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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

(COMMERCIAL) 2018 No 103377

BETWEEN:

NORTHERN IRELAND HOUSING EXECUTIVE

Plaintiff

and

DIXONS CONTRACTORS LTD

Defendant

HORNER J

A. INTRODUCTION

[1] On 28 August 2018 Dixon Contractors Ltd ("the defendant") served upon the Northern Ireland Housing Executive ("NIHE") a Notice of Intention to Refer to an Adjudication. The relief sought under the notice was:

> "A Declaration that there is an ambiguity/inconsistency on and between the *Code of Practice – Specification, Survey and Installation of PVC-U Windows and Sidelights"* revised in March 2016 which stated that "*Finishing Trims are to be Cellular extruded PVC-UE Trims"* and "Drawing Nos A(02.11)08, A(02.11)09, A(02.11)14, A(02.11)18, A(04.12)03 and A(04.12)04 which do not provide that finishing trims are required."

[2] The Adjudicator appointed by the RICS, Mr Richard Silver, gave his decision on 5 October 2018. He declared that:

> "(i) There is an ambiguity/inconsistency as and between the *Code of Practice – Specification, Survey and*

> *Installation of PVC-U Windows and Sidelights* revised in March 2016, which states that *Finishing Trims are cellular extruded PVC-UE Trims* and Drawing Nos A(02.11)08, A(02.11)09, A(02.11)14, A(02.11)18, A(04.12)03 and A(04.12)04 which do not provide that finishing trims are required; and
>
> (ii) NIHE shall pay my fees in the sum of £9,480 + VAT although Parties are jointly and severally liable."

[3] The NIHE, as it was entitled to do under the contract served a Notice of Dissatisfaction and referred the dispute to this court for a rehearing. Clause 93.3(8) of the Contract between the defendant and NIHE provides:

> "The Adjudicator's decision is binding the Parties unless and until revised by the Tribunal and is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. The Adjudicator's Decision is final and binding and neither party has notified the other within the times required by this Contract that he intends to refer the matter to the Tribunal."

The Tribunal referred to is this court.

[4] All counsel are to be congratulated for the concise and well-focussed arguments, both written and oral, which were addressed to this court.

B. BACKGROUND FACTS

[5] In May 2016 the NIHE and the defendant entered into a contract substantially in the form of an NEC 3 Term Service Short Term Contract (April 2013) as amended to carry out construction related works (including surveys) in relation to the replacement of existing windows with new double-glazed units to the NIHE's properties in the South area of Northern Ireland. The contract is entitled:

> "Lot 1 – South – Low Rise Double-Glazing 2016 CTO20."

The key terms of the contract between the parties are set out below.

[6] The ambiguity or inconsistency asserted by the defendant is that the Drawings provided do not include a requirement that trims be installed by the contractor. The Code of Practice does provide that:

> "Finish Trims are to be cellular extruded PVC-UE Trims …"

The contract provides at page 7 of the Service Information that:

> "The Service Information should be a complete and precise statement of the *Employer's* requirements. If it is incomplete or imprecise there is a risk that the *Contractor* will interpret it differently from the *Employer's intention.* The Service Information should state clearly the part of the service which is to be carried out by the *Contractor* and which does not require the *Employer* to issue a Job Request. This part of the service is printed in Part 1 of the Price List. Information provided by the *Contractor* should be listed in the Service Information only if the *Employer* is satisfied that it is required, is part of a complete statement of the *Employer's* requirements and is consistent with the other parts of the Service Information."

[7] The Service Information, which clearly forms part of the Contract Documents, comprises the following:

> "The specification …
>
> The NIHE Code of Practice …
>
> The NIHE Standard Details …
>
> Document E3 for the LRDLG 216 Window Fenestration Schedule drawing (together the "Service Information")."

