a copy for Gerry Keane and a further copy for Phelim Conlon. The envelope for Gerry Keane went to Michael Burke who took it to the depot for Gerry Keane. He had discussed STRI Figure 20 with Phelim Conlon and told him that he would send him a copy of the specification. Both Gerry Keane and Phelim Conlon gave evidence that they had not received any copy of any specification.

[14] Catherine McKellan was the defendant's office manager. Her evidence was that she copied the Figure 20 from the Handbook, that she had made 3 copies, that one was for Phelim Conlon and that she delivered it, one was for Michael Burke to deliver to Gerry Keane and one was for the file. She put one copy in an envelope for

the attention of Phelim Conlon and delivered it to his office and she left it under the hatch. It transpired that there was such a system for delivery of mail to Phelim Conlon's office. She made a copy of a compliments slip that accompanied the copy sent to Phelim Conlon. The copy compliments slip was recovered from the file and was addressed to Phelim Conlon and referred to the enclosed Figure 20 STRI and that a copy had also gone to Gerry Keane.

[15] Michael Burke, a lorry driver and quarry owner and a haulier for the plaintiff, gave evidence that he rang Michael Ferrity about sand and Gerry Keane spoke to Michael Ferrity on Michael Burke's phone while they were sitting in Gerry Keane's car at the quarry. He was told that there was a bit of paper to give to Gerry Keane and that he called with the defendant and collected an envelope for the attention of Gerry Keane which he gave to Dympna, one of the office staff, at the plaintiff's offices the next morning. Michael Burke thought that Gerry Keane was driving a Cavalier or Volkswagen Passat at the time.

[16] The evidence of Gerry Keane was that he had tried to make contact with the defendant about the supply of sand in the course of his employment by the plaintiff between 8 March and 29 March 2009. He did not recall Figure 20 being mentioned. He knew a little about STRI but he would have gone to the technical team had there been issues about Figure 20 and he had not done so. Burke's quarry was about 50 miles away and he denied that he had spoken to Michael Ferrity while in Burke's quarry or while using Michael Burke's phone. He drove a Seat when he was working with the plaintiff and not a Cavalier or a Passat. He stated that he did not receive any copy of the Figure 20 from the defendant firm.

[17] It is necessary to look at what happened when things went wrong at the GAA Club. Difficulties emerged at the pitches in May 2010. There was ponding on the surface and an issue arose as to the cause of the problem and concerns were raised about the condition of the sand. Mr Ferrity's evidence was that he called Phelim Conlon and told him what had happened and asked him to send the grading curve for the sand that had been delivered. The grading curve was delivered, being the standard grading curve for Lough Neagh sand that did not comply with the Figure 20 standard. Mr Ferrity stated that the grading was on the low side and that was the cause of the problem with the sand, the size of the particles being too fine and this was causing water to collect on the pitch and to be slow to drain away. As a consequence of this problem with the sand Mr Ferrity stated that the GAA Club withheld a payment of £40,000 from the defendant. Mr Feherty noted that not all of the sand had been supplied from the Toomebridge Depot which was also known as Hutchinson's Site. Sand had been supplied from two other depots. Mr Feherty was of the belief that the sand that he required was only available from the Toome Depot.

[18] Mr Ferrity's evidence was that he became aware of problem when it was reported to him that some of the deliveries of sand were different in colour and sticky in texture. He visited the site and noted that there was more grey colour to the sand and it had a sticky texture. He contacted Phelim Conlon who came back with

the grading curve that did not meet Figure 20. On the site in Carrick-on-Shannon was Paul O'Keefe, an agronomist, who was advising in relation to matters connected with the pitch. Mr O'Keefe and Chris O'Kane took samples for the STRI to do a test and they delivered one of the samples to the plaintiff. Mr O'Keefe left the job and went to Australia. It was said that some of the information about the works was not traced after Mr O'Keefe left. An STRI test was provided on the sand on 20 August 2010 which showed that the sand did not comply with the standard. The sand that was tested was said to closer to the Prunty Mulqueen standard than the Figure 20 standard, that being an alternative standard that is used for some works.

