Neutral Citation Number: [2007[IEHC 391

THE HIGH COURT

COMMERCIAL COURT

[2007 No. 692 P]

BETWEEN

McCABE BUILDERS (DUBLIN) LIMITED

PLAINTIFF

AND

SAGAMU DEVELOPMENTS LIMITED,
LARAGAN DEVELOPMENTS LIMITED AND HANLY GROUP LIMITED

DEFENDANTS

Judgment of Mr. Justice Charleton delivered on the 23rd day of November, 2007

1. The issue in this case is whether the Plaintiff and the Defendants ever concluded a contract and, if so, what were its terms. A contract is not concluded unless the parties have agreed its essential terms; *Supermacs Ireland Limited v Katesan (Naas) Limited* [2000] 4 IR 273 at p. 286. Where work is done on behalf of a party in circumstances were there is a reasonable expectation of proper payment then, in the absence of a contract, the value of that work should be assessed on a *quantum meruit* basis. If the minds of parties who intend to do business with each other on the basis of obligations defined by a contract do not meet as to the fundamentals of what they will be required to do, a resolution of any dispute as to the value of work actually done must be measured on a *quantum meruit* basis.

The works

2. The plaintiff, a building company, was to build 30, later increased to 32, houses and 14 apartments at Kilmacanogue, County Wicklow for the defendants, which are, in effect, three building companies. Both parties take a radically different view as to what contract has been agreed between them. Mutually, they claim that there were different sets of offers and different acceptances, or non acceptances, in respect of particular sections of this alleged contract.

3. This dispute has been compounded by the attitude of both parties; which might be characterized as wanting in mutual respect towards each other. Building 46 dwellings in circumstances where the developer, as employer, and the builder, as contractor, know what their obligations are is a complex task. I take the view that the plaintiff is a respected building firm. In the past, they have been responsible for several developments of high quality housing. The three defendants operate under the umbrella of the Hanly Group Limited, the third named defendant. These companies have been involved in quarrying, road construction and house building and are a respected set of interlinked firms. I am satisfied that neither party to this dispute has a history of being litigious or of attempting to exploit the niceties of standard forms of building contracts with a view to squeezing unjust returns out of projects. However, there is now no real trust between the parties. The history of the matter explains why, but only to a degree. In essence, many things have gone wrong with this development. While it is not my task to resolve the rights and wrongs thereof, it is as well to list some of the main points that have come up in evidence as items of contention between the parties. The defendants would have liked to have built this development themselves. It seems they were too busy. Hence, they entered into a process of tender whereby the plaintiffs were chosen in a competition to perform the works. Had the defendants been on site themselves then the problems allegedly encountered by the plaintiff would have been theirs. Instead, as to the physical aspect of the completion of this housing development, there have been many serious contentions and counter contentions. Briefly, I will now list some of these:-

> 1. The site was at a place called Rocky Valley. Looking at the land surrounding the development you might reasonably expect rock. That is what the defendants say in answer to the plaintiff's claim that the development has been delayed, and has become markedly more expensive, because of the need to excavate. The plaintiff claims, on the basis of the contract documents, that it might have expected about 300 m^3 of rock but that they have instead encountered 20 times that amount.
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> 2. To save money on the building of foundations, the plaintiff engaged in a process which has been described in evidence as "value engineering". This process involves the excavation and treatment of earthwork on site, as opposed to carting away soil and replacing it with hardcore. This may, or may not, be a worthwhile process but, in evidence, the defendants have referred to it as a form of "gardening".
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> 3. The defendants claim that the project completion date has been delayed unconscionably. The plaintiff will agree that there has been considerable delay; a period of 40 weeks was mentioned in evidence. The plaintiff, however, puts this down to a series of boundary disputes about which it knew nothing, so it is claimed. In addition, they say that their "value engineering" works could not be carried out properly and expeditiously because of the failure, due to these boundary disputes, to give them immediate possession of the entirety, as opposed to around 60%, of the site.
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> 4. The plaintiff says that the specifications for the houses and apartments have been changed during the course of the development. The defendants disagree with this. The main focus of contention relates to the shape of doors; the interior fit out of the houses, with down lighters featuring prominently; and the changing of attic spaces into living areas.
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> 5. The utilities, it is claimed by the plaintiff, were not shown on the relevant drawings.

4. In answer to many of the points of contention of the plaintiff, the defendants claim that the requirements for the building works were shown in the descriptions in the Bill of Approximate Quantities, at tender stage. These descriptions at tender stage, the defendants contend, defined the obligations of the plaintiff as building contractor so that the plaintiff is now complaining in respect of matters that were incorporated in the obligations of the plaintiff under the building contract and are not allowable as variations from it for which the defendants must pay extra. Crucial to how these items of dispute may be resolved is the issue of whether descriptions in the Bill of Approximate Quantities, part of those contended for contract documents, are to be used in deciding, firstly, what was the nature of the work to be done by the plaintiff and, secondly, whether there has been a variation from the works agreed. Because there is so much in dispute, it is crucial to determine what the agreed contract works were and how variations are to be treated for payment purposes. These disputes, on the contended for contract documents, as to the nature of the mutual obligations of the defendants, as employer and the plaintiff as contractor, encapsulate the bulk of what is the disagreement between the parties.

Warning

5. The Liaison Committee for the Building Industry is a formal body that meets a number of times a year. Its constituent bodies are drawn from the building industry, from the architects' profession, and from the surveyors' group. The Liaison Committee's function is

to make recommendations as to any amendment that might be made to a standard building contract that is commonly known as the "RIAI agreement". The Liaison Committee have issued practice notes as to tendering and contracts. Note 6 consists of the following exhortation:

> "It is essential that the several documents which go to express or define the contract should relate accurately to one another, without contradictions or discrepancies. This correspondence should extend to all documents, the Agreement, the Conditions, the Contract, the Drawings, the Specifications and the Bill of Quantities."

6. The Committee also advises that contract documents should be prepared with particular care at the pre-contract stage. Where the nature of the project requires a departure from the standard RIAI form, it is recommended that changes should be made to that form and that the specific attention of the tendering contractors should be drawn to such changes. When it comes to dealing with tendering, at note 8 it recommends that the conditions of tendering should be absolutely clear so that all tenders are submitted on the same basis. At para. 8.3.2.4 the Committee strongly recommends the use of the standard forms of building contract in unamended form. The document reads-

> "The Liaison Committee believes that alterations to the standard forms impede the efforts being made towards achieving greater standardisation of building procedures. The Liaison Committee is firmly of the opinion that, if alterations to the standard forms have to be made, it is essential in the interests of good practice and of economic building that they be kept to an absolute minimum. They should not be undertaken without serious prior consideration and should then be drafted by a person competent to ensure that all consequential alterations to other clauses are made.
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> The tenderer's attention should be specifically drawn in the "Preliminary Invitation to Tender"… to any alterations to be made to the standard form of contract and, where appropriate, reasons should be given, so that the implications of such amendments may be considered by the tenderers prior to acceptance of the invitation to tender, and so minimise the risk of subsequent queries at tender stage which might result in an extension of the tender period."

Claim and Counterclaim

7. In June, 2005 Nolan Ryan partnership, a firm of chartered surveyors, acting on behalf of the Hanly Group Limited, one of the defendants, sought tenders for the construction of this housing development. In July, 2005 the plaintiff submitted a tender in a VAT exclusive amount of €17,222,620. After negotiations between the parties, a letter dated 5th August, 2005, was sent from the defendants to the plaintiff, and signed by both parties, whereby the sum agreed for the works to be paid by the defendants as employers, to the plaintiff as contractor, was reduced to €15,300,000. In order to get the project started, a letter of intent for works to the value of €1 million, was issued on the 26th August, 2005, in the absence of completed contract documents. In November, 2005 the defendants furnished to the plaintiff, through their quantity surveyors, a copy of the "blue form" of the RIAI contract. They enclosed the letter of 5th August therewith, but did not refer to it in the contract documents. This form of contract was not signed by the plaintiff until the 19th January, 2006. This, I am satisfied, was because of uncertainties as to its scope and effect. By letter dated the 9th November, 2006, the solicitors on behalf of the defendants indicated to the plaintiff that they did not accept that the agreement between the parties incorporated the terms and conditions spelt out by the "blue form" of the RIAI contract. The defendants contend that the works claimed as variations, in respect of which payment has been sought by the plaintiff, were included in the original contract; whereas the plaintiff says that they were not. This original contract contended for by the defendants is basically the letter of 5th August 2005 and the documents that are mentioned in its text.

