

THE HIGH COURT

[2003 No.6794 P]

BETWEEN

JAMES O'MAHONY

PLAINTIFF

AND

PATRICK O'CONNOR BUILDERS (WATERFORD) LIMITED, PATRICK O'CONNOR, POC CONSTRUCTION LIMITED, AQUALINE ENGINEERING LIMITED, FENWALL POOLS LIMITED, EASTERN REGIONAL CONSULTANCY SERVICES LIMITED, BREFFINI McGRANE AND TERENCE McSWEENEY

DEFENDANTS

Judgment of Mr.Justice Clarke delivered 22nd July, 2005.

1. The Preliminary Issue

1.1 I have already given judgment in respect of one aspect of this matter on 1st March, 2005. As appears from that judgment these proceedings are connected with two other proceedings as set out on p.1 of the judgment. As is further pointed out in that judgment these proceedings are, insofar as possible, being used as a vehicle for the resolution of as many issues as possible. This judgment is, therefore, potentially relevant to all three proceedings. Furthermore the judgment outlines the course, up to the 1st March last, of the management of all three cases. For the reasons set out in the judgment of 1st March I directed that a preliminary issue be tried to the following effect:-

"1. Is the valuation attached (to the draft preliminary issue produced by counsel for the O'Connor defendants and) furnished in or about May 2002 binding as between the plaintiff (James O'Mahony) and the second named defendant (Patrick O'Connor) and, if so, is the plaintiff (James O'Mahony) entitled to bring a separate claim in respect of alleged defects in the works, the subject matter of the valuation, against Patrick O'Connor.

2. In the event that the valuation referred to at 1.above is found to be binding is the plaintiff entitled to maintain proceedings in respect of damages claimed relating to remedial works which allegedly require to be carried out by virtue of alleged defects and/or consequential loss flowing from such alleged defects".

The valuation referred to is a valuation of Patrick Devlin to which I will refer in more detail in the course of this judgment.

1.2 Subsequent to that judgment points of claim were delivered on 2nd March, 2005, a response on 21st March, 2005 and a reply on 15th April, 2005. The reply made significant concessions in that at paragraphs 5 and 7 thereof, paragraphs 5 and 11 of the response was admitted. Paragraph 5 of the response pleaded as follows:-

"Further or in the alternative, without prejudice to the above, if the claimant and respondent entered into the said or any agreement, which is not admitted, the said agreement was limited, as pleaded by the claimant to the value of any building works carried out by the claimant and expressly or by implication did not include any claim for loss due to defective workmanship design or manufacture as claimed by the respondent in these proceedings".

Paragraph 7 of the reply admitted paragraph 11 of the response which provided as follows:-

"Further or in the alternative the said Mr.Devlin in his report valued the works as though there were no defects".

The Mr.Devlin referred to was, of course, the author of the report set out at para 1.of the preliminary issue direction and was a quantity surveyor appointed by the parties in circumstances which I will consider in greater detail in the course of this judgment.

1.3 Therefore it will be seen that subsequent to the direction that a preliminary issue be tried and prior to same coming on for hearing there was a narrowing of the issues between the parties.

2. Background Facts

2.1 Certain of the background facts to this dispute are not, in themselves, controversial. Mr.O'Connor is a builder. Mr.O'Mahony is a solicitor. In 1999 Mr.O'Mahony and Mr.O'Connor entered into a contract whereby Mr.O'Connor would carry out certain works at Mr.O'Mahony's residence at Garryhankard House in County Cork. The contract was, strictly speaking, oral although there was some documentation in the form of plans and specifications. It is also common case that significant works were carried out between March 1999 and June 2001. It is also common case that during the construction period certain moneys were paid by Mr.O'Mahony to Mr.O'Connor. Equally there is no dispute but that the parties could not agree as to how the balance which might be due and owing was to be computed. It is also clear that the parties entered into certain discussions which led to the appointment of Patrick Devlin to carry out a certain role in respect of the valuation of the works. These proceedings concern the extent, if any, to which a report prepared by Mr.Devlin binds the parties. As the precise circumstances in which Mr.Devlin came to be appointed and, consequently, the precise terms agreed between the parties to these proceedings as to his appointment are a matter of some controversy I will return to that issue in due course.

2.2 However it is common case that Mr.Devlin (together with others from his office) commenced on the task of valuing the works at Garryhankard House in the early part of 2002. The manner in which that process was conducted as a question of fact appears not to be the subject of any significant dispute between the parties or, indeed, Mr.Devlin. However certain aspects of that process are crucial to a determination of the issues between the parties and I will, therefore, also return to a description of that process in more detail in the course of this judgment.