[19] Chris O'Kane, site supervisor for the defendant, remembered the events of May 2010 as he was on paternity leave and he got a phone call about the problem with the sand and went to the site. He witnessed the state of the sand and he rang Mr O'Keefe. Stephen Garvey, the Club representative, was on site. Samples were taken and he lifted twenty different samples in a wheel barrow and they were sent to the STRI and to Michael Feherty and to the plaintiff. At that stage nearly all the pitches were covered in sand and the STRI results were given to Mr O'Keefe who met with Stephen Garvey to decide what to do about the pitches. It was decided, it appears largely by Mr O'Keefe, that the necessary remedial work in order to deal with the problem was gravel banding, which had to be undertaken by cutting strips along the pitches and filling in with gravel and thereby improving the drainage.

[20] A letter of 24 May 2010 from Stephen Garvey referred to discussions regarding the 'unapproved' sand that had been provided. I understand that to mean that it was unapproved because it did not comply with Figure 20. The sand was stated not to comply with Figure 20 because the plaintiff had sent a test result on the general Lough Neagh sand which showed Lough Neagh sand was not Figure 20 compliant.

[21] By a response from the defendant to the GAA Club on 27 May 2010 it was stated that the defendant could confirm that remedial works would take place to rectify the problem of the unapproved sand by means of gravel banding the entire playing field with extra maintenance over the next 5 years. Thus the GAA Club rejected the unapproved sand and adopted the requirement for remedial work.

[22] Phelim Conlon's evidence was that in May 2010 he got a phone call from Michael Ferrity who said that there was a problem relating to the colour of the sand and that it was possibly because the sand was coming from a different depot. He was told there was an agronomist on site but he, Mr Conlon, did not know what an agronomist was. He stated that mention was made by Mr Feherty of the Figure 20 sand and he, Mr Conlon, did not know what that meant. Michael Ferrity told him what STRI was and he, Mr Conlon, said he would speak to Jarlaith Gault, who was their adviser on such matters. He phoned Jarlaith Gault who said that colour issue would be slight and that all sand was the same from all the depots. Mr Gault said that he would email the grading for the sand and he did so.

[23] On 11 May 2010 the grading for the sand was forwarded to Phelim Conlon and on 12 May was forwarded to Michael Ferrity. The document was an analysis dated 19 October 2009. It was not Figure 20 compliant. While the document referred to the specification of the sand as STRI Figure 20 top dressing the evidence was that the document was not claiming to be Figure 20 compliant sand but was comparing the sand with Figure 20. While Mr Conlon agreed that when Mr Feherty rang to complain about the sand he did say that the sand should be Figure 20 sand, when Mr Ferrity had been giving his evidence he did not actually mention that he had raised the Figure 20 requirement at the first complaint. I am satisfied that the issue of Figure 20 sand was raised in May 2010.

[24] In August 2010 the test results demonstrated that the sand was not Figure 20 compliant. This outcome must have been evident to all for some time as the plaintiff's earlier analysis did not purport to be Figure 20 compliant. A letter of 2 September 2010 from the plaintiff to defendant made their case at that stage. It stated that no specification was mentioned to the plaintiff at any stage, that the results of the analysis of the plaintiff's sand were similar to that found by STRI, that at no stage did the plaintiff claim that the sand was Figure 20, that at no stage was the plaintiff made aware that Figure 20 sand was required on site and the plaintiff expressed confidence that the sand supplied would perform adequately as top dressing material.

