Another "Battle of the Forms" – lessons from *Noreside Construction Limited v Irish Asphalt Limited* [2011] IEHC 364

In a decision of the High Court (Ms. Justice Finlay Geoghegan) delivered on 4 October 2011, the Court was asked to decide what were the terms of the contract between Noreside and Irish Asphalt for the purchase and sale of aggregate by Irish Asphalt to Noreside.

Both sides contended that their own set of terms and conditions were included in the contract, to the exclusion of the other party's terms. It was of great importance to both parties that they were able to succeed with their respective claims: Noreside had used the aggregate in the construction of buildings, and was facing damages claims because the aggregate contained Pyrite, a mineral which is unsuitable for use in construction and can cause damage to buildings where it is used. However Noreside's terms and conditions of purchase had a comprehensive indemnity clause, which would, on its face, have afforded it protection against any loss suffered arising out of defects in the aggregate purchased. Similarly, Irish Asphalt's terms and conditions of sale contained a "limitation of liability" clause, which limited its liability for defective goods to the cost of their replacement, and purported to exclude liability for any other loss.

Interestingly, the Judge held that *neither side's* terms and conditions were incorporated into the contract between the parties, either expressly or by implication.

The contract between the parties

Early in 2003, Noreside was awarded a contract by Dublin City Council to build houses and senior citizen units at Griffith Avenue, Finglas, Co. Dublin. The parties then commenced negotiations with regard to the supply to stone and aggregate for the development. Correspondence and discussions ensued between the parties and Irish Asphalt commenced supplying the product at the agreed price on 27 March 2003. This continued until May 2005.

In September 2008, Irish Asphalt informed Noreside that Pyrite was present in products purchased by Noreside and extracted by Irish Asphalt from its quarry at Bay Lane. Irish Asphalt indicated that materials from the quarry should not be used as underfloor infill in any building or within a certain radius of any concrete or steel structure. Unfortunately, it appeared that the aggregate supplied by Irish Asphalt to Noreside in the period in question had in fact been so used by Noreside in the construction of the Griffith Avenue development.

Shortly afterwards, Dublin City Council notified Noreside of claims arising out of the use of aggregate containing the pyrite by Noreside at the development. Noreside in turn notified Irish Asphalt.

The "Battle of the Forms" commences

Shortly after this, Noreside sought an indemnity from Irish Asphalt against the claims made against it, referring to Clause 17 of Noreside's Purchase Order Conditions. This was refused by Irish Asphalt, which denied that these Purchase Order Conditions formed part of the Agreement between the parties for the supply of the aggregate.

Noreside's main case was that the terms of the Supply Agreement between the parties included those set out on the reverse of its Purchase Order form. Irish Asphalt's contention was that its standard terms and conditions, to which reference was made on its delivery dockets, were instead incorporated in the contract between the parties.

Clause 17 of the Purchase Order Conditions used by Noreside contained an indemnity whereby the supplier (Irish Asphalt) was required to indemnify Noreside against all liabilities, claims, losses, damages and expenses

both in respect of personal injury or death and also any damage to any property arising out of, or in the course of, or caused by the manufacture and delivery of, or any defect in, the aggregate or stone supplied.

In turn, Irish Asphalt pointed to a term in its terms and conditions, which provided that in the event of goods being delivered by Irish Asphalt which were defective, Irish Asphalt's liability was to be limited to the cost of the replacement, and that in no circumstances would Irish Asphalt be liable for any other loss arising directly or indirectly from the supply of defective materials.

The stage was therefore set for a classic "battle of the forms".

The decision

In a typical "battle of the forms" each of the parties to the contract contends that the contract is to incorporate its own, and not the other party's, terms and conditions. In terms of classical contractual analysis, the issue often turns on whether there has been a valid acceptance of a bona fide offer, or whether, on the facts, the response of the offeree is in fact a "counter offer", particularly in circumstances where the purported acceptance of the original offer itself lays down additional conditions which are to form part of the contract.[1] As Professor Clark has noted, it becomes particularly difficult to tell when an offer or counter-offer had been made "when negotiations consist of each party sending printed forms back and forth".[2] The outcome in each case will very largely depend on the particular facts of the transaction.

