Neutral Citation No. [2014] NIQB 75

Ref: WEA9261

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

Delivered: 10/4/2014

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEENS BENCH DIVISION (COMMERCIAL)

NORTHERN IRELAND HOUSING EXECUTIVE

Plaintiff

-v-

COMBINED FACILITIES MANAGEMENT

Defendant.

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WEATHERUP J

[1] The plaintiff claims a declaration that an adjudication decision of 10 September 2013 be set aside. There were no pleadings in the case and no evidence was called. The parties and the Court were content to proceed by reliance on the papers generated in the reference to adjudication and the decision of the Adjudicator. Mr Humphreys QC appeared on behalf of the plaintiff and Ms Danes QC on behalf of the defendant.

[2] The parties entered a standard form contract, the NEC3 Term Service Short Contract (September 2008) Conditions of Contract. Amendments were made to the standard form and have given rise to the difficulty that has emerged.

[3] Section 5 deals with payment. The relevant clauses as amended are set out below. In particular the issue concerns the interaction of clauses 50.14, 51.3 and 52.2.

> "50.1 The contractor assesses the amount due and, by each assessment day, electronically applies to the employer for payment of the change in the amount due since the last payment. There is an assessment day in each week from the starting date until the week after the later of the end of the service period and the latest date for completion of the Task.

50.11 The amount due is

- where a quantity is stated for item in the Price List or Job Request, the quantity of the work is calculated using the rules set out in the Price List and an amount calculated by multiplying the quantity which the contractor has completed by the rate.

- any tax which the law requires the employer to pay to the contractor and

- other amounts to be paid to the contractor, less

- amounts to be paid by or retained from the contractor (including low performance damages if applicable)

50.14 No later than five (5) days after the submission of an application for payment, *the employer amends any assessed amount due and notifies the contractor of the revised amount by giving written notice of intention to withhold payment.* This notice will specify the amount of the payment proposed to be made, to what the amount of the payment relates and the basis on which the amount is calculated together with the amount or amounts being withheld and the ground or grounds for withholding each amount. *The employer then pays the contractor the revised amount.*

50.15 Where the employer does not give any written notice correcting an assessed amount due the employer shall pay the contractor the amount of the assessed amount due.

51.3 Where the employer intends to recover monies by withholding and/or deduction from sums due to the contractor then not later than one day before the date for payment of the amount from which the withholding and/or deduction is to be made, *the employer gives a written notice of intention to withhold payment to the contractor* which specifies the amount proposed to be withheld and/or deducted from that amount, the ground or grounds for such withholding and/or deduction and the amount of the withholding and/or deduction attributable to each ground."

> 52.1 *The employer retains or sets off any amount owed to it by the contractor under this contract* which has fallen due and payable against any amount due to the employer (sic) under this or any other contract between the employer and the contractor.
>
> *52.2 If the payment or deduction of any amount to be retained or set off is disputed any undisputed element of that amount is paid and the disputed element is dealt with in accordance with the dispute resolution provisions of this contract.*
>
> 52.3 If the payment or deduction of any amount to be retained or set of is not disputed then the employer will issue a Job Request to the value of the payment or deduction."

[4] A dispute arose in relation to four maintenance contracts between the plaintiff as employer and the defendant as contractor. On 20 June 2013 the defendant made an application for payment of £110,032.88 plus VAT. On 21 June 2013 the plaintiff issued a withholding notice. The notice stated that the plaintiff proposed to deduct the sum of £5822.21 plus VAT as overpayments arising from incorrect prices applied against several SOR (Schedule of Rates) codes and £3254.41 plus VAT as low performance damages. The deductions were stated to be made under clause 52.1.

[5] The defendant referred the matter to adjudication. The redress sought included a declaration that, on a proper construction of the contract, where NIHE believe it is entitled to set of any amount owed to it by CFM, and an element of that amount is disputed, that disputed element may not be withheld, but is to be dealt with in accordance with the dispute resolution provisions of the contract.

[6] The conclusion of the Adjudicator, as stated at paragraph 110 of the decision, was that "Logically any undisputed amount is set off from any proposed payment to CFM and any disputed amount, in this case £9,076.62, cannot be set off but must be resolved under the contract dispute resolution provisions".

[7] The scheme of the payment provisions of the contract is as follows. First of all the contractor makes an application for payment. This may be described as the 'assessed amount' as provided for under clause 50.1. There are four items which make up the amount due, as set out in clause 50.11, and they include the deduction of sums due from the contractor, which include low performance damages.

