Neutral Citation No. [2012] NIQB 22 | *Ref:* **WEA8444**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **29/02/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN

VP plc

Plaintiff

-v-

THOMAS MEGARRY and JOAN MEGARRY

trading as T G MEGARRY

Defendants

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WEATHERUP J

[1] The plaintiff claims against the defendants for £26,155.50 for the hire of a machine described as an HB80 Hydroburst, which hiring was charged from 1 February 2008 to 31 March 2008. Mr Smyth appeared for the plaintiff and Mr Dunford for the defendant.

[2] The machine was supplied by the plaintiff to the defendants on a trial basis in January 2008. It was intended that the defendants would consider whether they would purchase the machine and in the meantime a hiring charge would be imposed. A fax of 28 January 2008 stated the rate for the hire at £2,650 per week which was said to be the standard rate. The fax also stated - "Should you decide to purchase the Burster within 7 days of receipt we would offer to deduct the weeks

hire charge from the purchase price". A delivery note dated 29 January 2009 indicated delivery of the machine to the defendants along with a list of accessories.

[3] An invoice was furnished by the plaintiff to the defendants dated 31 January 2008 for hiring charges from 30 January to 31 January 2008, a one day rate of £530, plus a delivery charge of £400, which charges with VAT totalled £1,092.75. A note at the bottom of the invoice stated "Hire suspended 30. 1. 08". The note was in the handwriting of a member of the plaintiff's office staff. The evidence on behalf of the plaintiff was that a hiring charge was imposed for one day in January and the note indicated, not that hire was suspended permanently but that hire was suspended for that day and the charge was imposed for the next day.

[4] The second defendant gave evidence on behalf of the defendants. The evidence was that notice had been given to the plaintiff by the defendants within the seven day period of the defendants intention to purchase the machine and that requests were made to the plaintiff for a price for the machine and no response was received from the plaintiff. On the other hand the plaintiff's evidence was that no notice had been given by the defendants within the seven day period of an intention to purchase the machine.

[5] An invoice was issued by the plaintiff to the defendants in respect of the period to 14 February 2008 for two weeks rental of the machine and a further invoice was issued by the plaintiff to the defendants in respect of the period to 29 February 2008 for a further two weeks rental of the machine.

[6] The plaintiff's office maintained a log of the telephone activity through the office. An entry for 8 February 2008 referred to Russell Fairhurst of the plaintiff company to 'call back' with the words "off hire" under the heading 'reference'. The defendants relied on the entry as confirmation that the machine was "off hire" at that time. Mr Fairhurst described it differently. His evidence was that the log operated an automated reminder system that had been activated within the office to remind him of the expiry of the seven day period for the hirers notice of intention to purchase. The entry in the log therefore was a record that he was to have been reminded to call the defendants in response to the expiry of time. Mr Fairhurst stated that he probably did call the defendants but could not remember.

[7] A further fax on 19 March 2008 from Frank Gowdy of the plaintiff company stated - "With reference to your recent discussions with Russell Fairhurst in respect of the purchase of the HB80 Hydroburst currently in your possession on rental I am pleased to confirm our offer below ….", following which was a description of the machine and the accessories and a total price of £88,871. The fax continued - "Assuming that all rental and transport charges are paid up-to-date (£23,320 plus VAT and transport) then the above price can be discounted down to £75,540 excluding VAT a saving of £13,331 excluding VAT. This offer can only be held for five days from today following which rental charges will recommence."

[8] The fax of 19 March 2008 was addressed to the second defendant and referred to her recent discussions with Russell Fairhurst in respect of the purchase of the machine "in your possession on rental". Any such recent discussions were not recorded on the internal telephone log. It was accepted by the plaintiff that not all calls were recorded on the log, whether incoming or outgoing calls, and mobile phone uses were not recorded on the log. It is of note that the fax indicated that the machine was still regarded as being on rental and that the proposed price for the purchase of the machine was subject to a discount which was stated to be on the basis that outstanding rental charges were paid. The fax also stated that if the offer was not accepted in five days the rental charges would "recommence", which the defendants relied on as indicating that rental charges had been suspended, they say from 31 January 2008 when notice had been given of intention to purchase. The plaintiff contends that rental charges were to recommence in the event that there was no notice to accept the offer within the specified time. Thus the plaintiff says that there were contacts between the plaintiff and the defendants in March 2008 about the purchase of the machine and that this was the first time that the defendants had made contact about a purchase since the delivery of the machine. On the other hand the defendants say that the fax was the first response that the defendants had received to their earlier notice of 31 January 2008 of intention to purchase. In any event the plaintiff's offer of 19 March was not accepted by the defendants.