[8] Thus it is clear that the Code of Practice provides for finished trims, whereas the Drawings do not. The defendant wrote to NIHE on 25 July 2018 asking for instructions to change the "Project-Specific Drawings" which form part of the Service Information on the basis that "it is simply untenable for this company to be asked to carry work to such a large number of properties when such a fundamental irregularity exists within the Service Information". There is a dispute as to whether the Drawings are project specific or generic but I do not consider that this should alter the outcome of the dispute before this court.

[9] The NIHE replied on 8 August 2018 denying that there was any inconsistency or ambiguity between the Code of Practice and the Drawings which required an instruction changing the Service Information.

[10] It is common case that such an instruction has the potential to result in claim(s) for compensation for what the defendant will claim is the additional work it will have to carry out as a consequence of any instruction to provide trims for the windows. It is noteworthy that in his decision the Adjudicator records that the NIHE's position is that the cost of providing and installing the trims was according to the NIHE not a matter which the NIHE was at risk under this contract. The Adjudicator notes:

"I provide no decision on this as it falls out with the dispute referred to me. As I have decided above, the issue before me is simply whether or not there is an inconsistency/ambiguity between the said documents".

C. RELEVANT CONTRACTUAL TERMS

[11] Under the heading "Price List" there is the following statement:

> "Part 1 of the Prices PL is not used under this Contract. The Employer is required to issue a Task Order for all work."

[12] Clause 11.2(6) states:

> "Service Information is information which either:
>
> - Specifies and describes the service; or
> - States any constraints on how the Contractor Provides the Service; and is either
> - In the document called `Service Information'; or
> - In an instruction given in accordance with this Contract."

Clause 12.5 of the Contract (added by amendment) provides as follows:

> "This Contract (including all Appendices) will be read as a whole, provided that this Contract shall be interpreted in a manner that is consistent with the provisions of Appendix 12 (Clarifications). However, in the event of their being any conflict, divergence, discrepancy or inconsistency between any provision of one of the documents comprised in his Contract and any provision of another document comprised in this Contract, the relevant conflict, divergence, discrepancy or inconsistency will be resolved by applying the following order of precedence (in descending order of priority) such that the provision of the document with a higher priority prevails in each case:
>
> (a) Appendix 12A (Tender Clarifications).
>
> (b) The Contract Data.
>
> (c) Appendix 1 (Document A – Additional Conditions to the NEC 3 Term Service Short Contract (April 2013) Conditions of Contract).

(d) Appendix 2 (Document B – Description of Service).

(e) Appendix 5 – Document E – Specifications).

(f) Appendix 3 (Document C – Constraints).

(g) Appendix 7 (Document G – Contractor Performance Management).

(h) Appendix 4 (Document D – Price List).

(i) Appendix 10 (Quality Submission).

(j) Appendix 9 (Document I – Form of VAT self-billing agreement).

(k) Appendix 8 (Document H – Strategic ICT Agreement).

(l) Appendix 11 (Fair Payment Charter).

The higher priority interpretation will be adopted only to the extent required to resolve the relevant conflict, divergence, discrepancy or inconsistency. In all cases specific provisions will take priority over general statements covering the same subject matter."

[13] Clauses 14.2 - 14.8 provide the following:

"14.2 The Employer may give an instruction to the Contractor which changes the Service Information or a Task Order.

14.3 The Employer's acceptance of a communication from the Contractor or of his work does not change the Contractor's responsibility to Provide the Service.

14.4 The Employer after notifying the Contractor, may delegate any of the Employer's actions and may cancel any delegation. The reference to an action of the Employer in this contract includes an action by his delegate.

14.5 If the Employer's agent is not identified on Contract Data, the Employer may appoint one after notifying the Contractor of his name. The Employer's agent acts on behalf of the Employer with the authority

set out in the Contract Data. The Employer may replace the Employer's agent after he has notified the Contractor of the name of the replacement.

14.6 During the service period the Employer may issue a proposed Task Order to the Contractor. The Contractor prices each proposed Task Order using the rates and prices from the Price List and submits it with a Task Programme, to the Employer for acceptance. Prices for work not included in the Price List are assessed in the same way as compensation events. The Employer consults the Contractor about the contents of a Task Order before he accepts and issues it.