2.3 Ultimately Mr.Devlin produced what might be described as an interim report ("the interim report") which was submitted to the parties in May 2002. Thereafter various attempts were made, to which I will again refer in more detail in the course of this judgment, to arrange further consultation with the parties concerning the interim report but, it would appear, to no avail. In those circumstances Mr.Devlin purported by letter of 25th November, 2002 to make the interim report final.

3. The Issues

The question between the parties on this preliminary issue is as to the extent, if any, to which that report (as purportedly made final by Mr.Devlin) binds the parties.

3.1 As appears above the key areas of difference between the parties are as to:-

(a) the proper construction of the agreement between the parties as to the appointment of Mr.Devlin.While there is no significant dispute as to what was actually done by Mr.Devlin it is contended on behalf of Mr.O'Mahony that Mr.Devlin did not, in fact, carry out the process in the manner which was expressly or by necessary implication agreed between him (Mr.O'Mahony) and Mr.O'Connor.In those circumstances it is contended that Mr.O'Mahony is not bound by the results of that process.

(b) As a consequence of (a) there are certain issues between the parties as to the detail of the process which, as a matter of contract between them, ought to have been carried out by Mr.Devlin in order for the results of Mr.Devlin's determination to be binding.

In particular there is a dispute as to:-

(i) the precise extent to which it was envisaged by the parties, and also by Mr.Devlin, that issues between the parties beyond the simple calculation of the proper value of works to be found at Garryhankard House were to be matters to which Mr.Devlin was to address his mind.Disputes between the parties as to whether certain of the building works which were actually carried out at Garryhankard House were in fact done by Mr.O'Connor (or by subcontractors paid by Mr.O'Connor) on the one hand or were actually done by persons directly responsible to and paid for by Mr.O'Mahony on the other hand, would also appear to have arisen.The question as to how Mr.Devlin was to deal with any such disputes of that nature appears to be an issue between the parties.

(ii) the extent to which Mr.Devlin was to resolve issues where it was not possible for him to obtain by measurement or otherwise verification of the precise works in fact carried out; and

(iii) whether Mr.Devlin ought to have taken into account and determined issues concerning allegations on the part of Mr.O'Mahony that certain works were not carried out in a proper fashion.

3.2 It will be recalled that while Mr.O'Connor initially claimed in these proceedings (to the extent that it was included as a specific item in the preliminary issue directed to be tried) that the report of Mr.Devlin was such that it bound Mr.O'Mahony to the extent that he was precluded from pursuing any claim in respect of defects and/or consequential loss flowing from such defects, that matter was ultimately conceded on behalf of Mr.O'Connor.

However there appears to remain an issue between the parties as to whether questions of that type should, on the basis of the agreement between the parties, in fact have been addressed and resolved by Mr.Devlin.Mr.O'Mahony contends that they should while Mr.O'Connor appears to contend that they should not.Furthermore in the event that Mr.Devlin did not resolve such issues, in circumstances where he should, as a matter of contract between Mr.O'Mahony and Mr.O'Connor, have resolved them, the question of the consequences of any such alleged failure to resolve such matters arises.

4. The Original Intention of the Parties

4.1 However it is clear that the starting point for any consideration of the issues must be the original agreement between Mr.O'Mahony and Mr.O'Connor.In that regard it appears to be common case that Mr.O'Mahony and Mr.O'Connor met on the 8th December 2001.It would appear that at that stage all of the valuations on the works done which were being put forward by Mr.O'Connor had been completed by his in-house quantity surveyor Mr.Tom Ryan.It is common case that Mr.O'Mahony suggested that an independent expert be employed and equally it is common case that it was Mr.O'Connor who suggested Patrick Devlin.Mr.Devlin is a highly experienced quantity surveyor whose principal place of practice is at Newry where he is principal of the firm of TMV Consultants.It would appear that Mr.Devlin was particularly acceptable given that he had little or no previous contact with Mr.O'Connor (other than having tendered unsuccessfully for one project) and also was not from the Cork or Munster region (which would have made him unacceptable to Mr.O'Mahony).Insofar as the meeting of the 8th December, 2001 is concerned the principal issue of contention between the parties is as to whether it was envisaged, at that stage, that Mr.Devlin would have a complete brief to deal with all matters between the parties (including defects and questions as to what work had actually been done by Mr.O'Connor).