In her Judgment, Finlay Geoghegan J. held that it was not in dispute that a contract came into being between the parties, and said that the real question was when and how the contract came into existence. This required a detailed analysis of the facts leading to the conclusion of the agreement.

Following that analysis, the Judge concluded that an oral agreement had indeed been reached between the parties on 26 March 2003 as to the terms on which Irish Asphalt would supply aggregate to Noreside for the construction contract at Finglas. However, the Judge concluded that the parties were content to conclude that oral agreement once the bare bones of the deal had been agreed. These included the names of the parties, the place of delivery, the four types of aggregate or stone required to be purchased and sold, the unit price of each type per tonne, the delivery charge per tonne and the credit terms, as well as the fact that it was a fixed price contract.

The Judge went on to hold that there were certain other relatively minor terms which were deemed to be implied in the agreement. The first of these was that a written Purchase Order signed by Noreside had to be communicated to Irish Asphalt at least by fax. The Judge noted that this had been done on 26 March, the same date on which the oral agreement was reached. It was also held that there was an implied term that a credit application had to be completed by Noreside and returned to Irish Asphalt, and it was noted that this appeared to have been done the following day, 27 March. Finally, the Judge held that there were implied terms about the manner in which the contract would be performed, including an industry-standard ordering system known as oral "call offs" placed by telephone call by the site manager or other operative from Noreside's construction site to Irish Asphalt's operative, and the recording of the amount of aggregate supplied by the use of delivery dockets, in accordance with well-established industry practice in the quarrying and construction industries.

The question then arose as to whether there was any room for the terms and conditions of either the Plaintiff or the Defendant to have been incorporated into the final agreement which the Judge held was reached on 27 March 2003.

Noreside's terms and conditions

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1 ***See for example the Judgment of Murphy J. in Tansey v. the College of Occupational Therapists Limited, unreported, High Court, August 27, 1986, cited in Clarke, Contract Law in Ireland (6th edition, 2008).***

2 ***Clark, Contract Law in Ireland, at page 17.***

In that regard the Court held that there were two reasons why the terms and conditions of Noreside were not incorporated into the contract. First, Noreside did not, on or before the date the oral agreement was reached, bring to the attention of Irish Asphalt Noreside's standard purchase order conditions containing the indemnity provision on which it sought to rely. Secondly, whilst these terms and conditions were printed on the reverse of the purchase order form which was sent by fax as part of the implied terms of the transaction, there was in fact no reference on the front side of the purchase order form to the purchase order conditions.

Irish Asphalt's terms and conditions

Irish Asphalt argued that its standard terms and conditions were incorporated into the agreement by the signature by or on behalf of Noreside on each delivery docket. Irish Asphalt's case was that each individual delivery formed a distinct and unique contract between the parties, although part of the overarching or master contract made between them, and that its terms and conditions were incorporated into each such contract by the signature referred to above, by reasonable notice of the prior delivery documents, or by a course of dealing.

The Judge agreed that terms and conditions may indeed be incorporated into a contract by signature, reasonable notice or by a course of dealing.[3] However, the Judge went on to rule that the key question in this regard is whether the document which makes reference to the terms and conditions is a contractual document, citing with approval the judgment of Auld J. in the English Court of Appeal decision of Grogan v. Robin Meredith Plant Hire (1996) CLC 1127. Finlay Geoghegan J. went on to hold that a distinction had to be drawn between, on the one hand, documents which give effect to or form part of the background to the formation of a contract, and, on the other hand, documents which are, in reality, *post-contractual* documents. She said that while the former are an obvious source of terms, *…."a Court may conclude that the latter came too late to prove an argument of incorporation"*.[4]

The Judge concluded that the delivery documents signed between the parties were all post- contractual documents because they did not have the effect either of making a new or distinct contract, or of varying the existing contract, having regard to the particular facts of the case (which the Judge stressed were of critical importance to any contractual analysis). In this regard the Judge noted that the facts in the case before her were sufficiently similar to the facts in the Grogan decision of the Court of Appeal, and that the analysis of Auld. J. in that case was of assistance as a result. In Grogan, the document which was sought to be relied on by one party as evidence of the agreement by the other party to a key term of the agreement between them was a time sheet signed by the other party recording the hours worked by the first party's driver. While the time sheet contained a statement to the effect that all hire was undertaken on the other party's conditions, the Court of Appeal held that the time sheet was a document whose purpose was not to make or vary a contract but rather to assist in the execution of an existing contract.

