Brian Royle Maggs (t/a BM Builders) v Guy Anthony Steyner Marsh [2006] ADR.L.R. 07/07

CA on appeal from Bristol County Court (Mr Recorder Lamb QC) before Lady Justice Smith, Lord Justice Moses; Lday Justice Hallett. 7th July 2006

JUDGMENT : LADY JUSTICE SMITH:

1. This is an appeal by Mr Guy Marsh against the decision and order of Mr Recorder Lamb QC, given in the Bristol County Court. The reserved decision was dated 14 October 2005. The order appealed was made on 22 November 2005 and amended on 19 January 2006. The Recorder ordered that Mr Marsh, the defendant in the proceedings, should pay to Mr Brian Maggs, the claimant, the sum of £69,692.22 plus VAT plus interest in respect of work done by Mr Maggs at Mr Marsh's premises in Bath. Permission to appeal was given by Hallett LJ.

2. The history of the dispute is as follows. Mr Marsh is a retired jeweller. He, or a company that he owns, has a town house in Bath. In 2002 he decided to have it refurbished and contacted Mr Maggs, who is a general builder with many years of experience. Some preliminary drawings were in existence at the time of their first site meeting in July 2002. At that meeting Mr Maggs was accompanied by Mr Cook, a surveyor, who assisted Mr Maggs with estimating and billing. At this meeting Mr Cook made a list of the work which Mr Marsh wanted.

3. In August 2002, Mr Maggs sent Mr Marsh what he described as a "*budget estimate*" for the works in the sum of just over £44, 000 plus VAT. The estimate did not particularise the works to be covered. Mr Marsh asked for a breakdown of the costs and a list of items with costings was provided. This first estimate was not accepted but, after further discussions between Mr Maggs and Mr Marsh, a revised estimate was submitted in the sum of £36,510 plus VAT. The estimate referred to the "omission of certain items as discussed" and other amendments. It included £750 for contingencies and £650 for a boiler which might or might not be necessary. A list of the works was attached to the estimate, but on that list the items were only briefly described.

4. The revised estimate was orally accepted by Mr Marsh and the work began in June 2003. It is common ground that, during the course of the work, Mr Marsh gave instructions to Mr Maggs' contractors or workmen that additional items of work were to be undertaken. Mr Maggs was willing to do these extra things, although not, of course, within the contract price. However, no estimates were asked for or provided for any of these works, although some of them were quite significant. For example, two bedrooms on the third floor were to have en-suite bathrooms.

5. On 7 July 2003, Mr Maggs sent an interim invoice for £12,750 plus VAT to cover work done at that stage. No particulars were given. That account was paid, although not within 14 days as requested. On 25 August, Mr Maggs requested a second interim payment of £16,000 plus VAT. Again no particulars were given of the work completed by that date. On 29 August, Mr Maggs provided a list of what he described as "variations to the work to date" with a price against each item. The total came to about £6,250 and it was stated that "further items would be advised when completed". Mr Marsh did not comment on this letter and, towards the end of September, he paid the second interim account. A third interim payment was requested on 13 November. It was not particularised; it was paid in December. The work was finished in early 2004 and, on 20 February 2004, Mr Maggs submitted his final bill in the sum of £69,293.71. Interim payments were deducted and Mr Maggs requested payment of the balancing amount of £26,043.71 plus VAT which came to £30,601. Accompanying the invoice was a list of items which had been omitted from the original contract (by agreement) which reduced the original contract price by just over £4,000 and also a list of extra items for each of which Mr Maggs provided the sum that he was claiming.

6. Unwisely, as events have turned out, Mr Marsh disputed that bill. In March 2004, he wrote disputing some extra items. There were discussions and a meeting but Mr Marsh and Mr Maggs did not reach agreement. Mr Marsh made an offer to pay a further sum in settlement. Mr Maggs would not accept it and on 1 April 2004, Mr Maggs issued a claim in the County Court. It was based upon his final invoice. Mr Marsh's defence said that he had already paid the contract price and that the sums claimed for extras were unreasonable. He also counterclaimed complaining about some aspects of the work, but at the trial that claim was dismissed by the recorder and no issue arises from it on this appeal.

