Neutral Citation Number: [2011] IEHC 364

THE HIGH COURT

COMMERCIAL

2009 2593 P

BETWEEN

NORESIDE CONSTRUCTION LIMITED

PLAINTIFF

AND

IRISH ASPHALT LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 4th day of October, 2011

1. This judgment is given on the trial of the first issue in a modular trial directed by the Court on 21st December, 2010. The issue directed to be tried prior to other issues in the proceedings is "what were the terms of the contract between the plaintiff and the defendant (express or implied) for the purchase and sale of the aggregate, the subject matter of the proceedings".

Background to the Proceedings

2. The plaintiff is a construction company with its head office in Kilkenny. The defendant is the operator, *inter alia*, of a quarry at Baylane, Dublin, at which it produces, manufactures and supplies products to the construction industry.

3. In early 2003, the plaintiff was awarded a contract by Dublin City Council to build a development of 52 houses and 31 senior citizen units at Griffith Avenue, Finglas, Dublin. The plaintiff, through Michael Regan, a director with responsibility for procurement, made enquiries of a number of persons, including the defendant, in relation to the supply of aggregate for the development at Finglas. Following exchanges between the plaintiff and the defendant, which will be referred to in greater detail below, a Purchase Order No. 19027 ("the Purchase Order") was faxed to the defendant on 26th March, 2003. The original Purchase Order was sent by post, the plaintiff contends, as a matter of probability, on the same day, and is date stamped as received by the defendant on 28th March, 2003. The plaintiff's "Purchase Order Conditions" were printed on the reverse side of the original Purchase Order sent by fax and received, at the latest, by the defendant, on 28th March, 2003. There is no reference to such conditions on the front side of the Purchase Order sent by fax on 26th March, 2003.

4. The Purchase Order set out the price agreed for each of four different types of stone, both for collection and delivery. It also specified the credit terms of 60 days and that the price was fixed for the duration of the contract. It is not in dispute that such terms were agreed.

5. The defendant commenced supplying aggregate at the price agreed on 27th March, 2003. It continued to supply until May 2005. For each delivery, there was a delivery docket signed on behalf of the defendant and on behalf of the plaintiff (either by a site employee or a haulier on its behalf). Each delivery docket stated, on its face, at the bottom, "THIS MATERIAL IS SOLD SUBJECT TO THE TERMS AND CONDITIONS AVAILABLE ON REQUEST".

6. In December 2008, the defendant informed the plaintiff that Pyrite was present in products purchased from its Baylane quarry and that any materials from that quarry should not be used as under floor infill in any building or within 500 millimetres of any concrete or steel structure. The aggregate supplied by the defendant to the plaintiff from the Baylane quarry between March 2003 and May 2005, had been so used by the plaintiff in the Griffith Avenue site.

7. In December 2008, and thereafter, Dublin City Council notified the plaintiff of claims arising out of the use of aggregates by the plaintiff at the development. The plaintiff notified the defendant of such claims.

8. In 2009, the plaintiff sought an indemnity from the defendant against the clams made against it, in particular, pursuant to clause 17 of its Purchase Order conditions. This was refused and it was denied that the Purchase Order conditions formed part of the agreement between the plaintiff and the defendant for the supply of aggregate.

9. On 19th March, 2009, the plaintiff issued the present proceedings, seeking, *inter alia*, a declaration that the terms and conditions of the agreement between the plaintiff and the defendant are as set out on the reverse of the Purchase Order; a declaration of its entitlement to an indemnity and further and consequential relief including damages for breach of contract.

10. In the pleadings delivered, including an amended Statement of Claim and amended Defence, it became clear that the plaintiff's primary contention was that the terms of the supply agreement between the plaintiff and the defendant included those set out on the reverse of its Purchase Order. Further, that the defendant's primary contention was that its standard terms and conditions, to which reference was made on its delivery dockets and, as initially contended, referred to in communications from the defendant to the plaintiff prior to March 2003, were incorporated in the contract or contracts. Alternative contentions in relation to applicable terms and conditions were pleaded by both parties. In addition, other issues are raised in the proceedings which can only be determined after determination of the applicable terms and conditions to the contract or contracts under which the aggregate was supplied by the defendant to the plaintiff.