14.7 A Task Order includes:

- a detailed description of the work in the Task;
- a price and total list of the items of work in the Task;
- the starting and completion dates of the Task; and
- the amount of delay damages for the Task.

14.8 The Contractor does not start a Task until the Employer has accepted the Priced Task Order and programme, and instructed a Contractor to carry out the Task. The Contractor does the work so that a Task is completed on or before the Task Completion Date. Prices for work not already included in the Price List are added to the Price List."

[14] Clause 60.1(1) provides:

"The following are Compensation Events:

(a) The Employer gives an instruction changing the Service Information unless the change is in order to make a Defect acceptable."

[15] Document B entitled "Description of the Service" provides a detailed description of the work to be undertaken in respect of each scheme of work to be carried out by the Contractor. Paragraph 1.7 provides:

"The Service to be carried out to meet the Employer's Programme of Works, and all Schemes are to be

completed as per the date specified in the relevant Task Orders and in accordance with the Specifications."

[16] The Price List provides at D2 as follows:

> "All rates are deemed to include for Providing the Service in accordance with Tender Documents including the Works Information and Site Information.
>
> All rates are deemed to include for the provision of all parts and equipment required to complete the item description whether it is stated or not."

[17] The heading entitled "Specific Rules and Conditions relating to the Double-Glazing" includes the following:

> "Windows (fixed and opening lights) and side lights shall be deemed to include all gasketry, ironmongery, furniture, fixing brackets, bedding, pointing, weather-sealing, trims, cills, end pieces, foam fillers and the like. Window safety restrictors are also deemed to be included.
>
> Further, … the purposes of clarity the attention of tenderers is again drawn to the extent of the works deemed to be included within the rates entered against the window requirements, ie:
>
> … finishing trims, including all internal and external beads, cill boards of relevant width and end pieces (silicone pointing all exposed edges) …"

[18] The Specifications provide at paragraphs 13.19-13.23 as follows:

> "13.19 Finishing trims are to be Cellular excluded PVC-UE trims/beads and must conform to BS7619 …
>
> 13.20 Trims are not to be used to simply provide or enhance the water tightness of the window or any perimeter joints. Finishing trims shall be used to neaten the interface between frames and opening, they are only to be used in conjunction with the "plaster-patching/making good situations as stated above. All joints are to be left neat and tidy with acceptable tolerance of plus or minus 2/3mm of normal joints/trim abutments and sealed with a sealant of matching colour.

13.21 Internal finishing trims shall be compatible with material of the window frame and must be colour-matched.

13.22 External finishing beads/trims shall satisfy the above criteria and be of an exterior quality material used in accordance with the manufacturer's instructions. External beading is not required where the external reveal had been re-plastered to match existing.

13.23 For the avoidance of doubt, windows shall be measured and fitted as described in Section 2 above and beads/trims should only be fitted to the opposite side of the determined cover/overlap – see Table 2(2). Only in exceptional cases where reveals are determined as flush will internal and external beads/trims be acceptable."

[19] It is alleged that this issue about whether trims were included or excluded with the windows arose quite some time before August 2018. For example, on 31 July 2017 the defendant wrote setting out the breakdown of the rate for external PVC trim. NIHE replied stating that there was no entitlement to any additional costs in respect of external trims. The defendant responded on 1 August 2017 stating that that was a compensation event and that the defendant would be claiming the additional costs in its assessments. So the issue of whether any claim for compensation is time barred is a live one, but not one that troubles this court.

[20] The parties were able to agree the following:

(i) The Codes of Practice L10 and L12 come within Appendix 5A.

(ii) The Drawings come within Appendix 5C.

(iii) The Price List comes within Appendix 4.

(iv) The Specifications are contained within Appendix 5.

(v) The document entitled "Prices for Double Glazing Installations" forms part of the Price List within Appendix 4.