Likewise, Finlay Geoghegan J. concluded on the evidence that the delivery dockets signed between the parties were signed on behalf of Irish Asphalt by the weighbridge operator at its premises, and were signed on behalf of Noreside by the haulier who was sent out to collect the aggregate, or by the site foreman or the site operative, if the aggregate was delivered to the site. The Judge noted that, when the original contract was agreed between the parties, each of the senior employees of Noreside and Irish Asphalt respectively had to consult in each case with a superior prior to reaching agreement between them. The Judge also accepted further evidence that none of the persons signing the delivery dockets had any authority to negotiate or agree to any contractual terms relating to the purchase of the aggregate. Accordingly, the Judge held that the purpose of the delivery dockets was simply to record the particular supply of aggregate with a view to payment, and that while the documents were undoubtedly important documents, they were non-contractual documents, relevant only to the administration and execution of the contract already previously agreed between the parties.

Were terms implied into the contract by virtue of industry custom and practice?

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3 ***Finlay Geoghegan J. referred in this respect to McMeel," Construction of Contracts" (Second Edition, 2011) at paragraph 15.53.***

4 ***At paragraph 32 of the Judgment of Finlay Geoghegan J.***

Having concluded that neither the Purchase Order Conditions of Noreside, nor the standard terms and conditions of Irish Asphalt, were in fact incorporated into the contract agreed between the parties, it followed that there was no limitation on Irish Asphalt's liability for defective product (if any) supplied pursuant to the standard terms and conditions of supply of Irish Asphalt. However, the Judge then had to consider whether such a term was to be implied into the contract by virtue of the custom and practice within the industry.

The parties were not in dispute as to the principles according to which terms will be implied into a contract by way of custom. The Judge referred in this regard to McDermott on Contract Law (2001), where the author sets out a non-exhaustive list of the requirements which must be fulfilled before a custom may be implied.[5]

The Judge held that the evidence adduced by Irish Asphalt fell short of establishing a custom of a type which would permit her to find that where a contract such as the one concluded between the parties had been entered into, a term was to be implied into that contract that in the event of goods being delivered which were defective, the seller's liability would be limited to the cost of their replacement only, and also a term that the sellers would not be liable for any other loss arising directly or indirectly from the supply of defective materials. In this regard, Finlay Geoghegan J. did find that there may well have been a standard practice amongst the larger quarry owners of inserting, in the standard conditions of sale, clauses limiting liability to replacement of defective products, and that a purchaser from the construction industry might well seek (albeit perhaps unsuccessfully) to obtain an indemnity against loss arising from defective product. However, she was not satisfied that there was evidence of a well-known custom according to which quarry operators were entitled to limit their liability for defective product to replacement product in the absence of the inclusion of an express contractual term to that effect. She went on to hold that the practice, insofar as one existed, appeared instead to have been of the inclusion of express contractual terms.

Were the goods supplied of "merchantable quality"?

Noreside also argued that a term was implied pursuant to Section 14 of the Sale and Goods Act 1893 (as amended by the Sale and Goods and Supply of Services Act 1980) to the effect that the aggregate supplied under the contract was of merchantable quality. The Court agreed that there was indeed an implied condition that the goods supplied under the contract were to be of merchantable quality, and that there was no evidence to support any exclusion of such condition. However, she went on to point out that the issue as to whether or not the aggregate in stone was or was not of merchantable quality was a matter which could only be determined at the full hearing of Noreside's claim.

Decision in James Elliott Construction Ltd v Irish Asphalt Ltd [2011] IEHC 269

Finally, the Court referred to the earlier decision of Charleton J. in the above case, which involved a claim for damages for breach of contract in relation to the supply by Irish Asphalt of aggregate alleged to contain Pyrite. Similar delivery dockets had been used by Irish Asphalt in that case, which contained a similar limitation of liability clause. Finlay Geoghegan J. noted that she and Charleton J. had reached similar conclusions on the non-incorporation of the limitation of liability clause, though on different facts and contractual analysis. She also noted that the Elliott decision was under appeal.