11. The plaintiff's primary purpose, in contending that the Purchase Order conditions form part of the contract of supply, is to enable it to rely upon the indemnity provided for in clause 17 of the Purchase Order conditions. This provides:

> "INDEMNIFICATION - The Supplier shall indemnify and save harmless the Company against all liabilities, claims, causes of

> action, costs, loss, damages and expenses whatsoever in respect of personal injury to or death of any person whomsoever, or damage in any property real or personal arising out of, or in the course of, or caused by, the manufacture and delivery of, or any defect in, the goods, or from any act or omission of the Supplier, the agents, employees or subcontractors and shall indemnify the Company in respect of any direct or indirect loss or expense of whatever nature incurred by or claimed against the Company, due to the goods not conforming with the specifications, plans, designs, instructions or orders of the Company or its employees."

12. Similarly, the defendant's interest in contending that its terms and conditions, and not those of the plaintiff, were incorporated into the contract or contracts of supply, is to enable it to rely upon the limitation of liability set out in clause 8 thereof:

> "In the event of goods being delivered which are defective the Company's liability shall be limited to the cost of their replacement. In no circumstances shall the Company be liable for any other loss arising directly or indirectly from the supply of defective materials."

13. Each of the parties also relied in submissions on certain other of their respective terms and conditions but they were of secondary importance.

14. Pursuant to a motion brought by the plaintiff, on 21st December, 2003, the court directed the modular trial and the issue to be determined prior to the determination of any other issue, as already set out, and to which I will refer as the contractual issue.

Facts in Dispute at Hearing of Contractual Issue

15. There were few relevant facts in dispute at the hearing of the contractual issue. Rather, this turned on the correct contractual analysis of undisputed fact and the appropriate characterisation thereof.

16. At the commencement of the hearing, the defendant, through its counsel, confirmed that it was no longer contending that it had brought to the attention of the plaintiff prior to the first delivery docket of 27th March, 2003, the existence of its terms and conditions. Such a contention had previously been pleaded, relied upon and disputed.

17. The plaintiff sought to establish on the balance of probabilities the fact that the original white copy of the Purchase Order with its Purchase Order Conditions printed on the reverse was received by the defendant at its Baylane quarry on 27th March, 2003, and not only on 28th March, 2003, as appears from the date stamp on the Purchase Order received by the defendant. It sought to establish this on the basis of the evidence of Mr. Regan that, having faxed the purchase form (which is agreed) at 13.09 hours on 26th March, 2003, he then, on the same day, arranged for his secretary to send the original signed Purchase Order by post to the defendant at the Baylane quarry in accordance with instructions given to him by Mr. Tuite of the defendant. Further, his evidence was that his normal postal system was that on leaving the office each evening at approximately 5.00pm, his secretary took the post with her and put it in a post box at the end of the road and that the last collection from there is at 5.45pm. The plaintiff also sought to rely on a report of the Commission for Communications Regulation on *'An Post Quality of Service Domestic Single Piece Mail; Quarter One, January to March 2003'*, dated 30th March, 2003. That report states that TNS mrbi, who were appointed to measure An Post's quality of service, carried out research, the result of which showed that three out of four items of ordinary correspondence were delivered the next day during the operative period. In reliance on that evidence, counsel submitted that the court should find, as a matter of probability, that the original Purchase Order was posted in Kilkenny on 26th March, 2003, and was received by the defendant at its Baylane quarry on 27th March, 2003. Mr. Tuite, who was then a quarry manager with responsibility for the Baylane quarry, gave evidence of a system of work whereby a Mr. Sheridan (now deceased), who was the weighbridge operative, opened post that came to Baylane and date stamped the post before sending it on to the head office, approximately one mile away.

18. I could not be satisfied on the evidence adduced that, as a matter of probability, the Purchase Order arrived at Baylane on 27th March, 2003, rather than on 28th March, 2003. The onus to establish such fact as a matter of probability is on the plaintiff and I could not be satisfied, having regard to gaps in the evidence as to what actually occurred, that it has been discharged. For the reasons set out below, the factual issue as to whether the Purchase Order arrived by post in Baylane on 27th March or 28th March, 2003, is not relevant to my conclusions.

Contractual Analysis

19. The resolution of the primary dispute between the plaintiff and the defendant as to whether the plaintiff's Purchase Order conditions or the defendant's terms and conditions as incorporated in the contract or contracts pursuant to which the defendant supplied aggregate to the plaintiff between March 2003 and May 2005, is dependent upon a conclusion as to when and how the contract or contracts between the parties came into existence. It is not in dispute that a contract came into being in March 2003, but the parties contend for differing dates and also differ in their submissions as to the relationship between that contract and the contract or contracts applicable to the subsequent deliveries.