[9] The internal telephone log records contact on 28 March with Frank Gowdy about the sale of the machine. On 31 March the plaintiff issued a further invoice for rental charges for four weeks in March. A further fax was sent by the plaintiff to the second defendant on 2 April 2008 that stated - "With reference to your recent discussion with Frank Today I am pleased to confirm our revised prices including the additional items requested as detailed below…." followed by a description of the machine and additional accessories and the total price of £96,171. It was then stated - "Assuming that all rental and transport charges are paid up-to-date (£23,220 plus VAT and transport) then the above price can be discounted down to £82,840 excluding VAT a saving of £13,231 excluding VAT. Please provide as soon as possible to enable the invoice to be raised."

[10] It is to be noted that this fax stated that it was a response to recent discussions with Frank (Gowdy). The description of the accessories was expanded and the price had increased. It was stated that the proposed price was subject to the rental charges being paid, in which event a discount was to be given on the price quoted and this time the defendants were asked to respond as soon as possible.

[11] There was no entry in the internal telephone log between the entry of 28 March referred to above and the date of the fax on 2 April. However a log was also available of Mr Gowdy's mobile phone calls. That log recorded a call by mobile phone on 1 April from Mr Gowdy to the defendants lasting 3 minutes 38 seconds and a further mobile call on 2 April, the day of the fax, from Mr Gowdy to the

defendants lasting 3 minutes 35 seconds. The plaintiff says that the revised quote arose out of contacts with the defendants who sought a price that included the extra items. Mr Gowdy's evidence was that he was in Northern Ireland that weekend, the plaintiff being based in England, and thus the calls were made on his mobile phone. On the other hand the defendants agree that they asked for a price for the extra accessories but say that they never intended to buy the extras. The defendants maintain that there were attempts to agree the purchase of the machine but they could not get a response from the plaintiff.

[12] Following the fax of 2 April the internal telephone log on 18 April stated that a message had been sent by office staff to the defendants about finance for the machine; on 21 April a message had been sent by office staff and under the heading 'reference' the words "Chased Joan", Joan being Mrs Megarry the second defendant; on 21 April Russell Fairhurst was to call back about finance; on the same day Russell Fairhurst was also recorded as "Chased Joan"; on 25 April office staff were recorded as "Chasing payments"; on 30 April Frank Gowdy was to call back about the sale. These entries indicate telephone activity on the part of the plaintiff concerning the sale of the machine and finance in respect of the sale.

[13] A further fax on 5 May 2008 to the second defendant from the plaintiff began "As per our discussions please find revised prices below….", followed by a description of the machine and accessories, now largely the same as those which appeared in the first quotation on 19 March 2008. The price was stated to be £88,871 less an agreed discount of £13,331 giving a total price of £76,540 plus VAT and "Discount assumes that all outstanding rental and transport charges amounting to £22,280 plus VAT are paid up-to-date". The difference between the charges stated in this fax and the earlier fax arose because the payments due on the invoice of 31 January 2008 had now been discharged and reduced the rental charges accordingly. Again the fax made reference to discussions and to the revised quote being subject to discharge of the outstanding rental. No rental had been charged for the period April and May, which was said by the plaintiff to be for commercial reasons.

[14] The plaintiff's evidence was that after the issue of the fax of 5 May 2008 the defendants asked for an accessory known as an expander to be added to the price and this was agreed at a cost of £5,900. The plaintiff issued an invoice on 25 May 2008 for what they believed was an agreement with the defendants for the purchase of the machine in the sum of £81,440 to which VAT had to be added. This total represented the addition of the price of the expander to the earlier quote. The invoice did not make reference to any discount or to rental charges.

[15] According to the plaintiff there was an agreement with the defendants in May 2008 for the sale of the machine and accessories and that the price was made up as set out in the fax of 5 May with an increase of £5,900 for the enhancer. However the plaintiff's evidence was that the invoice price included the breakdown appearing in

the fax and included a £13,331 discount that was subject to the discharge of the rental charges then outstanding of £22,260. On the other hand the defendants contend that the agreement represented a purchase price as stated in the invoice made up of the price quoted in the fax with the addition of the price of the enhancer. Thus the defendants stated that the discount of £13,331 had been taken into account and there had in effect been a waiver of the rental charges of £22,260.