THE ARGUMENTS ADVANCED BY THE NIHE AND THE DEFENDANT

The NIHE Argument

[21] The NIHE's submission is that there is no inconsistency/ambiguity as to the defendant's Scope of Work as defined in the Contract when read as a whole. The

Drawings which are relied upon by the defendant are not site or Task Order specific nor are they inconsistent with the defendant's obligations under the Contract.

The Defendant's Submission

[22] The defendant makes it clear that the dispute which was referred to the Adjudicator was whether or not an ambiguity and/or inconsistency exists specifically as between (only) the Specifications and the Drawings and the Adjudicator was not asked to consider the Price List or the order of hierarchy of contract documents and did not have the necessary jurisdiction to do so. The only issue that falls to be determined by the court is the issue of whether or not the Adjudicator was wrong in law to determine that an ambiguity/in consistency exists as between the Specifications and the Drawings.

[23] I do acknowledge that these are short summaries of the respective arguments and they most certainly do not do justice to the detailed arguments which were addressed to the court. I can confirm that I have taken into account all the arguments which were advanced both orally and in writing by both sides although for reasons of brevity I have not included all them in this judgment.

DISCUSSION

[24] There is no doubt that there is a difference between the Code(s) of Practice that forms part of the Service Information and the Drawings. The former provides for trims "where necessary" and the latter do not show any trims at all. However, this court is not determining whether there is a difference between the Code of Practice and the Drawings, because there clearly is one. Rather it is this court's task to determine if there is an ambiguity and/or inconsistency as a result of the difference between the Code of Practice and the Drawings.

[25] An ambiguity is defined by the Shorter English Dictionary as "an ability to be understood in more than one way." An inconsistency is defined as "an incompatibility or discrepancy". Both ambiguity and inconsistency do not mean simply comparing one word or phrase with another and determining whether there is a difference. With both ambiguity and inconsistency context is all important.

[26] In McGeown v Direct Travel Insurance [2004] 1 All ER (Comm) 609 Auld LJ said:

> "A court should be wary of starting its analysis by finding an ambiguity by reference to the words in question looked at on their own. And it should not, in any event, on such a finding, move straight to the contra proferentem rule without first looking at the context and, where appropriate, permissible aids to identifying the purpose of the commercial document of which the words form part."

Lewison on the Interpretation of Contracts (6th Edition) at page 530 states:

> "The court is reluctant to hold that parts of a contract are inconsistent with each other, and will give effect to any reasonable construction which harmonises such clauses."

It goes on to say that this approach is explained by Lord Goff in Yen Yeh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd [1989] 2 HKLR 639 PC:

> "Their Lordships wish to stress that to reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified in circumstances where the two clauses are in truth inconsistent. In point of fact this is likely to occur only where there has been some defect of draftsmanship. The usual case is where a standard form is taken and then adapted for a special need, as is frequently done in, for example, the case of standard forms of charter party adapted by brokers for particular contracts. From time to time, it is discovered that the typed editions cannot live with the printed form, in which event the typed editions will be held to prevail as more likely to represent the intentions of the parties. But while the document has been drafted as a coherent whole, repugnancy is extremely unlikely to occur. The contract has, after all, to be read as a whole; and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction."

[27] Finally in Wood v Capita Insurance Services Ltd [2017] UKSC 24 Lord Hodge giving the judgment of the Supreme Court said at paras [10]-[15]:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds [1971] 1 WLR 1381*, 1383H–1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989*, 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the

prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896*, 912–913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky case [2011] 1 WLR 2900*, para 21f. In the *Arnold case [2015] AC 1619* all of the judgments confirmed the approach in the *Rainy Sky* case: Lord Neuberger of Abbotsbury PSC, paras 13–14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299*, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn [2010] 1 All ER 571*, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter ***1180** whether the more detailed analysis

commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn [2010] 1 All ER 571*, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.