8. In the plaintiff's statement of claim a declaration is sought that a binding agreement exists between the plaintiff and the defendants in respect of this development and that the terms are to be found in the RIAI "blue form" of contract, the standard form of building contract where quantities do not form part of the contract. It makes no mention as to any modifying effect, if any, which the letter of 5th August 2005, may have had.

9. The defendants, in their defence and counterclaim, assert that the course of dealings between the parties incorporates into the contract a number of 2005 documents including, most importantly, a letter of 25th July, a number of letters on the 3rd August, the letter on 5th August (misdated the 9th August) and an interior design report. The defendants counterclaim for a declaration that the contract consists of the letter of 5th August, and the documents referred to therein, and supposedly incorporated thereby; they seek an order declaring that the R.I.A.I contract as executed by the plaintiff is not a contract document; they seek, in the alternative, an order of rectification of that contract so that same conforms with the alleged agreement entered into and evidenced in the letter of the 5th August; and they seek a declaration as to the true terms of the contract if it is otherwise than as pleaded by the defendants and, implicitly, as pleaded by the plaintiff.

10. I now need to refer to these documents, the history of dealings between the parties, and the conflicts of evidence between them. In resolving the latter I must then apply the law as to the construction of contracts with a view to answering the questions inherent in the case.

The tender process

11. The tender forms were distributed in June, 2005. In essence, anyone who wanted to do this work would fill out the tender document which would then be returned to the defendants as an offer. The form of tender documents used recites that the proposed contractor "offers to execute and complete the works described" for a particular sum nominated by the proposed contractor. It indicates that, in the event that the employer accepts the tender, the contractor will "execute with the employer a sealed contract embodying all the conditions and terms contained in this offer". Clause 5 of that offer has the proposed contractor undertaking to the employer "to complete the works within the time frame advised by the Project Manager, subject to the Conditions of Contract". The tender documents included tender drawings. These were based on the planning permission application of the defendants for this development and then slightly tweaked for building purposes by the architect on behalf of the defendants. I am satisfied that they contain considerable detail. On the other hand, the specification for materials which formed part of the tender documents has been described in evidence as one of the worst, meaning lacking in detail, ever issued as part of a tender process in a job of this size. A Bill of Approximate Quantities, as it is called, accompanies these documents and runs to several volumes. This part of the tender document details the work to be done, the quality of product to be used, the expected quantities involved and the price in relation thereto. One essential point of disagreement between the parties is as to whether the descriptions of the scope of works set out in the bill of quantities is, or is not, a contract document. The plaintiff contends that it is merely a Schedule of Rates. Normally, it is argued, where a quantity is increased under the "blue form" of contract no variation will arise in respect of which the contractor is entitled to claim. Nor is the employer entitled to any saving in cost that might arise if the quantity in the Bill of Quantities decreases or where the work becomes unnecessary. Where a provisional quantity is inserted, and here the main issue is in relation to the excavations of rock required, it is contended that the contractor does not take the risk of increases in the quantity as, by using the

term "provisional quantity", the employer is taken to recognise that the quantity is not ascertainable. The defendants claim that this contended for rule does not apply here because the descriptions in the Bill of Quantities are part of the contract documents and because of the description of the site as "Rocky Valley". In addition, the defendants say the invitation to dig trial holes, with a view to ascertaining what amount of excavation might be required, places all the obligation in respect of any contingency as to excavation work on the contractor. The defendants also point to certain terms within the Bill of Approximate Quantities, which made up part of the tender documents. These they say, define the obligations that the plaintiff assumed by making an offer that incorporates the tender documents.

The contentious clauses

12. The Bill of Approximate Quantities within the tender documents contained a section marked "Project Particulars" and was followed by a section entitled "General Conditions". Three issues arise: firstly, what is specified in these documents; secondly, whether these documents ever became part of the contract; and, thirdly, what they mean within the context of the documentation purportedly agreed by the parties in an attempt to reflect their agreement, if any.

13. The project particulars describe the works to be done in building these dwellings. It states what the site is for the proposed works and then specifies:-

> "The form of contract will be the Articles of Agreement and Conditions of Contract, 2002 (Revision 1, Print 4) as issued by the R.I.A.I in agreement with the C.I.F. and the S.C.S. where quantities do not form part of the contract. The appendix to the contract will be filled in as shown in the preliminaries section of the Bill of Approximate Quantities."

This is commonly called the "blue form" RIAI agreement, and that colour distinguishes it from the "yellow form". This section of the document goes on to give details as to other matters, like damages and tax clearances certificates. The next section, the general conditions, recommends that the contractor visit the site and states that he is to be taken to have made himself acquainted with the nature of the works, the character, dimensions, levels and other features of the site, all existing buildings on or adjacent to the site and all other things insofar as they may have any connection with, or affect, the works. The contractor is required to submit an approved programme for the entire works. The conditions deal with the disposal of materials on site and such matters as historical finds. The document also requires the use of "qualified tradesmen, together with their labourers". Under the heading of 'Documents' the following appears:-

> "The contractor shall carefully examine the drawings and other contract, documents and satisfy himself as to their accuracy and ensure that they cover and embody the proposed works. The contractor shall properly execute the works whether or not shown on the drawings or described in the Bill of Approximate Quantities, provided that same may reasonably be inferred therefrom."

14. The general conditions require that materials should be of good quality. The works are defined as the entire of the works envisaged by the contract. A reference is made under the heading "Bill of Approximate Quantities" to the following:-

> "Where the work has not been measured or described in detail but has been referenced to the detail drawings or sketches, the description given in the Bill of Approximate Quantities shall be deemed to include the additional information given on the detail drawings as if given in full in the bill item."

15. It is argued by the defendants that by making an offer in response to these tender documents, as the plaintiff did, it could only expect the contract to be as outlined in the project particulars. It is contended that any appendix to the contract could reasonably be expected to be filled in as shown in the preliminary section of the Bill of Approximate Quantities. This follows on in the tender documents from these just quoted sections. Under the heading "Contract" it provides for the RIAI 2002, Revision 1, Print 4, printed March, 2004, form of contract where quantities do not form part of the contract. This negative as to quantities is emphasised in this form. When this "blue form" is chosen by the parties, the Bill of Quantities, the plaintiff contends, becomes a schedule of rates for particular materials and works. Both forms allow for an appendix to be inserted into the standard wording so that the printed terms may be altered so as to reflect the understanding of the parties as to what they have agreed. If no unusual term is specified between the parties, the appendix to the contract may be expected in the form which complies with the articles of agreement and conditions of contract as outlined in the tender forms. However, as the evidence disclosed, the standard form referred to may be amended to reflect what the parties want as their agreement. The form of any future amendment must be uncertain at tender stage. Further, the submission of a tender document is no more than an offer by the contractor hoping that an employer will award him the work at an agreed remuneration. In this form of contract negotiation, all of the terms and the amount of the remuneration are up for discussion after the best tenderers have been identified. Tender documents, incorporating an offer by a contractor made to a potential employer, may be accepted as it is, or subject to new conditions, by the employer. This makes the form of contract actually used in the ultimate agreement crucial to determining the mutual obligations of the parties. The tender process is a means of getting there.

16 The form of contract documents eventually exchanged between the parties, the RIAI "blue form", specifies in particular detail what documents form part of the contract. The Bill of Approximate Quantities, part of the original tender documents, was signed by the plaintiff on the 19th January, 2006. This was after their tender had apparently been accepted and well after the works had begun. It was signed, however, in the context of the other contract documents, particularly the Articles of Agreement in the "blue form" RIAI contract which specifies in detail how the contract is to work. The appendix to the contract document does not contain the clause contended for as having the effect that descriptions in the Bill of Approximate Quantities became part of the contract.