[16] Against that background I am satisfied of a number of matters. First of all, the defendants did not notify the plaintiff of an intention to purchase the machine on 31 January 2008. Whatever exchanges took place at that time I am satisfied that they were not sufficient to convey to the plaintiff that the defendants had an intention to purchase the machine. Secondly, the plaintiff did not consider that they were on notice from the defendants to purchase the machine until March 2008 when there were telephone calls that resulted in the plaintiff producing the first quotation. Thirdly, the defendants had the opportunity to talk to the plaintiff's representatives and in March and April and May there were contacts between the parties by telephone. The faxes refer to such discussions. Mr Gowdy's mobile phone log records two calls lasting over seven minutes. The internal telephone log set out the contacts or attempted contacts. Fourthly the defendants sought to obtain from the plaintiff a price for extra items on 2 April 2008 and this arose out of the mobile calls with Frank Gowdy on the day of and the day before the fax. The defendants explanation that the request for a price for additional items was an academic exercise and was never intended to result in the purchase of the items is not accepted. Fifthly the plaintiff made it clear in the faxes that the price included a discount that was conditional on payment of the rental. The defendants could not have failed to be aware that the plaintiff's price required discharge of the rental charges. Whatever the defendants thought had been achieved on 31 January 2008 when the second defendant spoke to a representative of the plaintiff, the rental was being charged thereafter. Notice of such charges appeared by the issuing of invoices. The defendants stated that the invoices would have been important had they not purchased the machine as rental charges would then have been due. However the defendants were also on notice of rental charges being imposed after 31 January 2008 from the quotation faxes that made it clear that the price included a condition in relation to the discharge of the rental.

[17] I am satisfied that the machine was sold and purchased in May 2008 for £81,440 plus a discharge of the rental. The plaintiff clearly understood that to be the position. The defendants may mistakenly have believed the £22,260 had been waived at that time. I have not heard evidence of any discussions that took place at the time. The legal position depends on the intention of the parties. That intention is to be construed objectively. Any objective assessment in the present case must conclude that the agreement was that the rental charges had not been waived. The plaintiff contends that the defendants must have known that the invoice price had been reached by a calculation based on the discharge of the rental. It is difficult to

understand how it could have been otherwise. However I proceed on the basis that the defendants were mistaken as what had been agreed.

[18] Chitty on Contracts (30th ed) at paragraph 5-071 discusses mistake where the parties are at cross purposes and states "In most cases the application of the objective test will preclude a party who has entered into a contract under a mistake from setting up his mistake as a defence to an action against him for breach of contract. If a reasonable person would have understood the contract in a certain sense but a party 'mistakenly' understood it in another, then, despite his mistake, the court will hold that the mistaken party is bound by the meaning that the reasonable person would have understood. But where parties are genuinely at cross purposes as to the subject matter of the contract, the result may be that there is no offer and acceptance of the same terms because neither party can show that the other party should reasonably have understood his version. Alternatively the terms of the offer and acceptance may be so ambiguous that it is not possible to point to one or other of the interpretations as the more probable, and the court must necessarily hold that no contract exists." This is not a case where there could be said to be no offer and acceptance of the same terms as I am satisfied that the defendants should reasonably have understood the price to require discharge of the rental. Nor is this a case where the terms of the offer and acceptance are so ambiguous that it could be said that no contract exists.

[19] Chitty on Contracts at paragraph 5-077 discusses refusal of specific performance for unilateral mistakes not known to the other party. It is stated that even though a mistake by one party has no effect at common law, for example because the party neither knew nor had reason to know of it, it may be a ground on which the court would refuse to order specific performance when it would otherwise have done so. The text cites Barrow v Scammell (1881) 19 ChD 175.182 –

> "It cannot be disputed that courts of equity have at all times relieved against honest mistakes in contracts, where the literal effect and the specific performance of them would be to impose a burden not contemplated and which it would be against all reason and justice to fix, upon the person who, without the imputation of fraud, has inadvertently committed an accidental mistake; and also were not to correct the mistake would be to give unconscionable advantage to the other party."

[20] In all the circumstances I propose to apply an equitable remedy in the present case. The equitable remedy will be that the consequences of not paying the rental, which the defendants mistakenly believed had been waived, should be that the defendants forfeit the conditional discount which had been awarded by the plaintiff on condition that the rental be paid. That discount was £13,331. There will therefore be judgment for the plaintiff for £13,331 together with interest at 4% from 1 June 2008. The plaintiffs will have their costs of the proceedings. The costs fall in the

County Court scale. I allow the plaintiff the High Court fees that have been incurred and the costs of the witnesses travelling from England.