It is noteworthy also that in the Elliott case, while Charleton J. ruled that the limitation of liability clause was not incorporated into the relevant contract, he went on to hold that even if it had been, it would have been unenforceable: this was because he was of the view that the material supplied by Irish Asphalt in that case was not of merchantable quality. As indicated above, contracts for the sale of goods contain, by virtue of Section 14 of the Sale and Goods Act 1893 (as amended by the Sale and Goods and Supply of Services Act 1980) an

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5 ***At para. 7.07. The list of requirements is as follows:***

- ***(i) The custom must have acquired such notoriety that the parties must be taken to have known of it and intended it should form part of the contract.***
- ***(ii) The custom must be certain.***
- ***(iii) The custom must be reasonable and the more unreasonable it is the harder it will be to prove that it exists.***
- ***(iv) Until the Courts take judicial notice of a custom it must be proved by clear and convincing evidence.***
- ***(v) The custom must not be inconsistent with the expressed contract.***

implied term that they are of merchantable quality. While the Act provides that such implied terms may be excluded by other terms of the contract, any such excluding term must be "fair and reasonable", as required by the relevant provisions of the 1980 Act. In Charleton J's opinion, the relevant limitation of liability clause also failed this test.

Comment

The decision in Noreside is also currently on appeal to the Supreme Court, and we will report on that Court's decision in due course.

The Noreside decision is noteworthy because it illustrates the approach of the Irish High Court on key issues such as contract formation; the inclusion of standard terms and conditions in a contract; and the extent to which terms may be implied into a contract, particularly on the basis of an alleged custom or practice.

An oral contract will be binding

In relation to the formation of a contract, the case confirms the willingness of the Court to conclude that an oral agreement has been formed for the supply of goods, without the necessity for such an agreement to be in writing. The message here is that if parties wish to prevent a contract coming into force before all terms have been agreed, including "standard" terms of sale or purchase, they must say so clearly.

Incorporating unusual or onerous terms

In addition, it is clear from the decision, which is in line with other recent decisions of the Courts in Ireland and the UK, that if a party wishes to ensure that its terms and conditions are to prevail to the exclusion of the other party's terms, again it must do so clearly and unambiguously. The Court found that Noreside's purchase order conditions were not drawn to the attention of Irish Asphalt, either specifically during the negotiations or on the face of the purchase order form, and the Judge was unwilling to hold that the fact that they were printed on the reverse of that form was sufficient to bind Irish Asphalt.

From the point of view of Irish Asphalt, the Judge was also unwilling to agree with its submissions that each individual delivery was a distinct and unique contract in itself, and that accordingly Irish Asphalt's own terms and conditions were incorporated by signature or reasonable notice, by reason of reference to those terms on delivery dockets. To this extent, Finlay Geoghegan J. took the same approach as the Court of Appeal in the Grogan decision, which rejected the proposition that the court should look only at the words of a signed document, and disregard its nature or function. From the perspective of a supplier, therefore, the mere fact that a document is signed by the purchaser will be of no assistance if the document does not have contractual effect as between the parties. Additionally, the decision in Noreside also suggests that, even if the document being signed had contractual effect, it would be necessary, in order for such signature to amount to a legally binding variation of the original agreement, to ensure that it was signed by appropriate duly authorised representatives of the contracting party, and not by operatives below management level.

Establishing a custom or usage regarding contractual terms

The finding in relation to industry custom and practice will be of particular interest, and not just to quarry owners and the construction industry. It confirms that a very high legal bar must in practice be surmounted by any party seeking to convince a Court that the parties did not need to incorporate an express term into the contract. Finlay Geoghegan J. referred in this regard to the judgment of Hedigan J. in McCarthy v Health Service Executive [2010] IEHC 75, approving the statement of Maguire P. in O' Reilly v Irish Press [1937] 71 ILTR 194 where that Judge said:

"[A] custom or usage of any kind is a difficult thing to establish…. I have to be satisfied that [it is] so notorious, well known and acquiesced in that, in the absence of agreement in writing, it is to be taken as one of those

terms of the contract between the parties".

In practice, this approach makes it difficult for such an argument to succeed.

The golden rule

The "golden rule" of contract negotiations therefore applies: take all necessary steps, at the time the contract is being negotiated, to establish, with clarity, what all of the terms of the agreement actually are.

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