17. The Articles of Agreement, signed on 19th January, 2006 by the plaintiff, recite the parties and the works. It indicates that the employer desires having the works done and then states:-

> "And whereas the contractor has made an estimate of the sum which he will require for carrying out the said works as shown on the tender dated 19th July, 2005 and has furnished a Schedule of Rates in conformity with the requirements of the conditions referred to hereafter and whereas the said contract drawings numbered as per attached list and the said specifications have been signed by or on behalf of the parties hereto."

18. The document is boldly headed with words indicating that quantities do not form part of the contract. The document declares that it has been agreed between the parties as follows:-

> "For the consideration hereinafter mentioned the contractor will upon and subject to the conditions annexed hereto execute and complete the works shown upon the contract drawings and/or described in the specification and conditions all of which together with this agreement or hereinafter referred to as 'the Contract Documents'."

19. This contract document is immediately followed by a schedule of precise contract obligations that are headed "Conditions". It would ordinarily be difficult to construe this as incorporating the general conditions which are part of the Bill of Approximate Quantities at tender stage. Specifically, this concept is excluded by the Bill of Approximate Quantities being described under the "blue form" as a Schedule of Rates. The conditions in the "blue form" oblige the contractor to carry out and complete the works in accordance with the contract documents. Clause 3 of the conditions deals with the drawings and the Bill of Quantities. One of two alternatives is provided. It is as well to describe first the alternative that was specifically crossed off and initialled by both parties. This clause, at 3(a) (i), specifies that if the Articles of Agreement provide for the inclusion of the Bill of Quantities as a contract document, then the contract sum is to be deemed to provide for the quality and quantity of the work set out. The clause goes on to state that no error in the description, or quantity, in the Bill of Quantities should vitiate the contract, but any such error, or omission, is to be rectified as a variation under Clause 13. The alternative clause, the one actually used, provides as follows:-

> "If the Articles of Agreement do not provide for the inclusion of the Bill of Quantities as a contract document the contract sum shall be deemed to provide for the quantity and quality of work set out in the drawings and specification and the contractor shall, before the signing of the Articles of Agreement furnish the architect with the Schedule of Rates. The Schedule of Rates shall be deemed to mean:
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> A copy of the fully priced and detailed estimate upon which the contractor's tender is based priced in ink, or
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> Where a Bill of Quantities is provided for tendering purposes the rates therein contained.
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> The Bill of Quantities unless otherwise stated shall be deemed to be have been prepared in accordance with the method of measurement of building works last before issued or approved by the Society of Chartered Surveyors and the Construction Industry Federation. Nothing contained in the contractor's estimate or the Bill of Quantities (except as a Schedule of Rates) shall confer rights or impose any obligations beyond those conferred or imposed by the contract documents."

20. In reading these two clauses I note, in particular, that the clause that is specifically rejected refers to the quality and quantity of work set out in both the descriptions and quantities in the Bill of Quantities, whereas the clause apparently accepted by both parties refers only to the quantity and quality of work set out in the drawings and specification. Further, in the clause apparently chosen to reflect their agreement by both parties, the Bill of Quantities does not confer rights or impose any obligations beyond those conferred or imposed by the contract documents, except as a Schedule of Rates. This is completely different to an obligation arising by description. Clause 13 allows for the ascertainment of prices for variations and specifies that in the form of contract, as amended, the Bill of Quantities has become a Schedule of Rates and that this is to be used to determine the value of the work carried out as a variation, if this is payable under the contract, where the work is of similar character and thus attracts the rate applicable. Wages and price variations are dealt with under Clause 36. If the yellow form had been used then, I am told, an escalation in wage prices due, for example, to economic buoyancy or a series of strikes, or variations in relation to the pricing of materials due to shortages, become the responsibility of the employer. Under the blue form, the general rule is that the contractor, having furnished the Bill of Approximate Quantities, transformed by contract under the "blue form" of RIAI agreement into a Schedule of Rates, has to comply with that Schedule of Rates and gains if prices fall or loses in the event of wage and price inflation.

Preliminary Conclusion

21. The clauses relied on by the defendants in the tender documents argued by them to incorporate the descriptions in the Bill of Quantities were drafted by them. I have difficulty in accepting the evidence of David O'Laoire to the effect that these clauses are almost terms of art that morph the "blue form" of RIAI contract into a hybrid whereby descriptions in the Bill of Approximate Quantities become part of the contract obligations. It would be simple to state clearly in the eventual Articles of Agreement signed by both parties, by way of an appendix, that the descriptions in the Bill of Quantities would form part of the specifications for the works, or to use words to the effect that the works would be defined as comprising the specifications, the drawings and the descriptions in the Bill of Quantities.

22. I regard this matter as analogous to an insurance contract whereby general categories of risk are covered but whereby some specific risks are excluded. In those cases, exclusionary clauses must be clear as to their effect: the burden of proving the incorporation of any derogation from an obligation assumed under a contract is on the party drawing back from the general obligation. Here, the party having charge of the form and wording of the documents, the defendants, wish to put an unusual meaning on to what would otherwise be a standard form. The ordinary and normal expectation in the use of the "blue form" RIAI contract is, as the relevant branches of those concerned in the building industry indicate, that a form of obligation that differs from the standard form should only be used in circumstances where it is expressly agreed by the parties. A lack of clarity arises here by reason of the form of wording in the tender documents and, more particularly, by reason of the clause contended for as the hybrid effect clause having been placed in a document that is not a contract document as defined by the "blue form" RIAI contract eventually signed in January, 2006. I would apply the principle as to interpretation stated in the judgment of Griffin J. in *Rohan Construction v. I.C.I.*, [1988] I.L.R.M. 373 at 377:-

> "It is well settled that in construing the terms of a policy the cardinal rule is that the intention of the parties must prevail, but the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning. The court must not speculate as to their intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances. The whole of the policy must be looked at, and not merely a particular clause."

23. I am also influenced by the reasoning of Kingsmill Moore J. In *Re Sweeney and Kennedy's Arbitration* [1950] I.R. 85. In settling, on the form of the contract following on the receipt of a tender, the defendants were at liberty to adopt any phraseology which they desired. The defendants could have provided clearly and expressly that the descriptions in the Bill of Quantities would form part of the contract documents and, therefore, be subject to the conditions set out in the Articles of Agreement. In that judgment Kingsmill Moore J. quoted Lord Greene M.R. in *Woolfall and Rimmer Limited v. Moyle*, [1942] 1 K.B. 66, at p. 73, where he indicates that those who have the benefit of competent advice should make up their minds as to the qualifications they wish to impose and express their intention in language appropriate to achieving the result desired. If this form were the whole of the documents incorporating the agreement between the parties, a matter which, as I have said, is in dispute, then those making use of the clauses which they wish a contractor to adopt as incorporating their obligations, must make up their minds as to what they mean and then express it in suitable language. It could be argued that this is the kind of clause which is so unusual, or so onerous, that an unusually high level of notice must be given of it. It seems to me to be reasonable, however, to require that a clause imposing an unusual obligation, and departing from a standard printed form, should not be so unclear in terms of its wording as to attract two days of evidence from expert witnesses on each side of this case, as to what it means within the context in which it occurs. Where an unusual clause is used then the parties should satisfy themselves as to what the clause means and that each has notice of it. If necessary, I would apply the

principle set out in *Interfoto Picture Library Limited v. Stiletto Visual Programmes Limited* [1989] Q.B. 433 which, in turn, is derived from the remark of Denning L.J. in *Spurling v. Bradshaw* [1956] 1 W.L.R. 461 at p. 466 that there are some clauses which need to be printed in red ink on the face of a document with a red hand pointing to it before it could be held that notice would be sufficient. Here, I need not go that far. Instead, I construe ambiguities against the defendants, as authors of the disputed clauses in the tender documents.