[8] Secondly, the employer may amend the contractor's assessed amount and issue a notice of intention to withhold payment, as provided for under clause 50.14. The employer makes a deduction of the amount to be withheld. The payment may be described as the 'revised amount'. The employer is here taking two steps, he is giving notice of intention to withhold payment and he is deducting the amount to be withheld from the payment to the contractor.

[9] The third process involves the employer proposing to withhold or deduct a payment under clause 51.3. The employer serves a notice of intention to withhold payment. This clause is not limited in operation to amendment of the contractor's assessed amount. The clause must relate to matters other than those covered by clause 50.14 which deals with the contractor's assessed amount and the employer's revised amount. It could cover sums that are due to the employer under the present contract and which have not been included or cannot be included by the employer in his revision under clause 50.14. It may also be intended to include other sums due to the employer on other contracts with the contractor.

[10] A further matter of note in respect of clause 51.3 is that while it provides for the service of a notice of withholding it does not in terms provide for the withholding of the amount specified. That is to be contrasted with clause 50.14 which does provide expressly for the withholding of the difference between the contractor's assessed amount and the employer's revised amount. Looking at clause 51.3 alone, it may be implicit that, with the service of the notice to withhold a stated amount, it is intended that the employer withholds the amount.

[11] The fourth process arises under clause 52 where the employer sets off an amount due to the employer under the present contract against a sum due to the contractor under the present or any other contract. However clause 52.2 provides that if the amount which is proposed to be set-off is disputed then the disputed amount is not to be deducted by the employer but is to be dealt with under the dispute resolution provisions. To that extent clause 52.2 is in conflict with clause 50.14 which provides that the employer deducts the difference between the employer's revised amount and the contractor's assessed amount, which difference may of course be disputed by the contractor.

[12] *Lewison's Interpretation of Contracts* (5th ed.) at paragraph 9.08 under the title 'Internal Inconsistency' states that if a clause in a contract is followed by a later clause which destroys the effect of the first clause, the later clause is to be rejected as repugnant and the earlier clause prevails. If, however, the later clause can be read as qualifying rather than destroying the effect of the earlier clause, then the two are to be read together, and effect given to both.

[13] The defendant contends that there is no such inconsistency. It is said that clause 52.2 qualifies clauses 50.14 and 51.3 rather than destroying their effect. Thus the defendant contends that where the contractor disputes a proposed deduction by the employer the disputed amount must be paid and the dispute

referred to adjudication. However clause 50.14 contains no such limitation but provides expressly that the employer should only pay the employer's revised amount and not the contractor's assessed amount, that is, the employer withholds the reduction indicated by the employer, even if that amount is disputed by the contractor. The defendant's approach may however be applied more readily to clause 51.3 where it is not stated expressly that the employer may withhold the amount stated in the withholding notice. I am satisfied that there is an inconsistency between clause 50.14 and clause 52.2.

[14] If there is an internal inconsistency the rule stated in *Lewison* at paragraph 9.08 provides that the first clause prevails. On the basis that clause 50.14 prevails the plaintiff would withhold the disputed payment. The effect of the rule has been described as producing an arbitrary result. *Megarry and Wade's Law of Real Property* describes the rule as quaint. *Chitty on Contracts* refers to it as out of keeping with the modern construction of documents. Lewison J in his judicial role has described it as an ancient rule of thumb and a matter of last resort.

[15] The rule appears to have its origins in an ancient case, namely Slingsby's Case (1587) 5 Co Rep 186. An estate was conveyed to the grantees as joint tenants and by a subsequent covenant the grantor dealt with the grantees severally. Thus there was an issue as to whether the grantees held as joint tenants or severally. The words of the covenant were rejected on the basis that a grantor cannot covenant separately with each of several joint tenants because joint tenants have no separate interests.

[16] A similar issue arose in the same context in the relatively modern case of Joyce v Barker Brothers Builders and Others [1980} 40 P & CR 512. A deed provided that the parties were to hold the property in fee simple "as beneficial joint tenants in common [in] equal shares". It was stated that where there is the grant of an estate to beneficial joint tenants the words should not be cut down by anything that follows, except by qualification or proviso.

[17] The rationale for the rule was considered by Millet J in Martin v Martin (1987) 54 P&CR 238. A property was conveyed to three family members as "beneficial joint tenants in common in equal shares". The wording produced a conflict between the creation of a joint tenancy or a tenancy in common. It was held that on the true construction of the phrase, the words 'in equal shares' constituted words of severance or provided a controlling context for the word 'joint' and consequently created a tenancy in common and not a joint tenancy.