4.2 On Mr.O'Connor's case those issues did not loom very large in discussions at that time because, he says, there were only a number of minor issues which had been put forward by Mr.O'Mahony at that stage concerning defects (such as the alleged unsuitability of some of the windows and a problem with a chimney).Mr.O'Mahony contends that, even at that time, the range of areas in respect of which he was making complaint was much wider.Whatever may be the case as to the extent to which there were issues of defects openly on the table as between the parties at that time it seems to me clear that what the parties must have envisaged, originally at least, was a complete valuation which would bind the parties not only as to the value of the works done but also in relation to disputes as to who had done work and in respect of defects.

4.3 My reasons for coming to that view stem from the fact that the case, as originally pleaded by Mr.O'Connor, was to that effect.While appreciating the concession quite properly made when Mr.O'Connor discovered (as a result of a consultation between his solicitors and Mr.Devlin) that Mr.Devlin did not in fact embark upon the consideration of defects, it nonetheless must follow that Mr.O'Connor's view up to the time of that discovery was that Mr.Devlin was to adopt such a process of valuation and had in fact so done.In those circumstances it is difficult to take any view other than that, at their initial meeting on the 8th December 2001, both Mr.O'Mahony and Mr.O'Connor understood that the intention was to appoint an independent expert (who ultimately turned out Mr.Devlin) to carry out a process which would lead to a complete resolution of all issues between them as to the amounts which Mr.O'Mahony should have to pay to Mr.O'Connor on foot of the building contract.

4.4 However the agreement reached between Mr.O'Mahony and Mr.O'Connor on the 8th December, 2001 is not, necessarily, decisive as to the terms of the agreement which was ultimately entered into between them.As part of the process whereby Mr.Devlin was appointed to carry out the valuation role, correspondence ensued between Mr.Devlin and the parties.It is necessary to consider whether that correspondence can be taken to have varied the original agreement between Mr.O'Mahony and Mr.O'Connor.I now turn to that correspondence.

5. The Devlin Correspondence

5.1 There would not appear to be any dispute in relation to the manner in which Mr.Devlin was initially approached.On foot of the arrangements agreed between Mr.O'Connor and Mr.O'Mahony, Mr.O'Connor contacted Mr.Devlin by phone and gave him a brief outline of what was involved.On foot of that initial contact Mr.Devlin went to Cork where he met Mr.O'Mahony and also met with Tom Ryan

(Mr.O'Connor's Quantity Surveyor).

5.2 Mr.Devlin indicated in evidence that the purpose of his visit was to establish the extent of the work which he would be required to do and to have a look at Garryhankard House for the purposes of determining the resources that would be necessary to do the work involved.

5.3 As a result of the initial contact and that visit, Mr.Devlin wrote to both parties ("the January letters") setting out his proposal for conducting the exercise concerned. The letter to Mr.O'Mahony was directed to him personally. The letter to Mr.O'Connor's side was addressed to Mr.Tom Ryan. Both letters were in identical terms and were dated 29th January, 2002. Significant issues arise as to the proper construction of the process set out in those letters and I should, therefore, set out the terms of same in full.

5.4 The January letters provided as follows:-

"Following my recent site visit to the above dwelling I have set out below my proposals regarding the valuation of the works completed. The valuation will be completed in the following stages.

1. Analyse the original drawings and quotations
2. Value the amended drawings for the dwelling
3. Carry out site measurement of variations and site works including works to the lawns and the new stables.
4. Value the variations
5. Make adjustments to the provisional and PC Sums included in the original tender to reflect the works completed
6. Consult with client and contractor
7. Present report to client and contractor making recommendations of value of final account.

During the process we will have to make requests for specific information from both parties.

I will have to receive written confirmation from both the client and the contractor that they would accept the recommendation of the report before I commence work on the final account".

There also followed provisions relating to Mr.Devlin's fees and the payment thereof.

5.5 Mr.O'Connor faxed a copy of the letter sent to Mr.Ryan back to Mr.Devlin with his own signature at the bottom as a means of accepting the terms. That fax would appear to have been sent on 31st January, 2002. Mr.O'Mahony, for his part, replied by a letter dated 12th February, 2002 in the following terms:-

"Thank you for your letter dated 29th ult addressed to my home.

I confirm my agreement to the process you propose and I confirm that I will discharge my portion of your fee.

My agreement is subject to the proviso that the builder will not increase his demands on any particular item claimed to compensate for matters deemed by you to be over claimed.

We require you to complete this work by St.Patrick's Day.

My Quantity Surveyor is Mr.John Cotter of Edward Cotter Partnership, Cork, (phone 021-4501333) and I would be obliged if you would make contact with him and keep him advised during the process".