24. I also feel that I cannot get over the express definition within the Articles of Agreement, which is supposed to be the contract in itself, as to what is to constitute the contract. By expressly excluding the clause allowing for descriptions while expressly incorporating one which refers only to drawings and specifications; by failing to incorporate any appendix to the Articles of Agreement that expresses the incorporation of descriptions as part of the conditions of the contract; by expressly including a definition of contract obligations by reference to a Schedule of Rates, contract drawings and specifications, it becomes impossible to conclude that the parties have agreed that descriptions in the Bill of Quantities should be part of the contract obligation.

25. That, however, is not the end of the matter. It is necessary to look at the course of dealings between the parties, and in particular the letters contended for by the defendant in their defence and counterclaim, in order to ascertain whether the contract was agreed in a different form or, if the parties minds did not meet as to an essential term, whether a contract was agreed at all.

Interpretation
26. In resolving the important conflicts of evidence, and interpreting the documents, I am guided by the judgment of the Supreme Court in *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274 at p. 280. There, Geoghegan J. accepted, as representing the law in Ireland, the principles stated by Lord Hoffman in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 W.L.R. 896, which quotation occurs at pp. 280-281 of the Supreme Court's judgment:-

> "1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> 2. The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> 3. The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
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> 4. The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd*. [1997] A.C. 749.
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> 5. The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:
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> > "If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

Dealings between the parties
27. When the tenders were received on 19th July, 2005 the various VAT exclusive prices for the works, between the competing tenderers, varied between a high of €21.2 million and a low of €15.7 million, using round figures. The plaintiff was the second lowest tenderer. The pre-tender estimate of the cost of the works by Nolan Ryan, the quantity surveyors acting in respect of the tender on behalf of the defendants, was €18 million. This was not a contract which was governed by the public procurement rules in European law. The parties were therefore entitled to meet and to negotiate, something normally only possible in respect of public procurement for ultra-complex projects, such as nuclear power stations, under European rules. This meeting and negotiation is what happened. Those resulted in a drop in the tender price of almost €2 million from the price offered by the plaintiff, bringing it down to a level nearly €400,000 below the next lowest competitive tender. Negotiations after tender can also mean that a completely new form of agreement is arrived at, in distinction to a tender submission being treated as an offer and accepted by the employer in the form in which it is received.

Intention
28. Alan Hanly, as principal of the defendant companies worked with his quantity surveyors on this job, Nolan Ryan, and trusted them. He wished to find himself in a situation where there was a fixed price lump sum contract with no variations. He described this as a situation where he knew exactly what the job would cost with no variations allowing for extra costs, with the exception of upgrades. He instanced, as an acceptable variation, putting in a better class of kitchen or better types of tiling. His quantity surveyor, Denis Carron of Nolan Ryan, considered that a fixed price lump sum contract would generally be achieved by using the "blue form" of the R.I.A.I contract, where quantities are not included, but his stated intention was to define the scope of the works by flushing out the requirements from the drawings and specifications by putting certain matters into the Bill of Approximate Quantities in the tender documents. Mr. Hanly's concern, on receipt of tenders, was not to discuss matters as to the tender details, or the form of contract. Instead, as he said, he was interested in the "bottom line" and wanted to concentrate on the finishes. As was obvious from his evidence, that Mr. Hanly is a committed and competent businessman. With respect to the detail of any proposed form contract, he did not pretend to any expertise. Indeed, he was not aware, until this case, that there was a "yellow form" and a "blue form" of the RIAI contract. Most of his past work was done on the basis of trust. In eventually signing the Articles of Agreement he did not notice

the statement, in bold letters, at the top, that quantities did not form part of the contract. He did not consider the relevant written definition as to what documents defined the contract obligation. His case was that a deal had been made on the 5th August 2005 and, in essence, any legal requirements as to the form of contract were just that, a formality. His interpretation of his requirements here was that a Bill of Quantities would be prepared and sent out to the contractor; if ten centimetres were specified in respect of a particular job and they needed to use twelve, then the risk in respect of any extra work or materials had passed to them, no matter what, unless he, as the employer, insisted on an upgrade. That, in any event, was his firm intention. He did not discuss general conditions with his quantity surveyor and nor did he later have a detailed discussion as to the terms of the contract, or whatever appendix that might be inserted in the appropriate form of contract document. Mr. Hanly was assisted by Michael Oates, who works primarily for the defendant Laragan Developments Limited. He did not read the tender documents. The specification in relation to this tender form was scant, in his opinion and, in addition, more work needed to be done on the drawings. My impression was that he and Mr. Hanly had a good working relationship, an understanding of each other. Mr. Oates could not recall reading the legend at the top of the Articles of Agreement, to the effect that quantities did not form part of the contract: he stated that if he had read this, it would have meant very little to him. My view is that neither Mr. Hanly nor Mr. Oates gave any thought to, or were ever aware of, any mechanism to incorporate descriptions from the Bill of Quantities into the contract obligations.

29. Richard McCarthy, as Commercial Director of the plaintiff, had a good understanding of the nature of these forms of contract. A quantity surveyor by profession, he had never dealt with Mr. Hanly before but regarded Nolan Ryan as among the top quantity surveying firms in the State. His evidence, in relation to this contended contract, was that where quantities do not form part of the contract, then the risk on errors in quantities stays with the contractor. When quantities form part of the contract, the opposite applies; the risk on errors in the quantities or changes in the quantities stays with the employer. If a Bill of Quantities was included for tendering purposes, and the contract was without quantities, then excavation done from contours for tendering purposes to calculate the quantity of excavated material can be estimated inaccurately and an excess is not payable. In written submissions, this understanding was advanced by reference to the term of art that it is claimed was actually used in the Bill of Quantities to approximate a measure, such as rock excavations. I will return to this point in the context of the troubled issue as to rock. The Bill of Quantities becomes redundant, on signing such a contract, as Mr. McCarthy understood it, and is transformed into a Schedule of Rates. The contract is, therefore, based purely on the drawings and specifications. Mr. McCarthy's understanding was that, having submitted a tender, he was entitled to expect a standard blue form of RIAI contract; in which case he had, as he said, the security of knowing that the RIAI form of contract supersedes the Bill of Quantities apart from the fact that it is a Schedule of Rates. Such a form of contract does not, unless specifically amended, include descriptions from the Bill of Quantities, as part of the contract obligations.

Value engineering
30. After the submissions of tenders, I am satisfied that the preference within the defendants was for dealing with the plaintiff, as a company of high reputation. Negotiations ensued in July 2005 with a view, on the part of the defendants, to lowering the price and these were initially conducted between Mr. McCarthy and Mr. Carron. In consequence of looking at the process of treating foundations, the "value engineering" that is described above, and in looking for a different form of brick, it became possible to discount the price offered by the plaintiff, as tenderer, to €15 million. In respect of the prime cost sums, most of these were bought out by the plaintiff as developer. It was hoped that some savings might result thereby.

25th July letter
31. A conflict arises as to whether the plaintiff received a letter dated 25th July, 2005 from the defendant. This letter concerns planning conditions but also contains some points that the defendants wished to have incorporated into the price for the tender works. This letter was forwarded by Laragan Developments Limited to Mr. Carron of Nolan Ryan. I am satisfied that he immediately faxed it to another tenderer. I am satisfied that Mr. Carron would have faxed it on to the plaintiff but for the fact that he was aware that he had a meeting arranged the next day with Mr. McCarthy. On that Tuesday morning, when Mr. McCarthy came to their offices, Mr. Carron claims that he handed that letter, with appendixes, some eighteen pages, to him. Mr. McCarthy claims that complying with additional matters would have affected his price upwards, so he would have read and noted this material. In the discovery documentation of the plaintiff a copy of the fax sent to the other contending tenderer was produced. My view is that Mr. McCarthy had the letter, and that it was passed on to him by Denis Carron shortly after the 25th July, 2005. I will turn to the text of the letter and its effect later.

