SWI Ltd v P & I Data Services Ltd [2007] ABC.L.R. 07/04

CA on appeal from Luton County Court (D.J Hewetson-Brown) before Waller LJ; Keene LJ; Dyson LJ. 4th July 2007

Lord Justice Waller :

1. SWI (as I shall call the respondent to this appeal), was a subcontractor to P&I (as I shall call the appellants) in relation to building works being carried out on two buildings 3 and 5 at GSK's (Glaxo Smith Klein's) site in Stevenage. SWI brought proceedings against P&I in relation to a claim for £51,114.66 made originally under six invoices. P&I put in defences amended and re-amended from time to time but the essence of which was that SWI had not performed all the work for which they had charged with the result that far from any sum being due to them they in fact owed money to P&I.

2. By a judgment given on 13th November 2006 District Judge Hewetson-Brown gave judgment in favour of SWI in the sum of £51,114.66. He decided that the subcontracts between SWI and P&I were fixed price contracts. He further found that SWI had substantially completed the works the subject of the subcontracts, and that P&I were not entitled to any reduction in the price claimed. A joint expert had measured and valued the work done and had concluded that SWI had underperformed to the extent of some £40,000 but the District Judge made no reduction reflecting that figure.

3. On 16th May 2007 we heard the appeal from that judgment and having heard the submissions of Miss Asgarian for P&I did not call on Mr Rushton for SWI and dismissed the appeal with reasons to be given later. These are those reasons.

4. The issues are said to be twofold – first was the subcontract or were the subcontracts fixed price contracts? If so, was the judge right to reject the joint expert's view? But as argument developed it became clear that there was a significant third issue – in relation to these subcontracts, was there a term express or implied dealing with variations and the consequences thereof?

Fixed price or unit price

5. In so far as the main subcontracts were in writing they consisted of two tenders from SWI quoting for certain works *"complete for the sum of"* £97,800 for building number 3 and *"complete for the sum of"* £239,443.29 for building number 5 and P & I's acceptance thereof. The works were described in each case "as detailed on the tender record sheet attached, and as detailed on your issued tender drawings listed below". In each case the drawings were identified, and in each case there was a tender record sheet attached. So far as each tender record sheet was concerned, it contained no details of the work to be performed other than by reference to general headings such as "Ground floor Offices and works above ceiling" with sub headings such as "Main basket", but the detail of the work to be performed was as was common ground contained in the drawings.

6. The tender record sheets contained simply a sum of money being quoted for each broad item such as "main basket" for the "ground floor" and contained no rates per individual unit.

7. These tenders contained no reference to SWI's standard terms and conditions. They were accepted by purchase orders "in line with the issued specification and the following drawings and against your quotation [1160 for building 3 and 1154 for building 5]." The drawings were again identified and although there are differences in relation to the numbers by which the drawings are identified in the purchase orders, the drawings covered the same areas e.g. basement, lower basement etc, and nothing turns on the different numbering.

8. It is again common ground that if, and in so far as P&I required works to be performed that were not the subject of the tenders and purchase orders, SWI was asked to tender therefore and P&I accepted those tenders. These tenders were also in the form "complete for the sum of" with a round figure such as £30,000 *"to carry out the removal of the CAT 5 cabling within building 6"*. Certain of the invoices on which SWI bring their claim relate to work, the subject of these separate quotes.

9. Before the District Judge P&I sought to establish that it was the common understanding of the parties that the contract concluded was in reality a unit priced contract by which they meant, as I understand it, that the obligation on SWI was to perform the work in return for a price ultimately assessed at the conclusion of the contract by applying a unit rate to the work carried out.

10. Certainly, as the District Judge found, the terminology in the written documents was consistent with the subcontracts being "fixed price" contracts. If in reality they were something else, that could only be as a result of some oral agreement and it was in that context that P&I sought to establish that, in the context of their agreement with GSK being on a unit price basis, they had agreed with SWI that any changes in the contracts between them and GSK would "filter down and apply in the same way to SWI".

11. This term was not accepted as having been established by the District Judge. Paragraph 11 does not reject it in absolute terms but it is clear in my view that the judge was rejecting it.

12. P&I also sought to make something of the fact that the main witness for SWI accepted in evidence that he would not expect to be paid for work he did not do, but rightly the District Judge did not find that such an acceptance could turn what was otherwise a fixed price contract into a unit price contract.

13. Miss Asgarian before us accepted that P&I had not established an oral term which could change what was a fixed price contract into a unit priced contract, however she suggested that the way in which the subcontract actually operated, as recorded in paragraph 6 of the District Judge's judgment, supported the argument that the

contract was in fact a unit priced contract or by implication became one. Paragraph 6 so far as relevant is in these terms:-

"The contract terms were brief. So, for example, there was no provision for stage payments. However, the parties adopted an interim payment system by agreement that there would be monthly measurements and valuations of work done and SWI would be, and indeed were (if occasionally a little late) paid on those valuations."