[18] In the alternative Millett J considered the internal inconsistency rule and reached the same result. Millett J summarised the basis of the rule as follows –

> "In my view if there is any logical basis for this rule of last resort, it must be that where there are two inconsistent provisions in a deed which cannot be reconciled, they are to be

> treated as if they were contained in separate deeds executed by the same parties, one after the other, and in the same order in which the two inconsistent provisions are to be found in the deed. That, of course, explains the difference in treatment between a deed and a will; for, in the case of two inconsistent wills made by the same testator, the later revokes the former and prevails, whereas in the case of two inconsistent deeds the result will depend on *whether the grantor had put it out of his power* by the first deed to bring about the consequences purported to be effected by the second."

[19] The operative words for present purposes are 'whether the grantor has put it out of his power'. Thus, if the first grant is to give away an interest, the grantor cannot later purport to grant a further interest. Millett J found that the grantors had declared a beneficial joint tenancy and had not put it out of their power to sever the joint tenancy so the second inconsistent phrase, namely 'tenants in common in equal shares', constituted a severance of the equitable joint tenancy and the creation of a beneficial tenancy in common.

[20] The rule has also been considered in the context of commercial agreements. In Mark Taylor v Rive Droite Music [2004] EWHC 1605 (Ch) Lewison J dealt with a dispute between a music producer and a production company. Inconsistent clauses provided for a 2 year agreement or a 3 year agreement. Lewison J concluded that the clauses could be read together and that one part gave effect to the real intention of the parties. It was not necessary to revert to the internal inconsistency rule but Lewison J stated that, had he been otherwise unable to reach a conclusion, the "rule of thumb would still have a useful (though very rare) part to play".

[21] Lewison J referred to *Chitty on Contracts,* then the 29th Edition, which described the rule as "a mere rule of thumb, totally unscientific and out of keeping with the modern construction of documents". Lewison J stated that the editors of Chitty did not refer to the only two modern cases in which the rule had been considered (namely Martin and Joyce above) and ignored the rationale for the rule of thumb as explained by Millett J (above). He concluded that nevertheless he agreed that it was an absolutely last resort, if it was to be applied at all. The editors of the 31st edition of Chitty seem to have been unmoved by Lewison J's comments because they have repeated the text in the 31st edition at paragraph 12.078.

[22] I appreciate the rationale for the rule when applied to the grant of an interest which puts it out of the power of the grantor to grant a further interest. That rationale does not translate readily to commercial agreements generally. Certainly I am satisfied that it does not translate into the present construction contract. To apply the rule to the present contract would produce an arbitrary result.

[23] The defendant on the other hand contends for the application of the contra preferentem rule. *Lewison* states the contra preferentem rule at paragraph 7.08 as being that where there is a doubt about the meaning of a contract, the words will be construed against the person who put them forward. There are stated to be two main formulations of the principle. One concentrates on the party who put forward the clause, the other concentrates on the party who benefits from the clause, in each case the matter being decided against that party. In the present case the party introducing the amended clauses was the plaintiff. The party who benefits from the application of clause 50.14 would be the plaintiff. The party who benefits from the application of clause 52.2 would be the defendant. I have not found this rule helpful in the present circumstances.

[24] I return to the general imperative to read together the clauses of an agreement and determine if the clauses can be interpreted compatibly one with the others. The internal inconsistency rule as formulated by *Lewison* also seeks to establish if the second clause can be read as qualifying the first. If the earlier clause allows for the deduction of an amount stated in an employer's notice of withholding and the second clause does not allow for deduction when the stated amount is disputed by the contractor, where does the later clause operate? Which clause gives effect to what must be taken to be the real intention of the parties? The introduction of the amended clauses was not inadvertent. Amended clause 50.14 provides for the employer withholding the amount of the employer's revision, with no qualification in respect of disputed amounts. Amended clause 52.2 provides for the employer paying an amount proposed to be withheld where that amount is disputed. If clause 50.14 were to prevail it would render clause 52.2 ineffective where the employer's revised assessment is disputed. If clause 52.2 prevails it creates practical difficulties for the employer in establishing the amount to be deducted on the revised assessment.

[25] The introduction of the later clause must be taken to have been intended to qualify the earlier clause or it would be of no effect. Accordingly, I reach the conclusion that if clause 52.2 is to be afforded a meaning then any dispute by the contractor as to the amount must go to adjudication and the deduction of that disputed amount must not be made by the employer. Clause 50.14 must be read accordingly. Similarly, to the extent of any inconsistency, clause 51.3 should also be read accordingly. I find for the contractor.