Rock
32. Earlier, I set out what was contended by the parties to be the difference between the blue and yellow forms of RIAI contract. In their written submissions, counsel for the plaintiff described the exception to the rule that where quantities increase under the "blue form" RIAI contract, the contractor is not entitled to claim a variation because the Bill of Quantities is not a contract document. This is the exception, as so described:-

> "The one exception to this rule is where the quantity is described in the Bill of Quantities as a 'provisional quantity' (such as is the case in the present circumstances where rock is described as a provisional quantity). In these circumstances the Contractor does not take on the risk of increases in this quantity and it is recognised by the Employer (by inserting the word provisional in the tender Bill of Quantities) that this quantity is not ascertainable. Consequently if this provisional quantity increases the Contractor is entitled to claim this increase as a variation despite the fact that the Bill of Quantities is not a contract document."

The issue of rock is among the most contentious points of difference between the plaintiff and the defendants. Michael Oates, in giving evidence on this matter on behalf of Laragan Developments Limited, stated that on the 1st August, 2005 he offered the plaintiff and the other competing tenderer an opportunity to dig trial holes. Neither of the two contenders, however, took up the offer to dig. Mr. McCarthy, according to Mr. Oates, is supposed to have said that he has his own machines and that he would take care of it. He also said that he recalled Mr. Hanly telling Mr. McCarthy that if he wanted his help with the quarrying aspect of excavations, then this would be available to assist him. Mr. Oates described Mr. McCarthy as "a proud man" who had his own building company and did not want to hear about this issue. Mr. Hanly's view on the rock issue was that all who tendered for the contract had put up a rate in relation to rock and that this rate had to include an amount. On this essential point, as on so much else, the parties are at cross purposes. Mr. Hanly did not believe that the contractors were entitled reasonably to expect only 300 m^3 of rock. His view was that he had sold the risk on rock excavations to the builder just as he, to balance matters, retained the risk of financing the operation. In any event, he was interested only in a fixed price lump sum tender. Mr. Hanly thought that the plaintiff was happy to buy the risk of the rock from him. He claimed that he had never made an estimate in relation to rock. He said that, in any event, the contractor's job was to visit the site. If he did not, it would be like "buying a car unseen". He did not remember seeing a report from a firm of consulting engineers as to the ground composition. I have no evidence that any specialist report warning of the need for serious excavation of the site was passed to the plaintiff. I do not know if such a report existed.

33. I cannot accept that any specialist help was offered by anyone, neither Mr. Hanly nor Mr. Oates not any other person, on behalf

of the defendants to the plaintiff to deal with quarrying. As to the amount of rock recovered, it is certainly more than 300 m³ and may be as much as 7,000 m³. That can only be decided by arbitration subsequent to this judgment. Again, as with other issues, it is in dispute between the parties. A prudent contractor may have expected more rock than the amount in the Bill of Quantities by reason only of the appearance of the site. I regard this, however, as yet another area in respect of which the parties did not lay down a contractual basis for resolving their differences. It is one where I am not entitled to substitute a view as to the parties' obligations where they have not been defined by the parties themselves.

Letters of 3rd August

34. By early August, the defendants were moving swiftly towards a determination that the plaintiff should be the contractor in respect of this work. On 3rd August, Mr. Carron sent Mr. McCarthy an email with some specifications. In addition, Mr. Oates of Laragan Developments Limited sent a letter in relation to specifications. Finally, having spoken on the phone that morning, and arranged a meeting for the following afternoon, Mr. Hanly faxed a letter to Mr. McCarthy. I am satisfied that Mr. McCarthy had all these letters. I am also satisfied that his duty as quantity surveyor, as he told me in evidence, was that if a document which he did not have was referred to in the course of correspondence he should seek it out. I am satisfied, also, notwithstanding his evidence, that the appropriate course for a quantity surveyor to take is to seek out relevant documents and not to rely on a form of etiquette, if such exists, which requires a prospective employer to furnish documents to a prospective contractor.

35. The letter to Mr. McCarthy from Mr. Hanly of 3rd August, 2005 refers to the earlier documents. In confirming a meeting for the following day it states:-

> "You should now be in possession of our letter dated 25th July, which was sent to Denis Carron outlining the seventeen points of which we need to be incorporated as part of your contract price. You will also be aware of the 29 additional conditions and what issues pertain to the contractor. As indicated via telephone conversation, I am interested in meeting tomorrow with a view towards bringing the tendering process to a conclusion, possibly signing a letter of intent by Friday."

36. The letter then lists some prime costs sums and states that the employer intends "to achieve a fix priced contract for approximately €14 million, this we need to do in this development in order to maintain a profit as developers".

37. The letter lists the following items on the basis that these "will form an integral part of awarding this contract":-

> 1. We would like to be in a position to sign a letter of intent by Friday 5th August.
>
> 2. It would be our desire that works commence on site the following week, or certainly mobilisation of plant and equipment to be commenced by 15th through to 19th August…
>
> 3. Based on point no. 2 our main concern is that we have a show house ready for October 31st as this will be our launch weekend…
>
> 4. Laragan Homes staff including our resident engineer, marketing team and interior designer will be responsible for the fit out of the above mentioned show house and will work in tandem with the builder so as to achieve same.
>
> 5. We will discuss at the meeting issues pertaining to valued engineering. As stated before, it will be the ethos of the Hanly Group to work to best common sense principles to achieve cost effectiveness for both the contractor and the developer.
>
> 6. It is now considered by the developer that both the foul and storm sewerage needs to be moved on to the main road in one trench and the construction of back drop manholes will result in minimal depths being excavated for said drainage. This will achieve costs effectiveness for the builder in reducing the depth required for excavation of drainage, also, it will be easier for the builder to service each house having the main drainage on the road. The developer will work in conjunction with the contractor to try to establish the drawings for same. The developer has confirmed with the local authority that the movement of same is not a planning issue; it will be part of the compliance with Condition No. 10.
>
> 7. All fixtures and fittings are to be as per the designers report furnished from Elevation, Interiors. Upon commencement at site and over the next couple of weeks, we can supply actual samples of all contained within the report; however, it will remain at the discretion of the contractor, which subcontractor they wish to use for the majority of the items in the report, this will, of course, be subject to the approval of Laragan Homes."

38. Looking at these requirements, in the entire of this correspondence, I am obliged to apply a test as to whether the documents could reasonably have been construed as imposing additional obligations. In my view they would be so construed. What the nature of the obligations precisely were, however, is uncertain. It is uncertain, for instance, as to whether the interior design and fit-out applied to every house or simply to the show house. The letters say nothing as to the form of contract and whether descriptions in the Bill of Quantities will form part of the obligations of the contractor. It is also uncertain as to how the job will be priced in the event that there are variations beyond any additional obligations imposed. The Articles of Agreement, ultimately signed in January, 2006, do allow for a situation within the conditions whereby a job has not been priced; reference can then be made to a trade price. The evidence has been that an interior design report was sent by courier over to the offices of the plaintiff but I cannot establish, as a matter of probability, what was in that package or whether it arrived.

4th and 5th August

39. On the 4th August, a meeting was held between the two sides. The plaintiff was represented by Richard McCarthy and Ken Gallagher. On the defendants' side, Alan Hanly, Denis Carron and Michael Oates attended. Having reviewed the evidence, I accept the evidence of Ken Gallagher as to what was discussed. His recollection was that the meeting lasted about an hour and that the topics discussed included ground stabilisation, pricing and the programme for having a show house ready in about 13 to 14 weeks. He did not recall a discussion about downlighters or about buying out claims. What I am fundamentally satisfied of in relation to this meeting is that there was no discussion in relation to the form of the contract or as to variations. Nor was there any discussion about, or reference to, whether descriptions in the Bill of Quantities would form part of the eventual contract obligations. The account of Michael Oates was that Mr. Hanly emphasised at the meeting that he wanted a fixed price contract. His version was that downlighters and toggle switches were discussed. Mr. Hanly emphasised in his evidence that he made it clear that he wanted a fixed price lump sum contract and that this was his "number one thing, attribute and desire". This contention is not established in evidence as a probability. Even if it was, I could not rely on such a statement as amending the "blue form" RIAI contract into a hybrid form. I accept that he said he wanted tried and trusted people on the site. Whereas it might be possible that a reference was made to

downlighters and to toggle switches, I cannot regard that as raising a series of contract obligations that would not otherwise exist. I think it probable that Mr. Oates raised the letter of 25th July. I cannot accept that the interior designer's report was discussed in unequivocal terms or that the planning conditions were discussed either in the context of additional obligations or in the context of a neighbour dispute. Each side had different expectations in relation to this meeting. I am satisfied that Richard McCarthy was aware of the letter of the 25th July, 2005. One of the crucial points of this discussion is agreed; albeit from different perspectives. Mr. McCarthy remembers Mr. Hanly saying words to the effect that he was not interested in a "claims oriented-company". It is probable that this discussion in some form took place and then continued by reference to the plaintiff being an old-fashioned family firm. The issue in my mind, however, is what either party took out of this. Mr. Hanly agrees he thought that if there was extra work involved beyond what he believed he was contracting for then, as he put it, "hand on heart" he would pay. This was not said at the meeting, however.

