Full Metal Jacket Ltd v Gowlain Building Group Ltd [2005] Adj.L.R. 12/09

CA before May LJ, Arden LJJ, Sir Peter Gibson on appeal from HHJ Mackay. TCC. Liverpool sitting at St Helen's Magistrates Court. 9th December 2005

JUDGMENT : LORD JUSTICE MAY:

1. This is an appeal by the defendant against a decision of His Honour Judge MacKay in the Technology and Construction Court at Liverpool, sitting quixotically at St Helen's Magistrates' Court, on 10 May 2005. The judge gave judgment for the defendant, Gowlain Building Group Limited, for the small sum of £8.70. He ordered the claimant to pay the costs of the claim and the counterclaim on a standard basis. He gave the claimants permission to appeal. I have to say that I would not have done so had I been asked to consider this matter on the papers.

2. The claimant had a contract to do some building works at St Augustine's Roman Catholic School, Hammersmith. Part of the job was re-roofing the boiler house. The defendant subcontracted roofing works to the claimant. The defendants asked the claimants to quote for this work. They initially supplied them with a simple drawing of the roof. The drawing showed not very much, but it did show an internal 120mm rainwater outlet towards the top of the plan.

3. The claimants sent an initial quotation, dated 27 May 2003. This was for a mistakenly small price and was subsequently withdrawn. On 28 May the defendants faxed to the claimants a drawing. The fax message said*: "Please note the attached drawing done by Anderson's. Will give you a ring later for an update."*

   It was the evidence apparently of both parties that a subsequent telephone call did not in fact take place, although it is to my mind unclear whether the anticipation of a subsequent telephone call was necessarily likely to be concerned with the content of the drawing.

4. What the drawing showed was a plan of the roof in slightly greater detail than the previous, rather simple plan showing the roof structure, and no doubt the covering, falling in at least three directions toward the gully at the top of the plan. It was an Anderson plan. The defendants, unfortunately, paid no attention to this drawing and I, for my part, find it difficult to understand why they did not.

5. On 5 June 2003 they sent a new quotation for a larger price, £6,160.70 as it happens, and on 9 June the defendants accepted this quotation. The quotation reads: *"We refer to our telephone conversation and enclose our revised price for the flat roof omitting the strip up and decking."*

   Then there is a heading "***Boiler Room Roof***", and beneath that are the words: *"To supply and lay Anderson Built Up Felt System as described on bill page 3/7. To supply and fix Thermazone rigid urethane foam board cut to falls. Provide aluminium roof trim. Allow for timber upstands to chimney and code 4 lead flashings. Allow for one no. Harmer 1000 120mm Outlet."*

   The bill of quantities to which that quotation referred has this on its page 3/7, under the headings ***"Replacement Roofcovering Works":***
   "B. The works comprise the replacement of the entire boiler house felt roofcovering with a new Anderson HT built up felt system."

   There is then a reference to ***"insurance",*** and then at paragraph D, we find: *"Provide and lay the following roofing system to boiler house roof. Anderson HT 3 layer built up high performance elastomeric roofing felt system covering (HT Elastomeric Mineral, HT Elastomeric Underlay, Thermovent Base Layer) over Thermazone rigid urethane foam board insulation cut to falls/internal gutter profiles (to achieve max heat loss of 0.25w/m²K - minimum thickness: 50 mm."*

   It seems to me that the important point here was that the requirement was to provide an Anderson system built-up felt roof.

6. The claimants did the work, ignoring the drawing which they had been sent, and providing a single fall to the top of the roof on the plan. This was no good because the rain water did not all drain to the outlet and there was a puddle when it rained. The work had to be redone. The defendants refused to pay the claimants for what they had done. There was an adjudication and the adjudicator found in favour of the claimants. The claimants sought to obtain summary judgment to enforce the adjudicator's decision. Judge MacKay declined to give them summary judgment and the matter went to trial. The judge decided that the contract between the parties required the claimants to do the work

in accordance with the drawing that was sent on 28 May 2003, but that is in the terminology which the parties had used to mitred falls and not just to a uniform fall. The judge found that the defendants were entitled to succeed on their counterclaim, and the balance of the claim and the counterclaim was £8.70 in favour of the defendants, hence the judgment in their favour. The true issue, of course, was not just about £8.70, but about £8,000 or thereabouts.

7. The appellants/claimants appeal on three grounds. They say first, that the judge misconstrued the agreement; secondly, that the judge unfairly admitted evidence to the effect that Anderson had delivered materials cut to mitred falls but that the claimants's workmen had recut them to effect the roofing with a single fall; thirdly, that the judge's costs order was wrong because the defendants had recovered only £8.70 and the judge should have proceeded as if this were a small claim.

8. There is, in my judgment, nothing in the third ground. The true issue was worth several thousand pounds and this was not in truth a small claim. The second ground takes the appellant nowhere if the judge was right on the first ground, which, in my judgment, he was.

9. Mr Philip Norman, on behalf of the appellants, urges what, in my judgment, is an entirely blinkered approach to the construction of this written agreement. The essence of his submission is that the words in the quotation which were accepted without qualification have to be construed according to their natural and ordinary meaning. The words in question were ***"cut to falls".*** It was agreed that the words ***"cut to falls"*** does not mean the same as ***"cut to mitred falls"*** and that there was, in essence, he says, no basis for a more flexible construction. The submission is that the quotation and the acceptance make no reference whatever to the drawing which was sent on 28 May 2003 and that this was of no relevance at all to a construction of the words in question.