14. On the approach to contractual interpretation, the *Rainy Sky* and *Arnold* cases were saying the same thing.

15. The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation."

[28] The issue of whether there is an ambiguity and/or inconsistency between the Specifications, and the Code of Practice in particular, and the Drawings is one that can only be determined in the context of the contract between the NIHE and the defendant because both documents are part of that contract and it is this contract which regulates their relationship. The narrow approach advocated by the defendant and urged upon this court by the defendant is both artificial and purposeless. It is artificial because the issue of whether there is an ambiguity or inconsistency can only be determined against the contract as a whole. The Code of Practice and the Drawings are contractual documents and form an integral part of the contract between the NIHE and the defendant. They must be viewed in the context of this contract as a whole. They cannot be viewed in isolation because the court is resolving a matter of contractual interpretation and to do so it must look at the contract as a whole and the relevant documents in their contractual context. All the cases make it clear that the court should adopt a broad approach and look at any difference in the context to the entire contract in order that it can judge whether there is in fact an inconsistency and/or an ambiguity. In other words, it must eschew the narrow approach advocated by the defendant. It is also purposeless if the sole aim is to determine whether or not there is a difference between the Code of Practice and the Drawings if this difference does not give rise to an ambiguity and/or inconsistency in terms of the overall contract. The fact that there may be a difference between two parts of the contract is irrelevant and of no consequence if that difference has no contractual significance. Insofar as the Adjudicator confined himself solely to comparing the Code of Practice with the Drawings, he erred. He should have looked at the Code of Practice and the Drawings in the context of the entire bargain which had been entered into between the NIHE and the defendant.

[29] I am prepared to accept that there is a difference between the Code of Practice, the Specifications and the Drawings, but in the overall context of the contract there is no ambiguity or inconsistency. The reasons for my conclusion are five-fold. They are:

(i) The Drawings, whether they are generic or site specific, come with notes. These notes qualify the Drawings. One of these notes requires the windows to be fitted as per "NIHE Codes of Practice" L10 (Timber) and L12 (PVC), the relevant Codes of Practice. The Codes make it clear that trims are to be used, when necessary, "to neaten the interface between frames and opening". It follows that there is no inconsistency or ambiguity. Trims are required in the circumstances provided for in the Codes of Practice. Any reasonable reading of the Drawings and the Codes of Practice in the context of this Contract must be on the basis that the fitting of windows required trims where the circumstances set out in the Codes of Practice demand them.

(ii) The Service Description, Price List and the Specifications make it clear when trims, external or internal are required and when they are not. Further these all provide that the inclusion of trims, where necessary, is included on the defendant's price. This must necessarily mean that such work comes within the contract scope.

(iii) Paragraph 1.7 of Document B, the description of the Service, states that:

> "The Service is to be carried out … in accordance with the Specifications."

These include both the Drawings and the Codes of Practice. The Codes of Practice make it clear that in certain circumstances trims must be installed.

(iv) The Notice to Tenderers entitled "Prices for Double-Glazing Installations" made it clear that rates for window replacement were on the basis of "full accordance with the NIHE documents Code of Practice L12 …". This is further spelt out in the discussion of the extent of the works deemed to be included within the rates entered against the window replacements ie "…finishing trims …" This provides the provision of trims in certain circumstances.

(v) It is clear from a perusal of all the Contract that the inclusion of trims, where necessary, must be included in the defendant's Work Scope. As Mr Singer QC submits, "it is work which is indisputably part of the Contract Scope".

[30] Indeed, it is difficult in all the circumstances to see how any reasonable contractor tendering for this work could have reached the conclusion that the inclusion of trims, where necessary, in the installation of replacement windows, was not included in the tender price.

Conclusion

[31] It was inevitable that once the court adopted a broad rather than a narrow approach to the issue between the parties, that the NIHE was bound to succeed. There is no ambiguity and/or inconsistency on the issue of whether or not trims are included or excluded in the price when one looks at the Drawings and the Codes of Practice in the context of the entire contract.

[32] In the circumstances and for the reasons which I have given, I consider that the Adjudicator erred. I will hear counsel on the issue of what is the appropriate relief I should grant and the issue of costs.