

PRIORITY

1984 No. 132 SS. ¹²⁷

THE HIGH COURT

IN THE MATTER OF THE ARBITRATION ACTS 1954 AND 1980

AND IN THE MATTER OF AN ARBITRATION BETWEEN

PRIORITY CONSTRUCTION LIMITED

Claimants

and

ENNIS URBAN DISTRICT COUNCIL

Respondents

CASE STATED BY VERNON D. HARTY PURSUANT
TO SECTION 35 OF THE ARBITRATION ACT 1954

Judgment of Gannon J. delivered the 30th July, 1984.

By an agreement dated the 19th April, 1974 the Council for the Urban District of Ennis (to whom I shall refer as "the employer") employed Priority Construction Limited (to whom I shall refer as "the contractor") for works in relation to the Ennis Main Drainage Scheme. The agreed price was determined by the acceptance by the employer of the tender submitted by the contractor. The tender, bill of quantities, drawings, specifications, and general conditions were incorporated with and form part of the contract. The general conditions provide for reference to arbitration in cases of dispute in the event of non-acceptance of rulings to be made by the engineer nominated in the contract.

Following such a reference the arbitrator Mr. Vernon D. Harty made an interim award based upon estimates made by him. He deferred making his final award for the purpose of considering and obtaining the opinion of

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this Court on questions involving rulings upon the interpretation of the general conditions of the contract. Mr. Harty accordingly submitted a case stated to this Court pursuant to Section 35 of the Arbitration Act 1954 in which the questions as posed appear to be concerned solely with the liability of the employer to pay to the contractor interest on the sums of money assessed in the interim award. It is recited in the Case stated that the opinion of this Court should be obtained as to "the liability of the employer to the contractor for financing costs under the contract as claimed by the contractor." It transpired in the course of submissions that the "financing costs" being claimed by the contractor were expenses incurred or losses sustained by him in the form of interest charged to him on money borrowed by him or interest which would have accrued to him had he not been forced to resort to invested capital. To avoid any ambiguity or confusion which might arise from the reference to the amount of interest on sums determined as payable under the interim award it has been agreed that the following question be considered by this Court namely:

"Whether the contractor is entitled to recover from the employer pursuant to Clauses 12, 42, and 51 and 52 of the general conditions of the contract in addition to the amounts of expenditure awarded by me under those clauses the cost by way of interest or financial charges

"if any incurred in meeting such expenditure on the basis that such interest or financial charges are constituent elements of the expressions "reasonable cost", "expense", and "reasonable prices" as used in such clauses?"

The particular clauses of the general conditions from which the chosen expressions or terms were extracted in this question are as follows:

"12 (6) Unless otherwise admitted by the engineer or subsequently agreed as a charge against the employer all claims made under a notice given by the contractor under sub-clause (2) of this clause shall if the contractor so requires be referred to an arbitrator as provided by Clause 68 hereof who if he is satisfied -

(a) that any of the physical conditions or artificial obstructions named in the notice were not such as an experienced contractor could have reasonably foreseen and

(b) that the additional work or use of the additional construction plant specified in the notice were necessitated thereby

shall award that such reasonable cost as in his judgment

" he shall determine of doing the additional work and using the construction and plant specified in the said notice and of suffering any unavoidable delay or interference shall be paid by the employer to the contractor Provided always that (i) if the engineer shall have accepted the quotation of additional costs under sub-clause (4) of this Clause the arbitrator shall not award any sum in excess of or less than such quotation except in respect of any matter expressly excluded therefrom and (ii) if the arbitrator is satisfied as to (a) above and is not satisfied as to (b) above he may in making his award disallow the cost of any additional work or use of any additional constructional plant which he considers to have been unnecessary and award such lesser sum as he thinks fit."

"42 (1) Save insofar as the contract may prescribe the extent of portions of the site of which the contractor is to be given

possession from time to time and the order in which such portions shall be made available to him and subject to any requirement in the contract as to the order in which the works shall be executed by the employer will with the engineer's written order to commence the works give to the contractor possession of so much of the site as may be required to enable the contractor to commence and proceed with the construction of the works in accordance with the programme referred to in Clause 14 hereof (if any) and otherwise in accordance with such reasonable proposals of the contractor as he shall by notice in writing to the engineer make and will from time to time as the works proceed give to the contractor possession of such further portions of the site as may be required to enable the contractor to proceed with the construction of the works with due dispatch in accordance with the said programme or proposals (as the case may be).