7. Nearly a year went by after the close of pleadings, during which time both parties instructed expert surveyors, ostensibly to assess what was a reasonable sum for the various extras. Mr Marsh instructed a Mr Easton and Mr Maggs instructed Mr John Cousins. In late March or early April 2004 (a whole year after his initial claim) Mr Maggs served an amended claim. Instead of claiming a total contract price of £69,293.71, he was now claiming a total contract price of £126,363.00. After taking account of the interim payments received, he was claiming a further £83,113.00 plus VAT plus interest. No particulars of how this sum was arrived at were provided in the pleading itself, but it was apparent that the justification for this significant increase was Mr Cousins' valuation of the work done.

8. So far as material to this appeal, Mr Marsh's defence referred to the variations of work listed in Mr Maggs' letters of 29 August 2003 and 20 February 2004. It then set out in a schedule the disputed items of work claimed as extras by Mr Maggs, some of which were disputed because Mr Marsh claimed that they were covered by the original contract and included in the initial global price; the rest were accepted as extras, but Mr Marsh was claiming that the sum claimed was unreasonable. Mr Marsh said that he would rely on the report of Mr Easton as to what sums were reasonable for such items as were true extras. Mr Maggs, through his lawyers, prepared a Scott schedule upon which all the disputed items were listed; and on that Scott schedule, battle was joined.

9. The hearing began on 19 September 2005 and was allocated three days. Mr Maggs gave evidence and called Mr Cook, his surveyor, also his foreman and several workmen or subcontractors. He also called his expert surveyor, Mr Cousins. Mr Marsh gave evidence and called Mr Easton by video link. A major factual issue in the case was what had been included in the original contract. It was agreed that the contract was oral, at least because the estimate had been accepted orally. But it was Mr Marsh's case, and it is clear to me that he was right in this, that the contract was partly oral and partly written, because such documents as had come into being at the time of the contract were far from being a complete record of its terms. Mr Marsh and Mr Maggs both gave evidence of things discussed at the site meeting and in the pre-contractual period. There were differences in their recollections. They also gave evidence about matters that had been discussed afterwards. For example, Mr Marsh was saying that, although clearance of the rubbish from the property was not originally to be included in the contract, as he intended to do that work himself, there was an oral agreement shortly before the works began that Mr Maggs would do it and would not charge for it. This, he said, came about because Mr Maggs' previous contract had finished early and he wanted to get on with this one. Mr Maggs disputed that and claimed that if he removed the rubbish, it was always envisaged that it would be an extra.

10. By the time the evidence at the trial had been completed, there was very little court time left. The parties and the recorder agreed that counsel would present oral submissions limited to the scope and formation of the original contract. The recorder would reserve judgment and decide as quickly as possible on those issues. The parties would then take stock. It was hoped that agreement could be reached on quantum once the true extras had been identified.

11. A major issue emerging during the trial, and in particular in closing submissions, was the extent of the evidence that the recorder could receive and rely on when determining the scope of the original contract. It was agreed between the parties that the contract was an oral contract. It was not a written contract. Mr Marsden, on behalf of Mr Marsh, submitted that, in determining which items of work fell within the original agreement, it was permissible and appropriate for him to take account of all the evidence, including evidence of what the parties said or did after the contract was formed, because that evidence might throw light on what they then believed was the scope of the original contract. He wished to rely on Mr Maggs' letters with their lists of extras dated 29 August 2003 and 20 February 2004. Mr Marsden did not suggest that those lists amounted to an estoppel upon Mr Maggs' claim for extras. But he submitted that they did provide a very good guide as to what his (Mr Maggs') then understanding was of what the parties had agreed in March 2003. He submitted that it was unlikely that anything of substance that had not been included in one of those lists was in fact a true extra. If Mr Maggs was now saying that a lot of items which were not included in those lists were true extras, that was a good reason to doubt the accuracy of his current evidence.

12. Ms Gough for Mr Maggs submitted that it was not permissible for the recorder to receive or take account of evidence of conduct subsequent to the formation of the contract, and she put in written submissions to that effect.

