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THE SUPREME COURT

O'Higgins C.J.
Griffin J.
Hederman J.

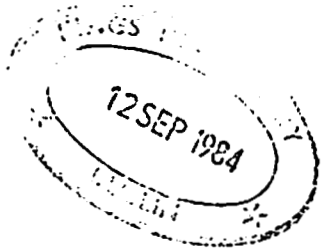
2637

207/82

H. A. O'NEIL LIMITED

Plaintiffs

and



JOHN SISK AND SON LIMITED

JUDGMENT delivered the 26th day of July 1984 by O'HIGGINS C.J.

The Defendants, a well-known construction company, were the main contractors engaged in the building of the Cork Regional Hospital. The Plaintiffs, who engage in the designing and installation of mechanical services, were sub-contractors for the mechanical works involved. It was part of the arrangement for the appointment of sub-contractors that tenders for particular works would be invited only from nominated firms. It was on that basis that the Plaintiffs tendered for the mechanical services contract. The conditions under which they tendered were contained in a document which, for convenience, I will refer to as "the Conditions of Tender". Among the conditions set out in this document was provision to the following effect:

"2. The successful tenderer shall enter into a sub-contract with the main contractor in the form of a sub-contract issued under the sanction of and approved by the Federation of Builders, Contractors and Allied Employers of Ireland and the Sub-Contractors and Specialists' Association (2nd edition reprinted 1968) with the following additions and alterations."

Subsequent paragraphs in the document (3, 4 and 5) contained the additions and alterations. Of these only paragraph 5 is relevant. This paragraph is in the following terms:

"5. The sub-contractor shall be entitled to price and wage increases as if Clause 3 of the General Conditions (variations arising from legislative enactments), the Clause in quotations in Clause A2.04 (xi) and Clause A2.04(Xii) of the Particular Conditions of Contract for the Main Contract were set out herein....."

The "Clause 3" which was mentioned was a clause in "the General Conditions" attached to the Main Contract between the Defendants and the Cork Hospitals Board who were the employers in the building project. As indicated, it dealt with alterations after tender in the

cost of the performance of the Contract due to legislation or Government action. Its operation has no relevance to the issues arising in these proceedings. Clause A2.04(xi) which for convenience I will refer to as "Sub-clause(xi)", is a clause in the Particular Conditions of the Main Contract and contains provisions expressed to apply to "any variation in the price of the materials or any part of the materials incorporated in the Works, or any variation in the wages, which may take place subsequent to the 'date of the tender' as defined in Sub-clause (xii)." Sub-clause (xii) defines "date of tender" and "date of submission of tender" as "the date which is 14 days prior to the latest date for submission of tenders".

The first question which arises for determination is whether Sub-clause (xi) and the defining Sub-clause (xii) should be substituted for the Price Variation Clause in the printed form of the specified Sub-Contract or whether the intention was that these Sub-clauses would operate merely to alter the existing Clause in the printed form. In dealing with this issue the learned

trial Judge said in her judgment:

> "In my opinion the word 'herein' in Clause 5 refers to the conditions of tender. The entire of Clause 5 is not in substitution for Clause 24 of the Sub-Contract."

She was here referring, of course, to the Clause already quoted in the Conditions of Tender which referred to Clause 3 of the General Conditions and to Sub-clauses (xi) and (xii). The reference to Clause 24 was a reference to the Price Variation Clause contained in the printed form of the specified Sub-Contract. She went on to say: (I quote)

> "It was open to the draughtsman of the Conditions of Tender to provide at the commencement of Clause 5 as he did in Clause 4, that the following Clause be substituted for Clause 24 of the Sub-Contract. He did not do so. Therefore Clause 24 of the Sub-Contract is not to be deleted but remains part of the Sub-Contract save in so far as it is altered by Clause 5 in the Conditions of Tender."

I regret that I cannot accept the conclusion arrived at by the learned trial Judge. In the first place it seems to me improbable that it was intended that price variations would be dealt with under two clauses in the

Sub-Contract. In the second place I note that Sub-clause (xi) is expressed to have a general application to all variations in prices and wages. The opening words of the Sub-clause make this quite clear in that it is stated that its provisions "shall apply in relation to any variation in the price of the materials or any part of the materials incorporated in the Works, or any variation in the wages which may take place subsequent to the date of tender as defined in Sub-clause (xii)." It then provides in detail for the manner in which all such variations are to be dealt with in the course of carrying out the Contract. This seems to me to make it impossible for another Clause also dealing with such variations to co-exist. Further, an examination of the two Clauses indicates differences in their provisions. Sub-clause (xi) read in conjunction with Sub-clause (xii) applies to variations occurring subsequent to a date which is "14 days prior to the latest date for submissions of tenders," while Clause 24 deals only with variations occurring after the actual date of tender. Further,

Sub-clause (xi) applies to variations in wages, while Clause 24 applies to variations in "wages and other emoluments and expenses". Other differences are to be found in the reference to customs and excise duties, import licence fees, and orders under the Control of Imports Acts in Sub-clause (xi) and the absence of such reference in Clause 24. For these reasons I have come to the conclusion that the Conditions of Tender provided for the conclusion of a Sub-Contract in the form specified but with a Prices and Variations Clause in the terms of Sub-clause (xi) in place of Clause 24.