20. As already indicated, the underlying facts are not in dispute, save to the extent already mentioned and determined. The contractual analysis also takes into account the evidence of the systems in operation in relation to the supply of aggregate by the defendant from its quarries for a particular construction job.

21. In my judgment, a contract came into existence between the plaintiff and the defendant on 26th March, 2003, in which they agreed the terms according to which the defendant would supply certain types of aggregate and stone to the plaintiff for its construction job at the site at Griffith Avenue, Finglas. Further, that there was no variation in the terms of that contract prior to the final delivery in May 2005. In my judgment, neither the plaintiff's Purchase Order conditions nor the defendant's terms and conditions, expressly or by implication, formed part of such contract. My reasoning for such conclusions is as follows.

22. The inquiry form sent by Mr. Regan on behalf of the plaintiff to Mr. Tuite on behalf of the defendant on 20th February, 2003, seeking "tender" for certain products was, in contractual terms, an invitation to treat. The defendant, by two faxed quotations from Mr. Tuite dated 24th February, 2003, offered to supply the specified grades of aggregate for the development at Griffith Avenue, Finglas, at prices specified both ex-works and delivered. This, in contractual terms, was an offer to supply at those prices.

23. The undisputed evidence is that there were further negotiations orally between Mr. Regan and Mr. Tuite during which Mr. Regan sought an improvement on the price. This does not appear to have been forthcoming. The further undisputed evidence of both gentlemen is that on the morning of 26th March, 2003, they had a final conversation during which Mr. Regan, having sought again to improve the price, ultimately informed Mr. Tuite that he was placing the order at the price offered. In addition to price, it appears probable that there were two further terms discussed as they are recorded on the subsequent Purchase Order and not disputed by

the defendant. These are credit terms of 60 days and that the price was "fixed price for duration of contract". The latter is a reference to the plaintiff's contract with Dublin City Council as it had already been specified that the supply was for the purpose of a construction contract of the plaintiff at Griffith Avenue, Finglas.

24. In my judgment, an oral agreement was reached between Mr. Regan and Mr. Tuite on the morning of 26th March, 2003, as to the terms upon which the defendant would supply aggregate to the plaintiff for the construction contract at Finglas. There is no requirement that such a contract be in writing. The express terms agreed are recorded on the Purchase Order then sent by fax on the same day at 13.09 hours, stated to be for the attention of "Terry", who, it was stated, was Mr. Terry Lagan, a director of the defendant. The fax number given by Mr. Tuite, and to which the fax was sent, was that of the head office of the defendant at Rosemount, where Mr. Lagan worked. The express terms include the name of the purchaser, the plaintiff; the name of the vendor, the defendant; the place of delivery, Griffith Avenue, Finglas; the four types of aggregate or stone, the unit price of each type per tonne for collection and the delivery charge per tonne and the specification that the credit terms were 60 days and that it was "fixed price for duration of contract".

25. On the evidence, I have concluded, as a matter of probability, that there were certain other implied terms. First, on the defendant's evidence, it appears probable that a written Purchase Order signed by the plaintiff had to be communicated at least by fax to them. This was done on 26th March, 2003. Also, that a credit application had to be completed by the plaintiff and returned to the defendant. Such a form appears to have been faxed by the defendant and returned shortly thereafter by the plaintiff on the afternoon of 27th March, 2003. There were also implied terms as to the manner in which the contract would be performed, including the ordering system by oral "call offs" placed in a telephone call by the site manager or other operative from the plaintiff's construction site at Finglas to the defendant's operative on the weighbridge at Baylane, and the recording of the aggregate supplied by the use of delivery dockets in accordance with a well established practice between the quarry and construction industries.

26. In my judgment, accordingly, there was a concluded agreement between the plaintiff and defendant on 27th March, 2003, as to the terms on which the defendant would supply aggregate to the plaintiff for the duration of its construction contract at the site at Griffith Avenue, Finglas.

27. The plaintiff did not, on or before 26th March, 2003, bring to the attention of the defendant its Purchase Order conditions according to which it now submits that it agreed to purchase the aggregate from the defendant. Whilst they are printed on the reverse of the Purchase Order form, there is no reference on the front side to the Purchase Order conditions. Communication of that Purchase Order to the defendant by fax is, in my judgment, the latest point in time at which the concluded agreement came into being. It may have come into being when the oral communication was made by Mr. Regan to Mr. Tuite that he was placing the order with the defendant.