10. In my judgment this submission fails for a number of reasons. First, the appellants had been sent a drawing quite clearly telling them what to do before they sent their operative quotation. The drawing quite plainly referred to the job in question; it was marked for the project - ***"St Augustine's Roman Catholic School".*** It is true that the client is stated to be Capital Roofing Company Limited (which was a company from which a previous quotation had been obtained) but the drawing itself quite clearly referred to the roof in question. There was, in my judgment, no room whatever for a misunderstanding. The subsequent contract is to be taken as comprising the work shown on the drawing. The expression ***"cut to falls"*** in the quotation is to be taken as meaning cut to falls as shown on that drawing. Secondly, the bill of quantities which was expressly referred to in the quotation stipulated a new Anderson system. The drawing was an Anderson drawing. Thus the contract was, in my view, undoubtedly to be construed as requiring the appellants to supply and install an Anderson roof as shown on this Anderson drawing. Thirdly, if all that were, perchance, wrong, the sending of the drawing was, in my judgment, a clear instruction to carry out the work in accordance with the drawing (that is, if necessary, but I do not think it is necessary), a variation to a contract which required the board merely to be cut to falls.

11. Mr Norman has two other points, the second of which is that the bill of quantities should be construed contra proferentem and the person who was putting it forward was the defendant. Perhaps he is right about that; but it seems to me that there is nothing ambiguous at all about the way in which the bill of quantities should be construed. His second submission is that, as a matter of fact, it may be that the parties thought they were contracting on two different and never meeting bases. The claimants thought they were contracting on one basis - cut to falls with a single fall; and the defendants thought they were contracting on the basis of the drawing. He suggests that that constitutes circumstances where no contract was made at all because the parties' minds were not at idem. In my judgment, there is nothing in that. The court is concerned, as the main submission acknowledges, with the construction of a written agreement and once the court has construed the written agreement, what the parties thought it meant, if they were mistaken, is neither here nor there.

12. Accordingly, in my judgment, the judge correctly construed this contract and reached the correct result. For those reasons I would dismiss this appeal.

LADY JUSTINE ARDEN:

13. I agree with the judgment my Lord has given.

14. What happened in this case is that the judge was there seemingly examining the parties' contractual obligations by reference to the manner in which the contract was performed. Thus at paragraph 15 of his judgment he said: *"But it is clear that when the job was started Gregory had the materials, had the plan, had the van, was there and he could have, but chose not to, put the work and the materials on the roof in accordance with the plan. And he was wrong not to do so.*

    16. *Therefore it seems to me that the claimants are in breach of contract, because whilst it may well be that initially they did not realise the true position, had they considered it properly and consulted with their suppliers they would have known that they had the materials and the plan to carry out the work. It may well be that they did not attach any importance at the time to the plan which was sent to them, but certainly when they ordered the materials they knew that the materials would be cut by Anderson and they knew, because everybody must have known, that in order to cut materials Anderson would have a plan, and they had got the plan themselves from the defendants."*

15. It is, I think, worth repeating that as the law stands today, evidence as to the conduct of the parties subsequent to making their contract in writing is not admissible to interpret that contract. Different rules apply where the contract is partly oral or partly written, or where the document to be interpreted is a title deed and the conduct in question represents acts of possession under the title or where estoppel is alleged or where it is alleged that the contract has been varied by conduct. But the general rule is established by a number of authorities, including **Schuler v Wickman Machine Tool Sales** [1974] AC 235.

16. Lord Nicholls has since questioned whether the policy underlying the principle that subsequent conduct of the parties is admissible to interpret a contract, the contract operative today (see [2005] 121 LQR 577, and **BCCI v Ali** [2002] 1AC 251). The courts must keep the principles applying to the interpretation of contract up-to-date like any other branch of law. It may be that in the future the law will develop so that evidence such as subsequent conduct is admissible in interpretation of certain types or contract, or that certain types of subsequent conduct are admissible in interpretation. However, courts have not yet taken that step, save so far as I have already mentioned, and this is not the appropriate case in which to do so.

17. The judge in his judgment deals with the issue of the meaning of the contract and breach of the contract simultaneously. In doing so he takes into account evidence which ought not to have been taken into account on the interpretation of the parties' obligations. If the contract had been performed satisfactorily by the claimant but the defendant claimed that the performance did not meet the specification of the contract, evidence as to subsequent conduct would not have given the court any assistance in deciding the meaning of the contract. Indeed it would have distracted it from the task of interpretation. When it comes to legal policy it is important that the law should not undermine the certainty of the meaning of contracts or lead to a position where the meaning of a contractual provision fluctuates according to the conduct which in fact occurs under the contract when it is performed by the time the meaning has to be ascertained. It is therefore worth repeating and emphasising that the courts in general should not have regard to subsequent conduct when interpreting written contracts. I agree with the order my Lord proposes.

SIR PETER GIBSON:

18 For the reasons given by my Lord, May LJ, I too would dismiss the appeal.

(Appeal dismissed; appellant to paying the respondent's costs assessed in the sum of £6,206.98).

Philip Norman (instructed by Knowles Solicitors, Liverpool) for the claimant.
Graeme Sampson (instructed by Martyn Amey & Co, Bromsgrove) for the defendant.