14. Miss Asgarian relied on the fact of "measurement" and "valuation". The difficulty is that even if payments were made following monthly "measurements" there cannot have been applied any unit rates because the subcontract did not contain such rates; all that could have been calculated was the amount of work that had been done and what proportion of the price quoted for 100%, was by that time due. Certain of the invoices with the papers support that being in fact what was done.

15. Miss Asgarian also sought to argue that SWI's terms were incorporated into the contract "by a course of dealing". It seemed somewhat incongruous for one party to be saying that the other party's terms were incorporated by course of conduct but, be that as it may, the argument having to rely on one previous contract was an almost impossible one. Even if the terms were incorporated I think the District Judge was right in thinking they did not assist P&I.

16. I am clear, despite the arguments of Miss Asgarian, that the judge was right in holding that the subcontracts and indeed the series of sub-contracts were all fixed price contracts.

Terms

17. To hold that the contracts were fixed price would not necessarily conclude matters in favour of SWI. In seeking to establish the terms they did, it seems P&I were seeking to turn the fixed price contract into a unit price contract, but Miss Asgarian had what in my view was a stronger argument when she submitted that applying the label "fixed price" does not necessarily tell you whether there are terms under which P&I were entitled to vary the works and if so what the price consequences would be. Even if the contract was fixed price, it could have been a term that if GSK chose to vary the works by, for example, omitting some part of the same, P&I would be entitled to pass that variation on to SWI and (though this is a separate point) with the consequence that SWI would have to reduce its quoted price accordingly.

18. Normally without some term allowing for variations under a fixed price contract to perform works, the paying party is not entitled to vary the contract by reducing the work to be done; the builder would have a right to say that he had quoted a fixed price to do certain work and he was prepared to carry out all that work in order to receive his payment. If, of course, the paying party simply waives his right to have the complete works performed the builder will be entitled to his full price for what he has done, and (which is important in relation to the question of substantial performance dealt with below) would not be in breach of contract for not performing. All this, what I would term "the norm", can of course be varied by agreement.

19. Miss Asgarian accepted that, since the terms that P&I had attempted to establish as agreed orally as varying the contract to a unit price contract had been rejected by the District Judge, she could not establish any express terms to vary what I have termed the norm. But she argued in the context where SWI were aware of the contract between GSK and P&I and aware thus that GSK could vary the works, that it must have been an implied term that P&I would be entitled to vary the works to be carried out by SWI. Must it not also, she submitted, have been an implied term that if the works were so varied and reduced then the price quoted would be varied downwards to take account of that variation?

20. In my view, even if some term was to be implied to allow P&I to insist on some variation of the works where GSK had so insisted, it does not seem to me to follow that it was necessary to imply a term under which the fixed price was to be altered with any variation. What might have been the position if, for example, a whole floor had been taken out, rendering the contract substantially different from the one the subject of the fixed price, would, I think, be another matter but it need not detain us because it cannot be suggested that any such type of variation was made.

21. It was on this aspect that Miss Asgarian's arguments had some force but it seems to me that a term relating to a reduction in price simply cannot be implied. This is of importance when one comes to consider the argument relating to substantial performance.

Substantial performance

22. What is submitted is that, if one looks at the joint expert's report one can see that if a comparison is made between the works actually done and the works as identified on the drawings on which the tenders were based, there is a difference. In some cases something a little more has been performed and in some cases somewhat less has been done. P&I's case is that, looking at it in the round, substantially less has actually been done than was tendered for, in one case calculated by Miss Asgarian some 18% less and calculated overall in value by the joint expert as worth £40,000. I understand that SWI do not necessarily accept that but, even if it is right, I do not understand how the doctrine of substantial performance helps P&I.

23. As I would understand the concept of substantial performance, it enables a party with a fixed price to recover that price even though he may not have performed every item. The theory is that he should be allowed to recover the whole price with a reduction for that which he has not performed, just as would be the case where he had performed the whole contract but performed some below standard. But that theory only works as I would

understand it on the basis that in failing to perform the whole, just as in performing badly, the builder is in breach of contract.

24. I do not understand P&I to be suggesting that SWI have failed to do things they were required to do. If they have performed less than they quoted for, that is because GSK altered the specification and P&I asked SWI to do less. SWI have simply done what they were asked.

25. It seems to me that the question whether P&I can seek a reduction in the quoted price comes back to identifying the terms of the contract. If P&I had established that it was expressly agreed that P&I could reduce the contract work and pay less if they did so, they would be entitled to succeed, but they failed to establish that term as an express term. Even if there was an implied term that P&I could request variations and SWI were bound to agree, it cannot be said to be necessary to imply a further term that the price would necessarily be reduced if the contract was substantially the same as the one quoted for.

26. It was for these reasons that I was in favour of dismissing the appeal.

Lord Justice Keene:

27. I agree.

Lord Justice Dyson

28. I also agree.

Jonathon Rushton (instructed by Messrs Jameson & Hill) for the Respondent
Tina Asgarian (instructed by Messrs Hughes Padddison) for the Appellant