28. Similarly, it is an undisputed fact that the defendant had not drawn to the attention of the plaintiff its terms and conditions on or before 26th March, 2003.

29. It follows from the foregoing conclusions that insofar as the plaintiff relies upon a communication of its Purchase Order conditions on either 27th or 28th March, 2003, that it would have to establish a variation in the already agreed terms for the purchase and supply of aggregate for its construction contract at Finglas. Sensibly, no such submission was made by counsel on its behalf as there are not facts to support any agreed variation. Rather, the plaintiff's only submission on the incorporation of its Purchase Order were upon a submission that the concluded contract did not come into existence until the first delivery was effected. This does not appear correct for the reasons already set out.

30. The defendant, in its wide-ranging submissions, places great emphasis on the incorporation of its terms and conditions by the signature by or on behalf of the plaintiff on each delivery docket. The defendant's submission is that each individual delivery formed a distinct and unique contract between the plaintiff and the defendant, albeit part of the over-arching or master contract between them, and that its terms and conditions were incorporated into each such contract, either by the signature given on behalf of the plaintiff, by reasonable notice of the prior delivery documents or by a course of dealing.

31. It is well established that terms and conditions may be incorporated into a contract by signature, reasonable notice or by a course of dealing. (See, *inter alia,* McMeel, *'Construction of Contracts'* (2nd Ed.) Oxford University Press 2011, at paragraph 15.53). On the question of signature, Denning L.J., in *Curtis v. Chemical Cleaning and Dyeing Company* [1951] 1 K.B. 805, at p. 808, as ever, put it pithily:

> "If the party affected signs a written document, knowing it to be a contract which governs the relations between them, his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation: *L'Estrange v. Graucob* [1934] 2 K.B. 394."

It is important to note the condition of "knowing it to be a contract which governs the relations between them".

32. Whether the incorporation is to be by signature, reasonable notice or course of dealing, the first question is whether the document which makes reference to the terms and conditions is a contractual document. McMeel, at paragraph 15.56, states:

> "A first hurdle to overcome is whether the document is of a character that it could be reasonably expected would contain terms and conditions. Is it a contractual document? This can either be satisfied by actual knowledge of the receiving party that it contains terms or by an objective test: would the reasonable recipient expect it to contain conditions? This is relevant to all modes of incorporation. A distinction has to be drawn between documents which effect or form part of the background to the formation of the contract, and post-contractual documents. The former are an obvious source of terms, whereas a court may conclude that the latter came too late to prove an argument of incorporation. Auld L.J. has drawn this distinction:
>
> 'A document may have a contractual purpose as a contract making document or in the execution of an existing contract. Documents such as a time sheet, an invoice or a statement of account are within the latter category. They do not normally have a contractual effect in the sense of the making or the varying of a contract'. (*Grogan v. Robin Meredith Plant Hire* [1996] C.L.C 1127, at 1130 CA).
>
> That may be an appropriate distinction to draw so far as 'one-off' arguments about incorporation by signature or notice are concerned. It may go too far if the argument is that incorporation has arisen by a course of dealing or of industry-standard terms. In that context both invoices and other administrative documents are often the basis of an argument of incorporation based on the parties' practice."

33. It follows from my earlier conclusion that the terms agreed on 26th March, 2003, between the plaintiff and the defendant were the terms in accordance with which the defendant agreed to supply aggregate to the plaintiff. The delivery documents commencing on 27th March, 2003, are all post-contractual unless they had the effect either of making a new and distinct contract, or of varying the existing contract. Any analysis must be based upon the facts of this case. Counsel for both parties opened many authorities to me which, whilst helpful insofar as they state the principles, must be very carefully considered and applied, as each tend to turn on their own particular facts. Nevertheless, it does appear that the facts in Grogan, to which reference is made above, are sufficiently similar and that, in particular, the analysis of Auld L.J. in his judgment is of assistance to me on the facts before me. It also appears that quite similar arguments were advanced before the Court of Appeal to those advanced on behalf of the defendant to me in favour of incorporation by signature on the delivery dockets.