5.6 Mr.Devlin did not formally reply to either party but made arrangements for a number of personnel from his office to travel to Garryhankard House for the purposes of taking measurements and carrying out other works associated with the valuation.

In those circumstances the question arises as to the extent to which, in coming to a view as to whether there was a binding agreement between the parties, and if so as to what the terms of such agreement were, I must take into account that correspondence. Furthermore certain questions of construction arise as to the process that Mr.Devlin was obliged to follow on foot of the correspondence.

6. The Agreement between the parties

6.1 There can be no doubt but that, as and between Mr.O'Connor and Mr.O'Mahony on the one hand and Mr.Devlin on the other hand, contractual relations were concluded and were as set out in Mr.Devlin's letter coupled with the variations specified by Mr.O'Mahony in his reply.

6.2 Insofar as possible contractual obligations between Mr.O'Mahony and Mr.Devlin are concerned different questions arise. I am satisfied that Mr.Devlin's office, to the knowledge of both Mr.O'Mahony and Mr.O'Connor, commenced work. While neither Mr.O'Mahony nor Mr.O'Connor were formally informed that the other had accepted the terms set out in the January letters, the only inference which either of them could have drawn from the commencement of work was that the other had accepted those terms. I am also satisfied that by accepting the "process" in his reply, Mr.O'Mahony was, at least in principle, agreeing to be bound by the results of the valuation. Insofar as there might be a question as to the status of the additional matters raised by Mr.O'Mahony in his reply of 12th February it seems to me that these matters are not of such substance as would have amounted to a substantive variation in the arrangements. It is, of course, the case that Mr.Devlin did not inform Mr.O'Connor of the additional matters raised by Mr.O'Mahony. If, therefore, those matters were of significant substance it might well be that that, of itself, could have prevented a concluded arrangement as and between Mr.O'Mahony and Mr.O'Connor from coming into effect because the terms upon which Mr.O'Mahony would have agreed to Mr.Devlin's involvement would have been different from those on which Mr.O'Connor relied.

6.3 However an analysis of the matters raised in the letter of 12th February make it clear that the matters specified do not really alter the arrangements between the parties in any substantive way. The first matter raised was an insistence by Mr.O'Mahony that Mr.O'Connor should not be entitled to increase a claim under any particular item to compensate for reductions on other items that

might be directed by Mr.Devlin.That simply amounts to an insistence that Mr.Devlin assess the amount actually claimed by Mr.O'Connor through Mr.Ryan.

The next requirement was that the work be completed by St.Patrick's Day.However in evidence Mr.O'Mahony made it clear that the overall arrangement would not, in his view, fall, if that term were not complied with.It was not, therefore, a provision of any great significance other than conveying a general air of urgency.

The final requirement was that Mr.Cotter (Mr.O'Mahony's Quantity Surveyor) was to be contacted and kept advised during the process.It does not seem to me that that provision adds anything to the obligations which Mr.Devlin offered to accept in the January letters.The requirement was simply an indication that insofar as it was anticipated that there might be requests for information, as contemplated in the January letters, same were to be made, at least initially, to Mr.Cotter insofar as they related to Mr.O'Mahony.Furthermore the requirement implied that the consultation contemplated by the process specified by Mr.Devlin would, again at least initially, be with Mr.Cotter on Mr.O'Mahony's behalf.

6.4 Therefore it does not seem to me that the inclusion of any of the above matters materially alters the arrangements between the parties and I am therefore satisfied that Mr.O'Mahony and Mr.O'Connor agreed in principal that they would, in the words of Mr.Devlin in the January letters, "accept the recommendation of the report".Mr.O'Connor's agreement to that is evidenced by his signing the letter and returning it to Mr.Devlin.Mr.O'Mahony's agreement is evidenced by his acceptance, in his letter of 12th February, of "the process you propose".

However, in order for that agreement in principal to amount to a binding contract between the parties it is necessary that all material terms of the arrangement would also have been agreed.I now turn to that issue.

7. The Terms of the Agreement

7.1 There are a number of issues concerning the terms of the agreement between the parties which are controversial and which require to be addressed before embarking upon an analysis of what actually transpired.