40. The crucial issues are how, firstly, the contract obligations were to be defined and, secondly, how extra work was to be assessed. If both parties had different understandings as to what the nature of the work was then it follows, as in this case, each party would take a different view as to what was an allowable variation from the contractor's obligation. How to define the works and how to allow for variations in terms of the obligations by reference to drawings, specifications, or a description in the Bill of Approximate Quantities, was left unstated at this meeting. I am satisfied that nothing happened at this meeting that would clarify these issues. What a fixed price contract is defined as can be capable of varying interpretations depending on the nature of what works are agreed within the contract price. It does not mean that no variations can ever be allowable.

41. On 5th August, Mr. Hanly and Mr. McCarthy had a discussion by telephone. Mr. Hanly's expectation was that everything had been agreed as to costing. I do not accept it has been proven that in this conversation there was any discussion in relation to attics or utilities forming part of the contract. I do not accept that a reference was made to the obligation of the contractor on the basis of descriptions in the Bill of Quantities. To accept that would mean implanting something into Mr. Hanly's mind that was not there. I do not accept that the "blue form" RIAI without quantities contract was discussed at all. I do not accept the evidence of Michael Oates that every aspect of this contract was discussed either at all, or in any meaningful way which would define the obligations of the parties as to the fundamentals which are in dispute here. Instead, I accept that there was a discussion in relation to some specifics, including white goods, and that a deal was made to do the works tendered for, including any extra works that might be implied by the correspondence of the 25th July, and 3rd August, for the sum of €15.3 million plus VAT.

42. What I cannot say, however, is how those works were defined. One party, namely the defendants, had no understanding of the "blue form" of the RIAI contract, how descriptions could be made part of the contract documents by reference to the Bill of Approximate Quantities and how variations might be dealt with in one of two fundamentally different ways depending on the form chosen and the clauses included or crossed off. The other party, namely the plaintiff, had a definite expectation that a particular form of contract would be used in a particular way thereby giving rise to a particular method of defining the work and, therefore, a particular way of defining, and then dealing with, variations.

Reasonable bystander

43. A further finding of fact is necessary on this issue. Mr. McCarthy agreed that the drawings in this case were lacking. The specifications, he accepted, were poor. In those circumstances, descriptions might be regarded as necessary for the purpose of defining the obligations of the contractor. I accept that this could have been done. In this case, it was not done. The plaintiff expected that the Bill of Quantities would drop away, apart from becoming a Schedule of Rates as the "blue form" RIAI contract specifies. If something was not in the drawings or specifications but was in the Bill of Quantities as a description then, theoretically, it is possible for the plaintiff, as contractor, to claim twice in respect of the same work. Some of the later correspondence from the plaintiff hints at some unstated, and perhaps even this, extreme position. I accept the evidence of Mr. McCarthy that no claim would be pursued on the double by the plaintiff. I accept also the evidence of Mr. Hanly that he could never have signed up to any form of agreement that might allow for this. I would also regard a reasonable bystander with knowledge of the intentions of the parties to immediately declare that a claim on the double, even if not expressly ruled out by the form of the contract chosen, would have been excluded. It is thus excluded by implication.

Later Dealings

44. On 5th August, Mr. Hanly sent Mr. McCarthy a letter which was misdated "Tuesday, 09 August, 2005". The first part of the letter was written prior to the telephone conversation last mentioned, and the second after it. In the first part, the plaintiff's company is thanked for their efforts in dealing with the project. The letter goes on to indicate that the defendants are under severe pressure to reach a conclusion on awarding the contract. It says: - "I need to decide this afternoon who will be awarded the contract at Kilmacanogue and subsequently issue a Letter of Intent for same". The letter continues by stating that there is pressure to complete a show house. This is described as "the main driving force in bringing this tender process to a conclusion this afternoon". The letter goes on to deal with the prime costs sums which have been bought out by the developer. It indicates, as would be standard in these circumstances, that any over-spend on these sums, one of which is missed out, would be the responsibility of the contractor. The letter gives a specification for stairs in the show house and then goes on to deal with covings. The letter says that if covings are improved or reduced then this would be the only remeasurable item "on the Bill". The letter offers McCabe's €15 million to carry out the works and states that this price is in excess of €300,000 above the competitor. In fact, that may not be correct. It is €700,000 less than the lowest tender received, if that had not been cut by other negotiations. I will now quote the letter, as it is and reproducing most infelicities, from the sentence before its dictation was interrupted by the telephone negotiations.

> "The parameters of this letter encompass all other documentation provided by The Hanly Group to McCabe Builders surrounding the compilation of this contract… The Hanly Group will pay McCabe Builders €15.3 million plus VAT for the Contract as outlined in the Spec. and Bill of Quantities at Kimacnonogue, County Wicklow. The Hanly Group is entering into a Fixed Price Contract and as stated earlier in this letter there are 6 PC Sums of which there are only two nominated Suppliers/Subcontractors (McNally's Kitchens and Vogue Bathrooms). In both cases, McCabe's Builders will be dealing directly with these suppliers, however the Hanly Group has already secured competitive quotes from both people and at any rate, as with the other PC sums, should same increase, it will be an extra over-cost for the Hanly Group. Our expertise and experience was used in choosing both suppliers, particularly given the product in question as both suppliers will be able to deal efficiently with customers who wish to upgrade/change product. This will be both beneficial to McCabe Contractors and to the Hanly Group as developers. The Hanly Group will adjudicate on product choices put forward by McCabe Builders; as such we will be taking same out of the domain of the designer and adjudicating on proposed product within our own management team. In the adjudication process, we will be working closely with McCabe Builders to achieve value for money on all products and samples chosen, while at the same time maintaining the theme as set out by the Interior Designer.
>
> Although not relevant to McCabe's, it must be noted that the Hanly Group are giving in excess of €600,000 over and above a competitor's price. We are doing this in the knowledge that the show house will be delivered in a timely fashion

by the second/third week in November as discussed; also the consolidation of what should be a mutually beneficial relationship between our firms.

In view of the above, whereby the Hanly Group will be fair to the contractor, we will be entertaining no claims whatsoever, we will work in conjunction and on a timely basis with McCabe's to approve whatever alternatives (both products and methods) are put forward, thus ensuring cost effectiveness for McCabe's throughout the course of the project.

We propose taking the opportunity over the coming days to work closely with McCabe's to finalise all outstanding issues and also we would hope to put forward some real samples of the type of product mentioned in the designer's report. It would be beneficial for both of our companies to have reached a conclusion on this upon signing of contracts."

45. I note that the price thus apparently agreed was approximately €400,000 less than the lowest competitive tender and was €2.7 million less than the pre-tender estimate by the defendants own quantity surveyor.

46. I am asked to draw three inferences from this letter:

1. That a contract was agreed between the plaintiff and the defendants thereby.

2. That the contract obligations were fully defined and consisted of the letter incorporating some 13 other documents as pleaded in the counterclaim of the defendants.

3. Insofar as a reference is made to the Bill of Quantities, if the "blue form" of the RIAI contract is to be found by the court to be a contract document, that thereby the descriptions became part of the contract documents notwithstanding the express wording of the Articles of Agreement later signed in January 2006.