34. The facts in Grogan were that the first named defendant, a plant hire company, approached Triact, a civil engineering contractor, seeking work. It was orally agreed that Triact would hire from the defendant a driver and a machine for an all-in rate of £14.50 an hour from 27th January, 1992. Neither party mentioned any other terms. At the end of the first and second weeks, Triact's site manager signed a timesheet recording the hours that had been worked by the first named defendant's driver. Toward the bottom of the timesheet was printed, 'All hire undertaken under CPA conditions. Copies available on request'. Under the CPA conditions, Triact was bound to indemnify the first named defendant against any liability incurred to third parties in the course of the hire. An accident occurred during the third week in which the plaintiff, Grogan, was injured, and ultimately, obtained judgment for damages against the first named defendant and Triact. The first named defendant claimed that the CPA conditions were incorporated into the contract by the signing of the driver's timesheet and Triact was therefore liable to indemnify it against its liability to the plaintiff. The High Court held that the contract had been varied so as to incorporate the CPA conditions and the first named defendant entitled to succeed against Triact. Triact appealed. Auld L.J., delivering the leading judgment, rejected the submission that the court should only look at the words of a signed document and disregard its nature or function stating:

> "I reject MT Turner's proposition that the court should look only at the words of a signed document and disregard its nature or function. The central question, adopting and adapting the useful statement of principle in *Chitty on Contracts* (27th edn), vol. 1, para. 12/008, is whether the time sheet in this case comes within the class of a document which the party receiving it knew contained, or which a reasonable man would expect to contain, relevant contractual conditions. Another way of putting it, as Kerr J did in Bahamas Oil Refining Co v Kristiansands Tankrederie A/S ('The Polyduke') [1978] 1 LI Rep 211 at pp. 215-216, is whether 'the document purport[ed] to have contractual effect'. It has to be borne in mind too that the circumstance to which the question relates, the presentation and signing of a time sheet for work done under an existing contract, is one of alleged variation, not the initial making of a contract."

35. He later considered the different ways in which a document may have contractual purpose in stating:

> "A document may have a contractual purpose as a contract making document or in the execution of an existing contract. Documents such as a time sheet, an invoice or a statement of account are within the latter category. They do not normally have a contractual effect in the sense of making or varying a contract. The purpose of time sheets is not normally to contain or evidence the terms of a contract, but to record a party's performance of an existing obligation under a contract."

36. He finally dealt with one further submission also made in these proceedings:

> "I should not leave the matter without returning to the argument of Mr. Turner that the mere signature on a document which contains or incorporates by reference contractual terms has the effect of incorporating these terms into a contract. In my view, such a proposition is too mechanistic. The fact that a time sheet is signed by a person authorised to effect or vary a contract on behalf of his employer does not affect the basic question whether that person, or a reasonable man, would have understood that his signing of the document varied the contract already struck between the parties. The question in Chitty, to which I have already referred and have adopted, is whether the document purports to be a contract or to have contractual effect. The answer in each case requires consideration, not only of the nature and purpose of the document, but also the circumstances of its use as between the parties and their understanding of its purpose at the time."

37. On the evidence given at the trial of this issue, I have concluded that there was already a concluded contract in being as to the terms upon which the aggregate would be supplied by the defendant to the plaintiff when the delivery dockets came into existence. The evidence given on behalf of both the plaintiff and the defendant was to the effect that delivery dockets are crucial dockets for both the construction and quarrying industry. However, in my judgment they are crucial as the written record of the amount and type of aggregate delivered and the time, date and place of delivery. They make no reference to price. The evidence given on behalf of the defendant was that a signed delivery docket was essential to enable the defendant obtain and enforce payment for the loads supplied or delivered. Similarly, the evidence given on behalf of the plaintiff was that they were crucial for the purpose of checking the plaintiff's potential liability for payments to the defendant. Accounts and invoices supplied by the defendant were checked against the plaintiff's copies of the delivery dockets.

38. The evidence was that delivery dockets were signed on behalf of the defendant by the weighbridge operator. The delivery dockets were signed on behalf of the plaintiff, either by a haulier sent to collect the aggregate and authorised to sign the delivery document on the plaintiff's behalf or the site foreman or other site operative if delivered to the site. Further evidence on behalf of the plaintiff was that no such person had any authority to negotiate or agree to any contractual terms relating to the purchase of the aggregate. Whilst express evidence was not given of the absence of any such authority by the weighbridge operator, I have concluded from the evidence of Mr. Tuite, as to the operating systems, that a weighbridge operator of the defendant did not have any such authority. In my judgment on the facts herein, the delivery dockets had a contractual purpose in the sense of being a document used in the execution of the contract which came into existence on 26th March, 2003. They did not have contractual effect in the sense of making or varying a contract. Having regard to the system operated by both parties for the performance ofr the supply contract agreed on 26th March, 2003, neither a reasonable man nor any haulier or site operative signing a delivery docket on behalf of the plaintiff would have understood that his signing of the delivery docket potentially varied the terms of the contract already agreed according to which the aggregate was being supplied by the defendant to the plaintiff.