[25] There was a meeting between the plaintiff's and the defendant's representatives on 23 September 2010 at which there was some confusion. At that meeting the defendant produced the specification for a contract at Aghalee. This was a Prunty Mulqueen specification and thus a different standard to that which was said to be required at Carrick-on-Shannon. The plaintiff had asked for the Carrick-on-Shannon specification and thought that that was what was being provided and therefore that their sand was compliant. I am satisfied that there was confusion about the production of the specification. The defendant asks why would Figure 20 be produced at the meeting when it was known to be the specification relied on by the defendant. The plaintiff says that it is not Figure 20 they want to see but the GAA Club's specification for sand to confirm that Figure 20 was the required standard of sand for the pitches. Michael Ferrity's evidence was that he produced a specification for the Prunty Mulqueen standard to illustrate the mistake made by the plaintiffs. I did not find the evidence or the argument over events at the meeting to be particularly enlightening.

[26] I am satisfied that at different times there was no meeting of minds between the parties. Mr Ferrity was aware of Figure 20 and he knew that Figure 20 was the GAA's specification and he agreed to supply Figure 20 to the GAA. That being so one might expect Mr Ferrity to ask his supplier to provide Figure 20 sand as that was his agreed specification with the GAA Club. He of course says he did ask for Figure 20 sand and Gerry Keane says he did not.

[27] I note that Mr Ferrity thought that Figure 20 sand and Zone 4 sand were the same, that Zone 4 came from the Toome Depot, that he had been getting Zone 4 from Toome from Cemex and that the Zone 4 sand was all Figure 20 sand. It now appears that he was wrong about all of that. The plaintiff and other suppliers excavated the sand from a 4 square mile area in the north of Lough Neagh at the mouth of the Lower Bann. The sand from that area is known as Zone 4 sand but it is not Figure 20 compliant and it has to be blended to reach that standard.

[28] The plaintiff contended first of all that the defendant had financial difficulties during the contract and tried to avoid payment for the sand by later inventing an agreement for Figure 20 sand being required. Secondly, it was suggested that the defendant sought to blame the sand so as not to jeopardise their other GAA contracts, particularly another Centre of Excellence contract in Leitrim. Thirdly, there is another possibility that I have considered and that was that the defendant knew of the Figure 20 specification but sought to agree the supply of a cheaper sand in order to save money and that worked out until there was a problem on site and the condition of the sand was discovered to be less than standard. In that event it might be said the defendant tried to get out of trouble by inventing a requirement for Figure 20 sand having been ordered when that was not the case.

[29] On the balance of probabilities I am satisfied that the defendant ordered Figure 20 sand from the plaintiff. That was the agreed specification for the GAA contract. Michael Ferrity was familiar with the Figure 20 standard. The plaintiffs sales representatives may have heard of Figure 20 STRI but were not familiar with the requirements of the standard. I am satisfied that, despite the confusion about the nature of Zone 4 sand, the order placed by Michael Ferrity was for Figure 20 sand. I accept that Figure 20 was copied from the booklet and forwarded to Gerry Keane and Phelim Conlon although I am not satisfied that the copies actually reached them. When problems arose on site Michael Ferrity raised the requirement for Figure 20 sand.

[30] It is not in dispute that there was non-compliance by the plaintiff of the requirement to deliver Figure 20 sand. That being so the defendant was entitled to reject the sand and the plaintiff is not entitled to be paid for the sand as it was not in accordance with the specification. The plaintiff would have been entitled to recover the sand delivered but recovery of the sand was rendered impossible by the nature of the transaction as it had been spread on the pitches and could not feasibly be collected and returned. The plaintiff must have known that sand that was not of the required standard would be irrecoverable once it had been used on the pitches. The plaintiff is not entitled to be paid for the sand.

[31] The plaintiff contends that the remedial work that was undertaken was not related to the sand. I consider this to be an unnecessary enquiry in the light of the above finding. The plaintiff cannot recover the cost of the sand regardless of the remedial work. The plaintiff could of course have recovered the sand if it had not been absorbed into the work. In any event I am satisfied that it was not the

defendant who required the remedial work to be undertaken but the GAA Club as employer. The GAA Club rejected the sand as unapproved on 24 May 2010. It was undoubtedly unapproved in the sense that the GAA specification was for Figure 20 sand and that is not what was used. Whether it was good sand or bad sand is a different matter. The GAA Club wanted Figure 20 sand and that is not what they got. The Club knew it was unapproved because the plaintiff had sent an analysis of the sand when the issue arose and that analysis did not comply with the GAA specification for Figure 20 sand.

