

H.A. O'NEILL LIMITED

.V.

JOHN SISK AND SON LIMITED

COUNSEL FOR PLAINTIFF:

John Blayney S.C.
John Cook S.C.

Niall St. J. McCarthy S.C.
Vivian Lavan

Judgment of Miss Justice Carroll

delivered the 13th day of July, 1982.

O'NEILL (HA) Ltd v Sisk



THE HIGH COURT

1977 No 5460 P

H.A. O'NEILL LIMITED

DOCUMENTS COLLECTION

.v.

JOHN SISK AND SON LIMITED



Judgment of Miss Justice Carroll delivered the 13th day of July, 1982.

The main issue to be decided is whether price variations which occur are subject to a deduction of 5% under Clause 11 (b) of the sub-contract dated the 18th day of February, 1974 made between the Defendant and the Plaintiff. It is necessary first to decide if Clause 24 of the sub-contract dealing with price variations has to be rectified because of the tender document.

The Conditions of tender provide as follows:-

Clause 2. "The successful tenderer shall enter into a sub-contract with the main contractor in the form of 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". Clause 3 provides for the completion of the appendix to the sub-contract form.

Clause 4 provides for the substitution of Clause 16 in the sub-contract form by another Clause set out in full.

Clause 5 provides as follows:-

" The sub-contractor shall be entitled to price and wage increases as if clause 3 of the General Conditions (Variation 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, amending "Contractor" to "Sub-Contractor", "contract" to "Sub-Contract", and "Employer" to "Contractor".

Clause 6 is of a general nature and amends Clause 8 (a) of the sub-contract.

Clause 7 adds words to Clause 7 (b) (ii) of the sub-contract.

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. 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.

The clauses to be read into Clause 5 of the Conditions of Tender deal with the following matters:-

Clause 3 of the General Conditions (Variation arising from Legislative Enactments) deals with variations arising from Government action.

The clause in quotations in Clause A2.04 (xi) of the Particular Conditions of Contract for the main contract, in sub-clause (a) thereof deals with Customs and Excise duties and the calculation of the amount to which the sub-contractor is entitled in the case of variation. Sub-clause (b) deals with the Control of Imports Acts 1934 to 1963 and the calculation of amounts to which the sub-contractor is entitled if there is a variation. Sub-clauses (c), (d), (e) and (f) deal with the market price of materials, increases in wages, decreases in wages, and the cost of insurance respectively. They all contain provisions that the amount to which the sub-contractor is entitled in the case of variation is to be certified by the architect. There is further provision for the production of books, invoices, receipts etc.

to vouch variations in prices.

Clause A204 (xii) of the same Particular Conditions of Contract for the main contract defines "date of tender" and date of "submission of tender".

In my opinion Clause 5 of the Conditions of Tender is an expansion of Clause 24 (1) (b) and 24 (2) (b) of the sub-contract and is concerned with the calculation or certification of the amount of price variation. This is exactly how the parties have calculated price variations. In particular Clause 5 of the Conditions of Tender does not affect the second last paragraph of Clause 24 (which I refer to as paragraph 5) which provides:

"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 Sub-Contract Sum".

In my opinion the sub-contract does not have to be rectified. There is no reason why the agreement cannot be contained in two documents. The contract between the parties consists of the sub-contract itself as amended by Clauses 3, 4, 5, 6, and 7 of the Conditions of Tender.

I now move on to the main issue.

In summary, Clause 11 (a) provides that the contractor shall apply to the architect for certificates of payment to include an amount which fairly represents the value of the sub-contract works and variations authorised and materials delivered on site. Clause 11 (b) provides that 14 days after the receipt by the contractor of a certificate from the architect, the amounts certified are due to the sub-contractor and within that time the contractor must notify the sub-contractor of the amount certified to be due and "any authorised variations thereof", less retention money (which does not concern us here) and less a cash discount of 5% (if payment is made within 7 days after the contractor himself is paid). The rest of the clause goes on to provide that the sub-contractor shall not take steps to enforce payment until after the seven day period has elapsed except in certain circumstances.

The phrase "any authorised variations thereof" in clause 11 (b) seems out of context. There is no provision for authorised variations of amounts certified in the certificate. No arguments were directed to this phrase which I take to mean that the certificate shall show separately the value of the sub-contract works and the authorised variations.

In the case of a price variation upwards, if the certified fair value of the authorised variations does not include an additional one-nineteenth on top of the actual increase, the deduction of 5% from the certified amount will have the effect of reducing the sub-contractor's profit. For example, if wages are increased, the sub-contractor is entitled under Clause A2.04 (xi) (d) to be paid such sum as the architect shall certify to be the amount of such increase. If this sum is subject to a reduction of 5%, that has to come out of the sub-contractor's pocket.

According to the evidence the sub-contractor calculates the price for which he is willing to do the job based on current market prices and wages and including a sum for his profit and on top of that he adds one-nineteenth to allow for the 5% deduction. This was done by the plaintiff in this case. Since the architect refused to certify for an additional one-nineteenth on top of the actual amount of the price variation, a reduction of 5% in payment of the amount certified for price variations will result in a loss to the sub-contractor.

This is in conflict with Clause 24 paragraph 5 (already quoted) of the sub-contract.

In my opinion that paragraph means that regardless of price variations under Clause 24, the sub-contractor is guaranteed the profit included in the sub-contract sum. This is defined in Clause 10 of the sub-contract and is shown in Part III of the appendix thereto.

In my opinion the clear words of Clause 24 paragraph 5 take precedence over Clause 11 (b). If the architect has failed to certify an additional one-nineteenth on top of the actual increase as being the fair value thereof, then the contractor is not entitled to deduct 5% which would reduce the sub-contractor's profit included in the sub-contract sum.

I am fortified in my construction of the documents by the evidence of Oliver Reddy, the Engineer on the project. He was responsible for valuing work on a monthly basis. His normal practice over a long number of years was to add the 5% builders discount (as he referred to it) to a price variation. He said he was shocked when he heard that the additional one-nineteenth was not certified. So the conclusion I have come to on the wording of the contract, accords with long practice in the building trade.

Approved

Sheila Canall