39. In *Continental Tyre and Rubber Company Ltd. v. Trunk Taylor Company Ltd*. [1985] S.C. 163, on quite different facts, a somewhat similar analysis was made by the Lord President in which he concluded on the facts of that case that the delivery note which expressly stated that "all offers and sales are subject to company's current terms and conditions of sale . ." was a non-contractual document, in the sense that it was "a document the only purpose of which was to record performance of a particular transaction with a view to payment". It appears to me on the facts of this case that the purpose of the delivery dockets was to record the particular supply with a view to payment. They were undoubtedly crucial documents, but in the administration or execution

of the contract already agreed.

40. The defendant's alternative submissions that its terms and conditions were incorporated by notice or a course of dealing by reason of the reference to them on prior delivery dockets is dependent upon a finding that each delivery potentially constituted a new and distinct contract between the plaintiff and the defendant. Unless each new call-off or order potentially gave rise to a new contract, in the sense of a contract with new terms of supply, the defendant's terms and conditions, to which reference had been made in prior delivery dockets, could not be incorporated, either by notice or by a course of dealing. Such appears to have been the factual position in *Circle Freight v. Medeast* [1988] 2 Lloyd's 427, upon which reliance was placed by the defendant.

41. The facts herein do not support the coming into existence of new and distinct contracts of supply to which potentially new terms applied upon the plaintiff's site foreman or other operative making what was termed "a call-off" or placing an order for a specified quantity of aggregate of a type referred to in the Purchase Order, which was accepted by the defendant's weighbridge operator, by either making the product available for collection or arranging the delivery of same to the plaintiff's site. The evidence was that the terms of supply were negotiated between senior management, Mr. Regan and Mr. Tuite on behalf of the plaintiff and defendant, respectively. Each of those gentlemen gave evidence of the need to consult in each case with a superior, Mr. Murphy, and Mr. Lagan prior to reaching agreement between them. Further, the evidence was that the important price terms were not disclosed in the copy of the Purchase Order sent to the site foreman or it would appear to the weighbridge operator. The weighbridge operator was informed when an account was opened by Mr. Lagan and when he might commence delivery. Whilst counsel for the defendant placed much emphasis on the fact that only a limited number of the delivery dockets referred expressly to the number of the plaintiff's Purchase Order, the evidence of Mr. Tuite was that all the deliveries were referable to the one Purchase Order.

42. I have concluded that on the facts herein, the system which operated between the plaintiff and the defendant was that the contractual terms applicable to supply were agreed at senior management level. Once agreed, they were to last for the duration of the plaintiff's construction contract at the Finglas site. The single Purchase Order to which all deliveries related confirms this. The single supply contract was to be performed or executed by operatives who had no authority to negotiate any variation in the terms agreed. Insofar as individual contracts for sale may be considered to have come into existence they were all for sales on the terms of the single supply contract as I have termed it. The supply contract was executed or performed in accordance with a well-established practice that the site foreman or other operative would make "a call-off" or, in other words, place an order for a specified amount of a specified type of aggregate to be delivered. Such communication was conveyed orally to the weighbridge operator and would be acted upon by him by preparing the product for delivery and, when placed on either the defendant's truck or the truck of a haulier sent by the plaintiff, a delivery docket would be generated recording the amount and type of aggregate supplied on that day. On supply, either at the quarry or delivery at the plaintiff's site, a copy of the delivery docket was required to be signed on behalf of the plaintiff. The purpose of the delivery docket was to record the amount of type of aggregate delivered. The agreed supply terms, including price and credit upon which it was being sold, was not recorded in the delivery docket. Those terms were the terms which had been agreed on 26th March, 2003. The operatives placing the order and supplying the product had no authority to agree any new or different terms of supply.

Other Issues

43. Having regard to my conclusion that neither the plaintiff's Purchase Order conditions nor the defendant's terms and conditions were incorporated into the contract of supply according to which all sales were made, it is unnecessary for me to consider the submissions made by the parties in relation to the nature of the limitation of liability in clause 8 of the defendant's terms and conditions and whether it was so onerous as to require special notice.