If the contractor suffers delay or incurs expense from failure on the part of the employer to give possession in accordance with the terms of this clause the engineer shall grant an extension of time for the completion of the works

" and certify such sum as he considers fair to cover the expense incurred which sum shall be paid by the employer."

"52 (1) The engineer shall determine the amount (if any) to be added to or deducted from the sum named in the tender in respect of any extra or additional work done or work omitted by his order. All such work shall be valued at the rates set out in the contract if in the opinion of the engineer same shall be applicable. If the contract shall not contain any rates applicable to the extra or additional work then reasonable prices shall be fixed by the engineer."

The question is essentially one of interpretation in the context of the contract and not solely a matter of the ordinary meaning of words according to their usage in every day speech. The first feature of the contract is that the drawings, specifications and bill of quantities are prescribed by the employer and are special to the works to be undertaken. The schedules of materials and prices and the tender are prepared specially for the works to be undertaken by the contractor having regard not only to the drawings and specifications but also to the general conditions. The general conditions are in fact general, are not prepared specially for the works to be undertaken, and may be applicable to works

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of a minor or relatively inexpensive project as much as to large scale and highly expensive projects. The general conditions make no allowance for distinction between a contractor with an availability of an extensive range of equipment, plant and machinery, an extensive skilled and unskilled workforce, and ready availability of capital and cash on the one hand and on the other hand the smaller contractor dependent upon hiring facilities for equipment, plant and machinery, recourse to the labour market for availability of skilled or unskilled labour, and dependent upon credit facilities for cash and capital. It is conceivable that those parts of the contract that had been prepared by the parties especially for the works to be undertaken and the project to be achieved might in their interpretation be subject to factors manifestly in the contemplation of the parties though not clearly expressed. That is to say there might be some existing fact or circumstance known to both parties and though not expressed so taken for granted by both as forming part of the consensus of the contract that it could affect the interpretation of the terms of agreement prepared by them. But general terms which are and are adopted as general terms in their interpretation are not susceptible to any inferences or meanings special to the parties and to their circumstances but must be construed solely in the manner expressed having regard to the

terms of all the conditions as well as of each one of them.

Before examining the purpose and terms of Clauses 12, 42 and 52 of the general conditions it should be noted that the contract price to be paid by the employer to the contractor for the entire and completed work required to be done is a total sum as calculated by the contractor and proposed by him in his tender and accepted by the employer. In arriving at that price the contractor must take into account all the obligations and contingencies provided for in the general conditions in order to arrive at a figure which will give him adequate profit or reward for his undertaking. The general conditions are drawn for the purpose of achieving a consensus between the parties in relation to all usual and most of the unusual aspects of projects and works of the nature undertaken. They are specific in relation to foreseeable and ascertainable costs and expenses, and in relation to these the onus is placed upon the contractor to estimate and calculate and take them into account in preparing his price for tender. As example of some of these see Clauses 5, 11, 14 to 17 inclusive, 23 to 26 inclusive, 31 to 38 inclusive. Clause 12(1) of the general conditions is as follows:

"The contractor shall be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his tender for the

"works and of the rates and prices stated in the price to bill of quantities and the schedule of rates and prices (if any) which rates and prices shall except insofar as it is hereinafter otherwise provided, cover all his obligations under the contract and all matters and things necessary for the proper completion and maintenance of the works."

In relation to expenses he must incur and to costs he must discharge before completion and final payment he must also take into account the fact that the contract price will be paid only in monthly instalments subject to conditions and deferment of final payment. (see Clauses 60, 61 and 62). The general conditions also make some provision for circumstances which might affect the work which might not be foreseeable or though foreseeable are not capable of being evaluated or predicted. Of their nature these could not have been taken into account in the calculation of the contract price. The only provision which can be made for such circumstances is the agreement upon procedures for resolving whatever difficulties they may involve. Variations in cost of labour and materials and stoppages and delays are circumstances of that nature. Clauses 12, 42, and 52 which are the clauses the subject of consideration in the case stated relate to circumstances of such nature that they could

not be provided for in the contract.

There is a clear and significant distinction between sub-paragraph 1 of Clause 12 already quoted and the provisions of sub-paragraphs (2) to (7) of that clause. Such sub-paragraphs are concerned with the circumstances when in the course of execution of the works the contractor "shall encounter physical conditions (other than weather conditions or conditions due to weather conditions), or artificial obstructions which conditions or obstructions could not have been reasonably foreseen by an experienced contractor and the contractor is of opinion that additional work or the use of additional constructional plant will be necessary which would not have been necessary if the physical conditions or artificial obstructions had not been encountered...." In such event the contractor must make a claim submitting particulars of these unforeseen difficulties, and of his proposals for work, plant, and materials, and the extent of consequential delay anticipated. He must also furnish a quotation of the cost, if calculable, and if not, an estimate of the additional cost to him and of the costs of the delay.