13. In his judgment, the recorder first set out the background and explained the limited scope of his judgment. At the fourth page of his judgment, which is page 24 of the appeal bundle, he said this: *"It is common ground that my task is objectively to construe the intention of the parties. What was the contract that they made? As Lord Reid put it in **Whitworth Street Estates Ltd v Miller** [1970] AC 583 at 603: 'The question is not what the parties thought or intended but what they agreed'. What they agreed was fixed in March/April 2003. That meaning was discernable immediately after Mr Marsh's acceptance. Subject to variation, that meaning did not change. The original contract is to be found in the terms of the documents generated on/prior to 28 March 2003 and in the words that I find were spoken up to that date. There are conflicts between the accounts of the pre-contract discussions given by Messrs Maggs and/or Cook on the one hand and Mr Marsh on the other".*

14. The recorder then set out his views of the credibility of the witnesses. He found Mr Maggs honest and straightforward. He found Mr Marsh anxious, guarded and at times evasive. He said that Mr Marsh's interpretation of events was subjective. He had admitted that he could not remember the precise words of the extensive discussions that had taken place in 2003. The recorder regarded Mr Cook as being "as straight as a die". In short, where there was a conflict, he preferred the evidence of Mr Maggs and Mr Cook to that of Mr Marsh.

15. Then, at page 26 of the appeal bundle, he continued thus: *"Now, I have said that the terms and meanings of the original contract were fixed in March/April 2003. The same analysis can be made of any subsequent variation to add or omit. The extent of any such variation was fixed at the time it was made. I say this because it is Mr Marsden's submission that the subsequent conduct of the parties can be used as an aid in the construction of the original contract and/or any variation thereof. Reference was made to the treatment in Chitty on Contracts of **Whitworth Street Estates**, cited above. I gave counsel the opportunity to put in further written submissions on that case. Miss Gough took the opportunity. I have since re-read the report.*

*Mr Marsden says that **Whitworth Street Estates** applies only to written contracts. I respectfully disagree. At page 603 Lord Reid says this: 'It has been assumed in the course of this case that it is proper, in determining what was the proper law, to have regard to actings of the parties after their contract had been made. Of course the actings of the parties (including any words which they used) may be sufficient to show that they made a new contract. If they made no agreement originally as to the proper law, such actings may show that they made an agreement about that at a later stage. Or if they did make such an agreement originally such actings may show that they later agreed to alter it. But with regard to actings of the parties between the date of the original contract and the date of Mr Underwood's appointment I did not understand it to be argued that they were sufficient to establish any new contract, and I think they clearly were not. As I understood him, counsel sought to use those actings to show that there was an agreement when the original contract was made that the proper law of that contract was to be the law of England. I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later'. And […] Lord Wilberforce dealt with the point in this way: 'In my opinion, once it was seen that the parties had made no express choice of law, the correct course was to ascertain from all relevant contemporary circumstances including, but not limited to, what the parties said or did at the time, what intention ought to be imputed to them on the formation of the contract. Unless it were to found an estoppel or a subsequent agreement, I do not think that subsequent conduct can be relevant to this question'."*

The recorder continued: *"The logic of that applies equally, in my view, to any oral or part oral contract. Once the words used to form the contract/variation have been established they fall to be construed in the light of the circumstances at that point in time".*

He then added: *"If I am wrong in my interpretation of **Whitworth Street Estates** I think there is force in Miss Gough's observation that subsequent conduct, here, could prove a double-edged sword for the defendant".*

The recorder did not explain what he meant by that observation.

16. The effect of this conclusion of law was that the recorder refused to consider Mr Marsden's point that the two lists of extras that Mr Maggs had provided before proceedings began was a good guide to what he then believed were the true extras; everything else must have been within the scope of the original contract. He did not, in the course of his judgment, consider Mr Maggs' explanation for the huge disparity between the amounts claimed in the final account and the amended claim. Apart from a passing reference to the point, saying that he was not impressed by it, the recorder said no more about it. We are told by Miss Gough that in the course of submissions there was a good deal of discussion about the force of this contention, led by Mr Marsden, but the recorder has not discussed it at all in his judgment.