44. Each party, however, made an alternative submission as to relevant implied terms in the event that the Court determined, as I have now done, that neither the plaintiff nor the defendant's terms and conditions were incorporated into the contract or contracts between the parties. The defendant, at para. 13 of the amended Defence, pleads that in the absence of incorporation of either party's terms that certain terms were implied into the contract by virtue of the custom and practice within the industry. The alleged terms were stated to include "a term that in the event of goods being delivered which were defective, a vendor's liability is limited to the cost of their replacement only, and a term that vendors are not liable for any other loss arising directly or indirectly from the supply of defective materials".

45. The plaintiff, at para. 8 of the amended Statement of Claim, contends for implied terms and/or warranties in the agreement, including that the defendant would sell, supply and deliver aggregate of merchantable quality. At the hearing, the plaintiff only pursued the implied condition as to merchantable quality pursuant to s. 14(2) of the Sale of Goods Act 1892, as amended by s. 10 of the Sale of Goods and Supply of Services Act 1980.

46. The principles according to which terms will be implied in a contract by custom are not in dispute. McDermott on '*Contract Law'* (Butterworth's 2001) at para. 7.06, identifies the basic question in reliance upon Evans J. in *Vitol S.A. v. Phibro Energy AG, the Maturaki* [1990] 2 Lloyd's Report 84, at 88, as being whether, "there was in the trade, a uniform . . . practice, so well defined and recognised that the contracting parties must be assumed to have had it in their minds when they contracted". McDermott further identifies, at para. 7.07, the following as an non-exhaustive list of the requirements which must be fulfilled before a custom may be implied:

> "(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 express contract."

47. The plaintiff relies on the statement of Maguire P. in *O'Reilly v. Irish Press* [1937] 71 ILTR 194, which has recently been confirmed by Hedigan J. in *McCarthy v. Health Service Executive* [2010] IEHC 75:

> "[A] custom or usage of any kind is a difficult thing to establish. Before a usage such as is contended for here can be held to be established it must be proved by persons whose position in the world [being considered by the Court] entitles them to speak of with certainty and knowledge of its existence. 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 the terms of the contract between the parties."

48. The defendant adduced evidence from Mr. Kennedy, a person with significant experience in the quarry industry, including approximately five years as the Pits and Quarries Director for Roadstone Dublin Limited. He gave evidence of the custom and practice amongst the international and large family owned quarries of limiting liability for defective product in supply agreements to the replacement of defective product, or excluding consequential loss. He acknowledged, in the course of his evidence, that he had experience in negotiation with the construction industry of being asked for an indemnity, but expressed the view that he would never have agreed to such an indemnity. Mr. Tuite on behalf of the defendant also gave evidence of the custom or practice within the industry or a standard practice of including limitation of liability in terms and conditions by quarry owners.

49. Mr. Regan on behalf of the plaintiff, from his 25 years experience in the construction industry, disputed this evidence insofar as it related to supply by quarries to the construction industry. He also gave evidence of an example of purchases made by the plaintiff from another quarry owner of aggregate for the Finglas development on the plaintiff's Purchase Order conditions, including the clause 17 indemnity. Mr. Murphy's evidence also disputed the alleged custom.

50. In my judgment the evidence adduced by the defendant falls short of establishing a custom of a type which would permit the Court to find that where a contractor operating in the construction industry, such as the plaintiff, enters into a contract with a quarry operator for the supply of aggregate for a construction contract, it could be objectively determined that both parties must be taken to have known of it and intended that it should form part of the contract. On the evidence, I find that there may well have been a standard practice amongst the larger quarry owners of inserting, in their standard conditions of sale, a clause limiting liability to replacement of defective product, or excluding consequential loss and being unwilling to deviate therefrom. Nevertheless, in particular in the evidence of Mr. Kennedy, it appears to be acknowledged that a purchaser from the construction industry might well seek, albeit, perhaps, unsuccessfully, to obtain an indemnity against loss arising from defective product. I am not satisfied that there is evidence of a custom well known and 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. The practice, insofar as it existed, appears to have been of the inclusion of such an express contractual term.

51. Accordingly, in my judgment, there is no limitation of the liability of the defendant for defective product implied by custom into the contract of supply between the plaintiff and the defendant.