[32] There was then an agreement between the defendant and the employer for the gravel banding scheme on 27 May 2010. The defendant, of course, was required to finish the contract works. At that time the plaintiff was aware of a problem and aware that the defendant was blaming the sand and claiming that the specification was for Figure 20 sand. Mr Ferrity had raised this when he phoned up to complain. The person he spoke to did not know what Figure 20 meant. However the plaintiff's staff were capable of finding out what Figure 20 meant and should have known that Lough Neagh sand was not Figure 20 sand. The plaintiff's staff did not need tests to know that the sand they supplied from Zone 4 was not Figure 20 sand because they had carried out tests before which showed that the sand was not Figure 20 compliant. The plaintiff knew they had a problem if Mr Ferrity was contending that the sand should have been Figure 20 sand. It is surprising that the plaintiff did not do anything to find out what was happening at the works at Carrick on Shannon at the time. If they were to contend that the sand was not relevant to the problem with the pitches they needed to engage and try to influence the solution to their best advantage. However the plaintiff allowed the matter to sit and awaited the outcome of tests which they must have known were going to fail the Figure 20 requirement. The employer rejected the unapproved sand and the defendant had to address the use of unapproved sand and the problems on the site and the agreed remedial work was the outcome.

[33] In any event I am satisfied that there was a colour and texture issue in relation to the sand. That suggests a delivery of sand which was different to the other sand. That raised an issue about the condition of some of the sand. That may have contributed to the problem on the pitches. The lack of engagement by the plaintiff at the relevant time denied them the opportunity to contribute to the investigation of the problem before matters were overtaken by the agreement for remedial work.

[34] Two issues raised particular concerns. First of all there was the evidence for the defendant in relation to the defendant company debts and the dispute with Cemex. Mr Ferrity's evidence was that the Cemex dispute over sand was a driver's mistake in loading the wrong sand. Chris O'Kane produced certain Cemex documents on a contract at Dromore where there was a dispute about the delivery of sand. It was only after further correspondence was produced by the plaintiff that it emerged that a dispute about the non-delivery of Figure 20 sand had also arisen with Cemex in relation to deliveries to Dromore. The dispute related to the specification for the sand that had been ordered. The correspondence that was first

produced by the defendant ended with Cemex appearing to agree to examine the need to undertake remedial work. However the further correspondence obtained by the plaintiff clearly showed that there was a dispute about whether Figure 20 sand had been ordered. It may be that the manager who agreed to consider the remedial work on behalf of Cemex in the first place and who had since left the firm had one view as to what had happened and the manager who had taken over and who wrote the later correspondence had a different view. I am not in a position to adjudicate on the rights or wrongs of the defendant's dispute with Cemex. The Cemex dispute bears the hallmarks of the dispute with the plaintiff. The concern is about the manner in which the nature of the dispute with Cemex emerged in evidence. I am satisfied that Mr Ferrity was not telling the whole truth in relation to Cemex. He must have known that the dispute with Cemex was about Figure 20 sand as he was signing the defendant's letters in the correspondence with Cemex. I am satisfied that he sought to distance himself from any knowledge of the nature of the dispute, which he did not want to be uncovered. Similarly with Mr O'Kane who must have been selective in his production of correspondence from the Cemex file as he left out the later correspondence relating to the Figure 20 element of the dispute.