Having come to this conclusion I now turn to its effect on the rights of the parties to these proceedings.

Following the acceptance of their tender it was necessary for the Plaintiffs to enter into a Sub-Contract with the Main Contractors, the Defendants. The Conditions of Tender provided that this Sub-Contract should be in the printed form issued and sanctioned by the Federation of Builders, Contractors and Allied Employers of Ireland with the additions and alterations specified in the

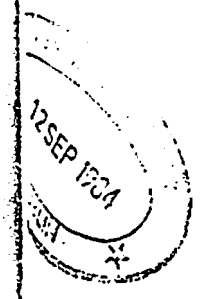
Conditions of Tender. In fact the blank spaces in the printed form were filled in to describe the parties, the works and other appropriate particulars and the form was then executed unaltered by the parties. It cannot be doubted that the Sub-Contract form thus executed did not represent the true contract and intention of the parties. This contract and intention was contained in the sub-contract form as read and altered in accordance with the Conditions of Tender. In my opinion it is in accordance with these two documents read together that the rights and obligations of the parties fall to be determined.

I now turn to a consideration of the Plaintiffs' claim. This is a claim that a sum of £18,500 has been wrongfully withheld from them by the Defendants. This claim arises under the following cirucmstances.

Provision was made in the Main Contract for a cash discount of 5 per cent in favour of the Contractor on prompt payment of amounts certified to be due to the Sub-Contractor. Paragraph 11(b) of the Sub-Contract carried this right into the Sub-Contract. It provided

that if the Contractor paid the Sub-Contractor any amount certified to be due, less authorised retention money, within seven days of the Contractor being paid, a discount of 5 per cent could be retained by the Contractor. This discount arrangement was well known in the building trade and normally worked well and caused no problems. In fact the Plaintiffs in tendering for the mechanical works Contract were aware of the 5 per cent discount arrangement and tendered a sum which expressly included "a cash discount to the Main Contractor for payment within the stipulated time". By reason of the tender making provision for the discount, no problem arose as long as prices and wages remained at the level upon which the tender was based. A problem did arise, however, when variations occurred in prices and wages. On such occurring certificates were issued authorising payment which included payments on account of variations in respect of which the Plaintiffs as Sub-Contractors could not have provided for a discount in their tender. Under Clause (xii)(b) on prompt payment the Contractor was entitled to

and did deduct 5 per cent. This had the effect that the Plaintiffs were only being paid or indemnified to the extent of 95 per cent of the monies involved in relation to increases in respect of materials and wages. In an effort to meet this situation the Consulting Engineers added one-nineteenth to all price variations which, if acceptable to the Architects, would have allowed for the Contractor 5 per cent and would at the same time have given full indemnity to the Plaintiffs in respect of the variation. This would have meant that the full cost of price and wage variations would have been borne by the Employer. The Architects, however, refused to certify for this one-nineteenth and the result has been a shortfall in the Plaintiffs' payments in respect of variations to the extent that the 5 per cent has been retained by the Contractor as his discount. It is on this account that these proceedings have been brought.



It is not in issue that the Defendants are entitled under Clause (xii) to deduct 5 per cent. The Plaintiffs complain, however, that unless some corresponding allowance is made to them the effect of the deductions is

to reduce their profit. This, they claim, to be contrary to the Contract and they rely on Sub-clause (5) of Clause 24 which is in the following terms:

> "No addition to or deduction from the Sub-Contract sum made by virtue of this Clause shall alter in any way the amount of profit of the Sub-Contractor included in the Contract sum."

In my view this claim by the Plaintiffs cannot succeed. It is based entirely on Sub-clause (5). No other provision can be of assistance to the Plaintiffs. Even if in some way Sub-clause (5) of paragraph 24 could be said to be part of the Sub-Contract and to have survived the substitution of Sub-clause (xi) as the provision governing variations, the variations involved would not have been made "by virtue of this Clause" as required by Sub-clause (5) of Clause 24, but would have been made by virtue of Sub-clause (xi). In fact, in my view, the entire of paragraph 24 is inoperable according to the true intent of the parties and has been replaced by Sub-clause (xi).

In my view, the Plaintiffs' claim as put forward in

these proceedings fails. At the same time I think it right to add that in fairness the sums involved should have been paid to the Plaintiffs and I would hope that such payment will eventually emanate from the Employers.

I would allow this appeal.