52. The plaintiff contends for an implied condition pursuant to s. 14(20 of the 1893 Act, as inserted by s. 10 of the Act of the Sale of Goods and Supply of Services Act 1980. Section 14 provides:

> "14.—(1) Subject to the provisions of this Act and of any statute in that behalf, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.
>
> (2) Where the seller sells goods in the course of a business there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition—
>
> (a) as regards defects specifically drawn to the buyer's attention before the contract is made, or
>
> (b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to have revealed.
>
> (3) Goods are of merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances, and any reference in this Act to unmerchantable goods shall be construed accordingly.
>
> (4) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgement.
>
> (5) An implied condition or warranty as to quality or fitness for a particular purpose may be annexed to a contract of sale by usage.
>
> (6) The foregoing provisions of this section apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made."

53. The plaintiff only contends that there is an implied condition that the aggregate and stone supplied under the contract by the defendant was of merchantable quality pursuant to section 14(2). There was some lack of clarity in the closing submissions as to whether counsel for the defendant continued to dispute the existence of such an implied condition in the event that neither party's terms and conditions were incorporated into the contract. For the avoidance of any doubt at the full hearing of the action, and as this Court on the trial of this issue has to determine what were the relevant terms of the contract between the plaintiff and the defendant (express or implied), I propose holding that those terms include pursuant to s. 14(2) of the Act of 1893 as amended an implied condition that the goods supplied under the contract are of merchantable quality. There is no evidence to support any exclusion of such a condition pursuant to s. 14(2)(a) or (b) of the Act of 1893 as amended.

54. I wish to make clear that all issues relating to questions as to whether or not the aggregate and stone supplied by the defendant to the plaintiff pursuant to the contract of supply between March 2003 and May 2005 for the development at the Finglas site was or was not of merchantable quality are matters for the full hearing of the plaintiff's claim herein.

Decision in Elliott Construction

55. Subsequent to the end of the hearing of the issue before me Charleton J gave judgment on 25 May 2011 in *James Elliott Construction Limited v. Irish Asphalt Limited* [2011] IEHC 269. The claim therein is for damages for breach of contract in relation to the supply by the defendant for aggregate alleged to contain pyrite for use in construction. The defendant had used similar delivery dockets to those used in the contract herein which contain a reference to its terms and conditions and sought *inter alia* to limit its liability in reliance on clause 8 thereof. The parties herein sought and were granted liberty to make further oral and written submissions in relation to the judgment of Charleton J. insofar as it relates to the incorporation of clause 8 of the defendant's terms and conditions in the contracts at issue in the *Elliott Construction* case. I have also been informed that the judgment is under appeal.

56. I have reached my decision for the reasons set out above upon a full reconsideration of all the evidence, submissions and authorities (including those relating to the judgment in *Elliott Construction*) to which I was referred. The contractual analysis made is this judgment is primarily dependent on the evidence before me and hence it does not appear necessary to refer to the judgment of Charleton J. I have noted that we appear to have reached similar conclusions on the non-incorporation of clause 8 of the defendant's terms and conditions albeit on different facts and contractual analysis.

Relief

57. Whilst the issue set down as the first issue is in terms "what were the terms of the contract between the plaintiff and defendant (express or implied) for the purchase and sale of the aggregate, the subject matter of these proceedings", it does not appear to me necessary to set out exhaustively, in the form of a declaration, all the relevant terms and conditions. The terms and conditions relevant to the plaintiff's claim in the proceedings and the defence thereof are those which relate to the plaintiff's claim for declarations as to the incorporation of its Purchase Order conditions, the declaration of entitlement to an indemnity and the claim for damages for breach of contract. In accordance with this judgment, it appears sufficient that I would make declarations to the following effect. However, I will hear counsel as to the final form of the Order, having regard to the terms of this judgment. The proposed declarations are:

> (i) A declaration that the contract of supply between the plaintiff and the defendant according to which the defendant supplied aggregate and stone from March, 2003 to May, 2005, for the plaintiff's construction contract at Griffith avenue, Finglas did not include either the plaintiff's Purchase Order conditions or the defendant's terms and conditions.
>
> (ii) A declaration that there is no limitation on the defendant's liability for defective product (if any) supplied implied by custom into the said contract of supply between the plaintiff and the defendant.
>
> (iii) There is an implied condition of merchantable quality pursuant to s. 14(2) of the Sale of Goods Act 1893, as inserted by s. 10 of the Sale of Goods and Supply of Service Act 1980, in the said contract of supply between the plaintiff and the defendant.