[35] The second concern relates to the plaintiff's website which carries the STRI logo. Mr Ferrity's evidence was that he looked at the website when first contact was made by the plaintiff. The plaintiff's delivery dockets to the defendant describe the product as "No 1 Top Dressing Sand". The page from the website is misleading. It refers to specialist sands meeting demanding specifications in six product types. Number 1 product type is "Top Dressing Sand".. The website states that "All Northstone Specialist Sands are washed, hydrosized and produced to Sports Turf Research Institute (STRI) standards. The Northstone Technical Team ensures all Specialist Sands suit the specific needs of each and every customer". Under the heading "NORTHSTONE No. 1 - TOP DRESSING SAND (All Grades) the product is described as Northstone "No 1 Top dressing Sand". This would appear to be the product that was being delivered to the defendant

[36] The evidence of Gordon Ellis, Director of Mathest, a Consultancy and Adviser to the plaintiff and part of the group of which the plaintiff company is a part, was that the term Zone 4 sand comes from an old concrete standard that was used for pitches for 30 years or more. In relation to the website he stated that if a customer wanted top dressing sand at Figure 20 standard it would be produced at a price. He agreed that Figure 20 is the only standard for pitches in the STRI booklet but the sand that was being delivered by the plaintiff to the defendant was not a specialist sand. The plaintiff supplied the defendant with what Mr Ellis called "alternative top dressing sand" and not "No 1 Top Dressing Sand' as appears on the delivery dockets.

[37] Keith Wood, the plaintiff's Sales Director, gave evidence that the plaintiff may market the sand as No 1 Top Dressing Sand but it is known as Zone 4 sand. In relation to the website he described it as a marketing exercise. He referred to the No 1 Top Dressing Sand as Lough Neagh sand and this was the sand supplied to all

customers as top dressing sand. He did not agree with Mr Ellis that there was an alternative top dressing sand that was being supplied to the defendant.

[38] I am satisfied that this website is misleading. It states that all "Specialist Sands" are produced to STRI standard. It includes "No 1 Top Dressing Sand" as one of the six specified Specialist Sands. The sand supplied as "No 1 Top Dressing Sand" is not supplied to STRI standard.

[39] The defendant counterclaimed for a number of matters. There was a claim for interest on a payment of £40,000 withheld for two months. I do not propose to allow a claim for interest on a sum withheld. Mr Aiken made much of the pleading that claimed interest on the basis that payment had been withheld up to the date of the Statement of Claim, a total of four years. I put that down to the draftsman who probably was not fully informed. Similarly the affidavit of Mr Ferrity made the same claim and that was probably drafted on a misunderstanding of what Mr Ferrity had said about the withholding of money and not corrected when the affidavit was signed. There was a two month withholding of a payment which may have been for any number of reasons and I have not satisfied that the withholding related to the sand.

[40] The counterclaim also claims the cost of remedial work at £29,358, which was the defendant's estimate of the cost to the defendant of completing the remedial work, although this claim is unnecessary as the cost of the sand supplied by the plaintiff has been disallowed. The cost of the remedial work was not in essence disputed by Paul Campbell who gave evidence on behalf of the plaintiff of an estimate of some £30,000 for the remedial work. In so far as it might have been necessary to consider this item I would accept the defendant's figure. The plaintiff wanted the figure to be analysed by reference to the actual cost of the remedial work undertaken by the defendant and although the cost of the materials could have been identified by the purchase price it would have remained necessary to estimate the cost of plant and labour and other items, as the defendant did in any event.

[41] The replacement sand was delivered by an alternative supplier who was unlicensed, which is beside the point for the purposes of this case. He too supplied Lough Neagh sand. The evidence to be that Mr Ferrity was that because of the problems he had had with sand he now requires the employer to reach agreement with the supplier as to the sand required so the responsibility does not fall on the defendant. Thus Mr Ferrity left Mr Garvey for the GAA Club to agree the replacement sand with the supplier. The Club may agree what they wish. They agreed a certain sand with another supplier and that was the sand that was used in the remedial work. If they specified Figure 20 sand and it was not supplied then the supplier will have a dispute with the GAA Club. If they agreed some other standard for the sand for the remedial work that is a matter for the Club and the supplier. That has got nothing to do with this case.