Subsequent dealings

47. On 10th August there was a meeting on site between the parties. The main contention on behalf of the defendant was concern as to the show house and the date when it might be handed over. It was mentioned that there were problems with neighbours who "had to be kept happy", according to the instructions to the plaintiff from the defendants. The batch of relevant letters was handed by Michael Oates to Martin Peers, the Procurement Manager for the plaintiff. I have already found as a fact that they had been handed over by Mr. Carron prior to this time. One of the letters concerned a neighbour and involved a substantial variation, according to Mr. Peers. I cannot find as a fact that this particular letter had been received before. Mr. Peers told the court, and I accept, that Richard McCarthy later took the relevant letters from him and told him not to concern himself because they had not seen them beforehand, that anything that was not in the tender would be treated as a variation.

48. Before going to work on site, a letter of intent was sought by the plaintiff from the defendants. I accept Mr. Peers' evidence that he regarded a letter of intent as necessary after the July and August letters because the plaintiff had no RIAI form of contract on hand at the time. I accept that he did not regard the events of the 5th August, the correspondence on that day, and the correspondence previously, had given rise to a contract. I have already commented on the difference of approach between Mr. Hanly and Mr. McCarthy in that regard. I accept the plaintiff's contention that it would not have proceeded with the contract for €15.3 million plus VAT on the basis of the letter of 5th August. My view is this; nor would a prudent contractor do so on the entire correspondence between the parties up to that point. In matters of this complexity, the RIAI and other bodies have worked out forms of agreement in order to deal with almost every foreseeable contingency. Both the employer and the contractor on complex building projects need the benefit of carefully defined obligations as provided for in these forms.

49. At some time during the week leading up to Friday the 26th August, 2005, Mr. McCarthy contacted Mr. Hanly. He asked for a letter of intent. Again, there is a conflict in relation to this conversation. Mr. Hanly indicated that his understanding from Mr. McCarthy was that the letter of intent was merely needed for accounting purposes. Mr. McCarthy, on the other hand, claimed that a letter of intent was needed because they were commencing a major project where the show house had to be completed, very speedily, in the absence of a written contract defining their obligations. The conflict here is more apparent than real. I accept that during the course of the conversation some reference may have been made to accounting. The letter of intent was sought and was issued, in my view, because of the absence of a contract. I am not in a position to find it proved that whatever was left to be worked out between the parties was minimal. The letter read:-

"Further to my letter dated 5th August, 2005, which you subsequently signed and returned, we have now appointed our resident engineer and my project manager, Neil McGarry, is also in liaison with your company to try and ensure that we sign a contract in the not too distant future. I believe we have a target dated set of Friday 2nd September for the signing of same.

The contract will comprise the documentation signed by yourself on 5th August and other correspondence between our companies regarding your contract at Rocky Valley, Kilmacanogue. Due to your request, and through this letter, I would like to formally issue you with a letter of intent for works to the value of €1m.

This is primarily to cover you for works that you are commencing on site at present in the absence of fully signed contract. Despite the comfort your company may achieve from this letter, it would be desirable to the Hanly Group that the contract is signed as soon as possible and in the true compliance of same we are still awaiting programmes for bills along with further items as per documentation already supplied to your company."

50. Thereafter, from September 2005, it seems that a certain amount of panic set in as to the progress and quality of this building project, whether it was justified or not. The defendants wrote to the plaintiff stating that they were disappointed with the lack of progress. Mr. Brennan, on behalf of the plaintiff, wrote to Mr. Neil McGarry of Laragan Developments pointing out the following:-

"We find your opening comments both alarmist and grossly exaggerated. You record your 'dismay' at not having documentation or administration controls in place. May we remind you the most fundamental document is not yet in place 'The Contract' an element strictly within your control."

51. On 4th November, 2005 a copy of the contract documentation was sent by the defendants to the plaintiff. At this stage a new company, namely the defendant Sagamu Developments Limited, was named as the party having responsibility. This has the same

registered office as the other defendants and is its vehicle.

52. By January 2006, despite expressions of contentment in the previous November, open disagreement had broken out between the parties. I am satisfied that at a meeting on 19th January, 2006, Mr. McCarthy told Mr. Hanly that the issues that he was raising could be put into a position that was not to the defendants' advantage. The contract had not then been returned. It seems to me that this confrontation was indicative of the fact that the plaintiff had examined the documentation furnished and was considering its meaning. Thereafter, relations between the parties went to an irrecoverable stage.

53. On 26th January, 2006, Mr. Alan Hanly wrote to Denis Carron of Nolan Ryan, his quantity surveyor for the tender and contract phase of the development, having then received back form the plaintiff an unsigned copy of the contract. He expressed his concern as follows:-

> "… I refer you to the letter which I wrote on 25th July, 2005, again I have this document here, whereby I listed seventeen number items which I wanted to include in the contract. Can you confirm that same is included as I do not have a full copy of this contract to hand. I also wanted the contents of my letter dated 9th August, 2005 to Richard McCarthy included, I believe that same is included and I have a signed copy of this letter back from Richard regarding our discussions on 9th August, whereby Richard comments that all is in order with the exception to the mechanical installation which needs further work. Both letters are to form an intricate part of our contract and if not, needs to be inserted at this late stage. The first letter being that, dated 25th July, 2005 in which I asked you to include seventeen number items and the second letter is that dated 9th August, 2005. Please find herewith a copy of both letters."

54. I note further that the defendant Laragan Developments Limited, in the course of a dispute concerning variations, by letter dated 26th April, 2006 did not make the case that the descriptions in the Bill of Approximate Quantities became part of the contract documentation. Underlining the difference in approach between the parties, Mr. McCarthy wrote to Laragan Developments Limited on 27th April, 2006 as follows:-

> "Notwithstanding your comments regarding the letter of 5th August, 2006 we are working under the standard form of RIAI contracts where quantities do not form part of the contract. As previously advised, the Bill of Quantities is not a contract document and the contract sum is deemed "To provide for the quality and quantity of work set out in the drawings and specifications."
>
> The Bill of Quantities act merely as a Schedule of Rates. Furthermore it should be noted that "nothing contained within the Contracts Estimates or the Bill of Quantities shall confer rights or impose any obligations beyond those conferred or imposed by the Contract Documents.""

55. This letter, together with subsequent correspondence, describes the gulf that existed between the parties as to their understanding of what the contract obligations should have involved: see letter of 2nd June, 2006 Hanly Group to the Nolan Ryan partnership; letter of Monday 12th June, 2006 from Hanly Group to Mr. John McCabe of McCabe Builders and letter from A. & L. Consultants Limited to Mr. Padraic Brennan of McCabe Builders Limited dated Tuesday 27th June, 2006.

56. On 1st August, 2006 Mr. Peers, on behalf of the plaintiff sent a copy of the signed contract documentation to the defendant Laragan Developments Limited. At that stage, the notion that the parties had never entered into any contract was not a foreign concept to the defendants. In the course of conciliation proceedings, on 24th August 2006 Michael Oates, on behalf of the defendant Sagamu Development, wrote to Mr. Padraic Brennan of the plaintiff in the following way:-

> "Can you please tell us why it took so long to return the Building Contract? Also we are surprised that you failed to enclose our letter to you dated 5th August, 2005 which was attached to the original contract documents as issued to you and which we say forms part of the contract between our two companies (without prejudice to any argument that we may put forward to the effect that no contract was finalised). Please tell us the reason for omitting this letter if anything other than an oversight."

Defined Obligations

57. It is of the essence of the concept of an agreement that the minds of the parties should meet as to their mutual obligations. Those obligations must be expressed in such a way that the obligations of each party can be determined with a reasonable degree of certainty. The test as to whether a contract ever existed is whether each contracting party had the same intention as to the fundamental terms that give any agreement substantial efficacy. The court is not entitled to substitute a judgment as to what would be an appropriate form of agreement for a situation where lack of certainty precludes the court from finding that a meeting of minds had occurred. As Murphy J. stated in *Tansey v. College of Occupational Therapists Ltd.* [1995] 2 I.L.R.M. 601at p. 603:-

> "Contractual obligations derive from an agreement made between two or more parties under which one promises or undertakes with the other the performance of some action. Ordinarily the existence of an agreement presupposes an offer by one party to perform the action on certain terms and the acceptance of that offer by the other. The offer must be communicated to the person for whom it is intended and, in turn, his acceptance must likewise be communicated to the offeror. In the absence of such communication, whether express or implied, there would not be that meeting of minds which is implicit in the concept of any agreement."