17. The recorder then turned to the Scott schedule of disputed items and went through each item, ruling on whether it was a true extra or whether it was part of the original contract. He gave very brief reasons for each decision. Many of them consisted simply of the statement that there was no reference to this item in the original written list of items. That, by definition, would suggest that he was accepting the original list of items as the contractual document. If he was doing that (and this decision will

not turn on this point), that was a mistake, because his task was to determine the terms of the contract, based upon both the written and oral materials. Apart from a very few disputed items which the recorder held had been included in the original contract, he held that the overwhelming majority were true extras. That was a natural consequence of his preference for the evidence of Mr Maggs over that of Mr Marsh.

18. In due course, there was a quantum hearing at which the now established extras were quantified. There was not a great deal of difference between the experts on reasonable remuneration, and Mr Maggs recovered payment for extras of nearly £87,000.

19. This appeal is concerned only with the recorder's legal ruling by which he excluded consideration of Mr Maggs' lists of extras as evidence relevant to the issue of what was agreed between the parties in March 2003.

20. Mr Marsden submits that the recorder was wrong to say that the principle enunciated in Miller v Whitworth applied to oral contracts as it does to written ones. Miller's case, was indeed a written contract, in fact an RIBA standard form contract. Everything that the House of Lords said in that case concerned the construction of a written contract. The recorder had given no reason for saying that the principle applied to oral contracts as well. He was wrong to do so. The scope of an oral or partly oral contract is a question of fact, Mr Marsden submitted, on which evidence of subsequent conduct can be received. It might throw light on what was agreed at the time of formation.

21. Mr Marsden referred the court to a passage in Lewison on the Interpretation of Contracts, 3rd edition. In the context of a discussion about the permissibility of admitting evidence of subsequent conduct of the parties as an aid to the construction or interpretation of a written contract, the main thrust of which is that it should not be done, the learned author makes two statements relevant to the issue in this case. Under a heading "Subsequent Conduct of the Parties" on page 89,, there is a general statement as follows: *"The court may not look at the subsequent conduct of the parties to interpret a written agreement. However, where the agreement is partly written and partly oral, subsequent conduct may be examined for the purpose of determining what were the full terms of the contract".*

And on page 91, the text is as follows: *"Where the contract is only partly written, nothing in the authorities prevents the court from looking at the way the parties acted for the purpose of ascertaining what terms were agreed but not written down. Thus in* ***Wilson v Maynard Shipbuilding Consultants AG Limited*** *the Court of Appeal held that where one cannot ascertain from the terms of the contract itself what was agreed about a relevant term, in that case the place where under his contract an employee normally works, one may look at what has happened and what the parties have done under the contract during the whole contemplated period of the contract for the limited purpose of ascertaining what that term is."*

22. Miss Gough submitted that the recorder was right when deciding on the scope of the contract to exclude from consideration the effect of the letters of 29 August 2003 and 20 February 2004. However, she submitted that, even if he was wrong, the recorder's exclusion of this material made no difference to his conclusion, because he was of the view that there was no ambiguity or doubt about the scope of the original contract.

23. Miss Gough submits that the appeal is hopeless because the recorder has made it plain that he accepts the evidence of Mr Maggs and rejects that of Mr Marsh, where the two conflict. That he was entitled to do. His conclusion was based upon three days of evidence, and the appellant cannot hope to disturb findings of fact, made on the basis of his preference for Mr Maggs' evidence. However, in my view, that submission misses the point of Mr Marsden's submission. Mr Marsden wanted to have the two letters and their lists of extras taken into account because they are capable of amounting to a real challenge to Mr Maggs' credibility, or at least to the accuracy of his recollection. If the recorder wrongly excluded that material from consideration, then his conclusion that Mr Maggs' evidence is accurate cannot stand. Admission of that evidence might well have led to the conclusion that Mr Maggs' recollection of the discussions in 2002 and March 2003 could not be right.

24. Was the recorder wrong to exclude this evidence? In my view, he plainly was. The recorder properly directed himself that his task was to decide what the parties agreed at the time of the original contract in March 2003. He very properly said that that was ascertainable at the time. Of course it was ascertainable at that time, but unfortunately no one ascertained it. The parties did not write down what they had agreed. No complete record was made. Accordingly, the only way to decide what had been agreed then was to hear evidence about it at the trial, two or three years later. The accuracy of the parties' recollections was mutually disputed. In those circumstances, it is plain to me, as a matter of general principle, that, for the purpose of testing the accuracy of those recollections, it is highly relevant to hear evidence about what the parties had said and done about the disputed matters in the meantime.