[42] The defendant counterclaims for additional maintenance work on the GAA pitches for four years, it having been agreed between the defendant and the Club that this was a necessary part of the remedial work. The claim is for £2,200 per annum for 100 tonnes of extra sand to be spread on the pitches in each of the following four years. I am not proposing to allow that figure. The reason I am disallowing it is that while Mr Feherty may choose to duck and dive when he is negotiating with his suppliers and I would expect no less, he is not allowed to duck and dive with the Court.

[43] There will be judgment for the defendant on the plaintiff's claim. The counterclaim for the gravel banding remedial work does not arise to the extent that the defendant has not had to pay for the sand but has recovered the value of the sand by payment of the contract sum on completion of the remedial works. If it were necessary to value the remedial works I would allow £29,258.

[44] This case required a disproportionate amount of time and expense and share of the Court's resources, involving five hearing days. From the beginning it was repeated that the Court considered that the issue concerned the terms of the order agreed between the plaintiff and the defendant. Nevertheless the evidence strayed over satellite issues that were said to be relevant to the dispute. In the hearing of a dispute the representatives are sometimes better placed than the Court to appreciate the significance of particular matters that are not obviously relevant and the Court is often reluctant to press too far the assertions of Counsel that a particular matter will prove to be relevant. It is appreciated that in the conduct of a case there are occasions when it is legitimate for some matters not to be revealed to the Court until a later stage of the proceedings. Only after the event might the Court be best informed as to the necessity for a line of inquiry undertaken during the hearing.

[45] The responsibility rests on all sides in litigation to avoid unnecessary expense and delay. If one side appears to be insisting on taking the case down unnecessary routes the other side may seek to apply a brake by taking steps that might fix the other side with added costs, even if the other side is ultimately successful. In the course of the hearing the concern about the course of the case led to the parties being reminded that the Court would be prepared to take into account Calderbank letters when it came to consider the award of costs. Neither party heeded the strictures that were issued.

[46] Under Order 62 Rule 3(3), if the Court decides to make an order for costs, the Court shall order the costs to follow the event, except where it appears to the Court that some other order should be made. In the present case the "event" is the success of the defendant in defeating the plaintiff's claim.

Under Order 62 Rule 7(4)(b), in awarding costs to any person, the Court may order that, instead of his taxed costs, that person shall be entitled to a gross sum specified in the Order in lieu of those costs.

[47] Under Order 1 Rule 1A (3) the Court is obliged to give effect to the overriding objective of the Rules when it exercises any power under the Rules or interprets any Rule. The overriding objective of the Rules is to enable the Court to deal with cases justly, which includes, as far as practicable, saving expense, dealing with the case in ways that are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party, ensuring that it is dealt with expeditiously and fairly and allotting to it an appropriate share of the Court's resources.

[48] In considering the issue of costs in the proceedings I seek to give effect to the overriding objective as required to do under Order 1 Rule 1A (3). The parties required a disproportionate amount of time, incurred disproportionate expense and took up a disproportionate amount of the Court's resources. The award of costs should seek as far as practicable to restore some proportionality to the matter. That will not be achieved by awarding one party their costs to be taxed as that party will recover unwarranted costs. I propose to establish some proportionality between the time occupied and the expense incurred on the one hand and on the other hand the amount in dispute, the importance of the case and the complexity of the issues. Every case is important to the parties involved but this case had no greater importance. Nor did it involve complex issues, resolving to a factual question over the terms of the order placed for the sand. The value of the claim was some £30,000. The total costs of both parties should not exceed one half of the value of the claim. Accordingly I propose to award costs to the defendant and under Order 64 Rule 7(4)(b) specify the costs at £7,500 plus VAT (to include all outlay) in lieu of taxed costs. I would have made the same award of costs to the plaintiff had the plaintiff succeeded in the action and recovered costs, but for different reasons.