58. The court is entitled to imply into terms which might otherwise be uncertain, the standard form of dealing within a particular type of business which it was clearly the intention of both parties to be bound by. A course of past dealings, or the habitual use of standard forms, may fill out the gaps in the agreement of the parties where these can reasonably be considered as defining mutual obligations. Apparent contracts should be given validity by referring, in addition, to the concept of commercial sense and construed, as to their terms, so that agreements have business efficacy. That does not, however, mean that the court is at large in rewriting the terms to suit an idealist purpose to an apparent agreement. If the parties' minds never met as to the fundamental obligations in an apparent contract, no one is entitled to renegotiate their intentions so that their obligations become defined in ways they never meant, or perhaps even thought of. Nor is a court entitled to introduce the concept of implied terms in order to cure a defect in an apparent agreement unless these are implicit within the terms of dealings between the parties, are reasonable and are established as something with which both parties would, at the time their minds met, have agreed. If parties are at cross purposes as to the meaning of a crucial term, or where an ambiguity in a crucial term cannot be clarified by reference to the dealings between the parties, the business context within which it occurred, commercial efficacy, or plain sense, then there has been a failure to form a contract; *Mackey v. Wilde* (No. 2) [1998] 2 I.R. 578 per Barron J at p. 587. The fundamental issue is thus as to whether the apparent contracting parties had the same intention; *Scammell v. Ouston*, [1941] A.C. per Lord Wright at p. 269.

59. If there is truly an agreement between parties then it is not ineffective because some fact upon which its operation depends is not certain when it is made. If the facts become ascertainable after the making of the agreement the requirement of certainty is satisfied. If, however, there is a need for further negotiation as to a fundamental point in the contract, it cannot be said that an agreement has been concluded. Parties can validly agree to execute a formal document incorporating terms which have been agreed. Those terms need to be listed and the form in which they are stated need to be certain for the benefit of ensuring the performance of the obligations by both parties.

Conclusion

60. I ask myself whether, if the mutual conflicts between the parties had emerged in late August, 2005, and this alleged contract based on the 5th August letter was made the subject of an action in damages by the defendants because the plaintiff refused to perform it, would it succeed as against the plaintiffs? The damages that might be contended for might reasonably be predicted to be the sum of approximately €2.3 million, being the sum lost by the defendants as against next available tender upwards. Were the plaintiff then to plead in its defence the absence of certainty as to the definition of its obligation, and as to variation, it would be impossible to hold that a contract had been concluded by this letter of August 5th.

The nature of this dispute has highlighted the complex and onerous nature of building contracts. I am driven to conclude that the issues as to whether descriptions would become part of the contract, and how obligations might be defined by a choice of particular forms of document would be fatal to any such claim. It is argued by the defendants that it is possible to construe the correspondence that includes the letter of August 5th as imposing an obligation on the plaintiff to complete the works for which they had tendered, together with such other works as are expressly mentioned in the correspondence post tender. I must reject this, however, because nothing in that correspondence deals with the central issue of what is or is not what is or is not to be regarded as a contract term defining the mutual obligations of the parties or what is to be regarded as a variation therefrom. Further, nothing in that letter of August 5th makes descriptions in the Bill of Quantities part of the obligations of the plaintiff.

61. Fundamentally I am satisfied, having considered all of the evidence, that Mr. McCarthy would not have agreed to an altered "blue form" RIAI contract incorporating the descriptions in the Bill of Quantities and that Mr. Hanly, if the matter had been explained to him, would not have agreed to a contract whereby his pricing responsibilities became anything less than certain. The minds of the parties never met as to central issues that are crucial to their differing understanding of what would otherwise be their mutual obligations.

62. It is difficult to regard this case as being in any way different to the principles stated by Kenny J. in *Dore v. Stephenson* (Unreported, High Court, 24th April, 1980). This related to a contract for the sale of land, where access through a foyer to an otherwise valid sale of a first floor premises had not been agreed. Absence of agreement on this essential term destroyed what would otherwise have been a valid contract. At page 1 to 2 of the unreported judgment Kenny J. stated as follows:-

> "Where two or more parties make a contract for the sale of an interest in land, there may be features about the property which make it essential that they should agree on terms in relation to them. This is particularly important when they have different assumptions about what the position is in relation to those features. It may be that they did not think it necessary to deal with these features when making the contract or it may be that they did not realise the legal complications which the features created. This type of case is not to be categorised as a mistake: it is to be regarded as a case where there was never a consensus and so no enforceable contract result. This is the rule even if all the parties, particularly when acting without the benefit of legal advice, believed that they had a made a contract. It is particularly necessary that there should be agreement without any exceptional features when the purchaser is buying part of a building and the vendor is retaining the remainder."

Remedy

63. I adopt as correct the following passage from Treitel, *The Law of Contract*, 11th Ed., (2003) at p. 1061:-

> "Work may be done where the parties believe that there is a contract but this is not the case because there was never a clear acceptance of an offer. In one such case a *quantum meruit* was awarded to the party who had done the work. Such an award may also be made where work is done, under an agreement which lacks contractual force for want of contractual intention, in anticipation of a formal contract which fails to materialize for want of execution of the requisite formal document; and where one party does work at the request of the other during negotiations which are expected to lead to a contract between them but which are broken off before its conclusion. But no such award will be made where the party doing the work takes the risk that the negotiations may fail. This was held to be the position where one party to an agreement 'subject to contract' incurred expenses without any request from, and without benefiting, the other but solely for the purpose of securing (and then of performing) the contract."

64. I cannot hold that there is a concluded contract in this case for the reasons that I have given. I have been asked to declare the terms of the contract between the parties. The gulf between them is illustrated by the wildly different interpretations as to what might constitute the contract which have been both pleaded and urged in argument. This is a case where fundamental issues, as to the manner in which an obligation might arise, and as to how any variation from that would be defined and dealt with, have resulted in a failure of the minds of the parties to meet. Having sought to find the terms of the contract, as was my task, one I cannot now fulfil, the matter was always to be sent to arbitration regarding amount.

65. I would make the following observation for the benefit of the arbitrator. This case must be dealt with on the basis of a *quantum meruit*. This means that the plaintiff is entitled to reasonable recompense, in my judgment jointly and severely against all the defendants, for the benefit which the plaintiff has conferred through the work that has already been done under the purported contract for the defendants.

66. That does not mean that the value of the houses and apartments and ground works standing to the benefit of the defendants at Kilmacanogue should simply be valued as such. This was a speculative building contract whereby an employer, namely the defendants, arranged for the construction of a number of dwellings by the plaintiff in the confident expectation of selling them on the open market. It might arise, for instance, that an arbitrator could be asked to value the nature of the work that was done by a company for its own benefit: an instance might be where a company needed to be valued for the purpose of share buy-out following the oppression of a shareholder-director. Here, however, the situation is different. The plaintiff, together with others, competed in order to be in a position to be awarded the work consisting of the construction of the dwellings at Kilmacanogue on behalf of the defendants and to earn profit from their efforts. The work that they have done, therefore, should be valued on a basis that allows for reasonable remuneration to the plaintiff, as a building contractor, for the work done by the plaintiff on behalf of the defendants who, in turn, assumed the responsibility for financing the contract and then for selling the dwellings on the open market. The remuneration, therefore, that would be reasonable would be to value the work done on behalf of the defendants by the plaintiff at such value that

was prevalent in 2005, when the plaintiff entered into the dealings with the defendants which gave rise to them doing these works, and so earned for them a right to recover reasonable remuneration. Such sum as the arbitrator will award, under the doctrine of *quantum meruit*, should look at those works on the basis that the defendants are entitled to reasonable competitive value from the plaintiff and the plaintiff is entitled to reasonable remuneration as a building contractor building a housing scheme for a developer.