25. The rationale of the well-established rule in Miller's case is this. The parties have made a complete record of their agreement at the time, in writing. The written words must be objectively construed or interpreted. Such construction is a matter of law. As Lord Hoffmann said in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1WLR 896 at page 912, the question is what meaning the document would convey to a reasonable person having all the background knowledge which would reasonably been available to the parties in the situation in which they were at the time of the contract. It is therefore irrelevant to call evidence of how one party behaved after the event. That only sheds light on what that party subjectively thought he had agreed.

26. In my judgment it is clear that the principle set out in **Miller's** case, does not apply to an oral contract. Determining the terms of an oral contract is a question of fact. Establishing the facts will usually, as here, depend upon the recollections of the parties and other witnesses. The accuracy of those recollections may be tested and elucidated by things said and done by the parties or witnesses after the agreement has been concluded. Receiving evidence of such words or actions does not mean that the judge is losing sight of his task of deciding what the parties agreed at the time of the contract. It is simply helping him to decide whose recollection is right. It is not surprising to me that the editor of Lewison should observe that there is nothing in the authorities to prevent the court from looking at post contract actions of the parties. As a matter of principle, I can see every reason why such evidence should be received.

27. That being so, I would conclude that the recorder fell into error in refusing to consider whether any inference should be drawn from Mr Maggs' two lists of extras. He should have done so. The view he took of the explanations for the disparity between the extras claimed in and before February 2004 and those claimed after March 2005 would have been bound to have some effect on his conclusions as to Mr Maggs' credibility. As the whole result of the case depended upon the recorder's preference for Mr Maggs' evidence, this issue goes to the heart of the case.

28. The explanations advanced for the disparity between Mr Maggs' case in 2004 and his new case in 2005 were twofold. First it was said that when the 2003/2004 bills were prepared Mr Maggs and Mr Cook had had incomplete information from some of the subcontractors and that, as a result, Mr Cook had understated the extras when preparing the bills for Mr Maggs. Yet the recorder had described Mr Cook as careful and meticulous, and Mr Maggs as a very experienced builder. If the recorder had received and considered that explanation, he would have had to make a finding about its reasonableness. I remind myself that the disparity was of the order of £55,000, a very large sum in the context of this contract. The second explanation advanced by Mr Maggs was that, in February 2004, he had deliberately understated the extras in order to reach a quick commercial settlement. But again the understatement was very large. If the recorder were to have confidence in Mr Maggs' evidence, he would have to accept those explanations as plausible. Although the recorder made two passing remarks about Mr Marsden's submission on this point, he did not grapple with it properly. He observed that he did not think much of the point, without saying why. Also, as I have said, he observed rather cryptically that, if the evidence were taken into account, it might prove a double edged sword. But the recorder did not deal with these issues as he should have done, and I for my part are not prepared to say that he would plainly have been justified in accepting Mr Maggs' explanations as plausible, leaving his credibility untarnished.

29. That being so, in my view, the recorder's decision is fatally undermined and I would allow the appeal. I do not consider that this court is in a position to make decisions as to the scope of the original contract. Therefore, with regret, it seems to me that, if this dispute cannot be settled, it will have to go for a rehearing before another judge. However, that is an event which should be avoided if at all possible. The costs of this litigation have already far exceeded the sum in issue. The case ought to have gone to mediation at the outset, and I note that the claimant did not comply with the protocol before commencing action.

30. I would therefore propose that the recorder's order be set aside and the case remitted to the Bristol County Court. However, in my view it should not be listed for hearing unless and until the parties are able to satisfy the District Judge that they have made appropriate attempts to resolve their dispute.

31. LORD JUSTICE MOSES: I agree.

32. LADY JUSTICE HALLETT: I too, agree.

Order: Appeal allowed.

MR A MARSDEN (instructed by Messrs Mowbray Woodwards, 3 Queen Square, BATH, BA1 2HG) appeared on behalf of the Appellant.

MS K GOUGH (instructed by Messrs Hollinshead & Co, Bristol & West House, 4c Duke Street, TAVISTOCK, PL19 0BA) appeared on behalf of the Respondent.