Under the provisions of Clause 12 the additional or extra expense to be incurred as a consequence of such unforeseen circumstances are to be borne ultimately by the employer. But, through the engineer, the employer

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must get adequate notice of and opportunity of evaluating the claim and may not be required to pay more than the engineer admits or than may be awarded by the arbitrator as the reasonable cost. In my opinion "reasonable cost" in this clause and in this context and having regard to the entire provisions of Clause 12 means a sum of money which will ensure that the contractor is at no loss as against his contract price, and that the employer by whom the payment must be met will not be charged any more than such competitive price as might have been negotiated had the parties not been bound to each other by the contract. It seems to me that what would be reasonable in this context should relate to the standard of rates and prices pertaining with contractors generally rather than with circumstances personal to the contractor, the party to the contract.

I do not think it can be ruled as a matter of law that such "reasonable cost" should or may include such financing charges as hire payments for extra plant, however probable, or interest on borrowed capital, which is less likely, or lost dividends from withdrawal of invested capital, which is highly unlikely. Having regard to the proviso to paragraph (2) of Clause 12 and the provisions for prior notice and estimates and the provision in paragraph (5) for weekly vouching and checking of cost it seems unlikely a figure including financing cost factors would be claimed as a

competitive price or would be accepted as reasonable cost.

Clause 42 which also provides for an eventuality which the contractor could not evaluate for the calculation of his tender price is different in its purport and effect from Clause 12. Clause 42 deals with circumstances under the control of the employer which, if not provided for, could devalue the contractor's price as tendered after its acceptance.

In this instance it seems to me because the parties are bound to each other by the contract the circumstances personal to the contractor are of

importance. Having regard to the nature of the many factors which the

contractor must take into account and evaluate for the purpose of proposing

his tendered price delays in completion caused by the employer could have

serious financial consequences for the contractor. The calculation of

expenses as provided for in Clause 42 must in my opinion relate to the

personal circumstances of the contractor relative to all aspects of his

obligations under the contract. Such expenses could include financing costs

of one sort or another and should be allowable to the extent they may be

vouched and shown to be a consequence of the delay.

The circumstances provided for, the terms, the nature of the provisions, and the apparent purpose of Clauses 51 and 52 are very similar to Clause 12. However unlike Clause 12 which provides for fortuitious

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circumstances which can involve the contractor in additional work over and above that covered by the tendered price, Clauses 51 and 52 relate to active intervention on behalf of the employer in changing the work for which the tendered price was quoted. Clearly the purpose of these provisions is to enable the contractor and the employer to agree to such prices in relation to variations and additions as would enable the contractor to receive payment of a total price such as might have been tendered had the original works been set out as varied. Clause 52 contains provisions requiring the contractor to particularise his expenses and to vouch them on a regular and timely basis, and to show that they are calculated in the same manner as adopted in pricing the original unvaried contract works. In the context of the provisions of Clause 52 and the circumstances for which it provides it would seem that the term "reasonable prices" should be interpreted in the competitive sense and should relate to the standard rates and prices pertaining with contractors generally rather than to circumstances personal to the contractor as a contracting party. I do not think it can be ruled as a matter of law that "reasonable prices" in Clause 52 (1) should or may include financing charges of the nature discussed.

As there have been no findings of fact that the contractor did incur

loss or expense of financing costs such as interest on borrowed money
 or loss of dividend on withdrawn invested capital or hiring charges
 it is difficult to express an answer to the question submitted in a
 manner which can be seen to have immediate practical application.

However it seems to me that Clause 42 is the only one in relation to
 which, subject to evidence of the facts, the question posed could have
 proper immediate application. For the reasons given and because of
 the qualifications explained the answer I must give to the question
 posed is as follows:

It cannot be said that as a matter of law financing charges
 are constituent elements of the expressions "reasonable cost",
 "expenses", and "reasonable prices" used in Clause 12 (6),
 Clause 42, and Clause 52 (1) of the contract. Nevertheless
 evidence could establish as a matter of fact that financing
 charges are constituent elements of the "expense" to which
 Clause 42 relates.

S. G.
 26 July 1984