7.2 The first and most important difficulty concerns the fact that it is clear that Mr.Devlin did not consider that it was his obligation to resolve any disputed issues between the parties as to whether work was defective or, indeed, whether work had in fact been carried out by Mr.O'Connor or subcontractors on Mr.O'Connor's behalf as opposed to by Mr.O'Mahony or persons working directly to him.Mr.Devlin's explanation for his view, which I accept, is that he would not have regarded it as within his normal competence and expertise as a quantity surveyor to become involved in the resolution of such matters.In the course of his evidence he indicated that a quantity surveyor may become involved in valuing the reasonable cost of remedial works but only where the necessity for, and extent of, such remedial works have either been agreed between the parties or have been determined by another expert such as an architect or an engineer.He indicated, and I accept, that it would not be part of the normal role of a quantity surveyor to determine whether works were defective and the consequences thereof in circumstances where there was a dispute between the parties either as to whether the works were, indeed, defective or the extent of any defects or the extent of any necessary remedial works.

Similarly Mr.Devlin indicated that he would have no particular expertise in resolving disputes between parties as to who actually carried out works.Again such matters, he said and I accept, would be dealt with by a quantity surveyor but only in circumstances where there was agreement between the parties or where the contested matters were the subject of clear documented evidence.

7.3 It is therefore clear that what Mr.Devlin envisaged doing, and did in fact do, was something different to that which was originally envisaged by Mr.O'Connor and Mr.O'Mahony at their meeting the previous December.The gap may not, however, have been quite as significant as might at first appear.It was Mr.Devlin's evidence, which I accept, that he envisaged issues concerning the question of defects or who had actually procured and had paid or was liable to pay for individual items of work to be likely to be raised in the course of item 6 of the process set out in the January letters.What he, therefore, envisaged was that items 1 to 5 of that process would involve him (or his staff) valuing all of the work which they found in place at Garryhankard House without reference to any possible dispute either as to the quality of the work or who had done it.Such latter questions could then be raised by the parties at item 6.Where the difference between the parties arises is as to the role which Mr.Devlin would play in relation to any issues of that type that arose at item 6.As I understand the general import of his (Mr.Devlin's) evidence, he would have envisaged that he would have attempted to facilitate agreement between the parties, during item 6, in respect of any such disputed matters.Insofar as the parties could agree on matters in principle he would have envisaged that he could have placed a binding valuation on the matters agreed.For example to the extent that the parties might agree that certain remedial works were required, he (Mr.Devlin) envisaged that he would exercise his skill as a quantity surveyor to value the remedial works on a reasonable basis and make an appropriate reduction in the final account accordingly.Furthermore insofar as the parties might agree that certain works were not done by Mr.O'Connor or those working to him, Mr.Devlin would make an appropriate calculation, to reflect that fact, in the final account.However it is clear that Mr.Devlin did not envisage that he would have any role (other than, perhaps facilitating discussions) in resolving disputed questions between Mr.O'Mahony and Mr.O'Connor as to whether there were in fact defects which required remediation, the extent of any remedial works required, or disputed questions of fact as to whether work had actually been done.

7.4 I must, therefore, approach this matter on the basis that what Mr.Devlin envisaged doing, and did in fact set out to do, differed in a material respect from what Mr.O'Mahony and Mr.O'Connor had envisaged at their meeting the previous December.

7.5 It seems to me, also, that the terms of the January letters are not inconsistent with Mr.Devlin's position.The process set out in those letters envisages both the obtaining of specific information from the parties and consultation with the parties.It also specifies the valuation of the works as originally planned together with variations.It does not specify one way or the other as to whether Mr.Devlin is to have the authority to make a binding finding in the event of there being a dispute between the parties as to the quality of work, the extent of remediation necessary or whether work was actually done by Mr.O'Connor.It does, in my view, on a reasonable construction, entitle Mr.Devlin to make a finding which is binding as between the parties as to the value of work actually found at Garryhankard House.The question of the consequences of any difference between that process (as reasonably interpreted by Mr.Devlin) and that originally envisaged by Mr.O'Mahony and Mr.O'Connor is an issue to which I will return in due course.

7.6 However it is necessary at this stage to say that two significant questions seem to arise:-

(a) can the correspondence, taken with Mr.Devlin's understanding of his role, be taken to have amended the original agreement reached in December 2001 so as to exclude from the process finally agreed, as and between Mr.O'Mahony and Mr.O'Connor, a requirement that Mr.Devlin resolve issues concerning defects, remediation and as to who actually carried out work; and

(b) if there was no such amendment is it, nonetheless, proper to regard the valuation conducted by Mr.Devlin as final so

far as it goes.

7.7 The other issues that arise as to the terms agreed are best understood in the context of a description of the process actually undertaken by Mr.Devlin and I propose dealing with such disputes while describing that process, to which I now turn.

8. The Valuation Process

8.1 There is no real dispute as to what actually happened during the valuation process. On foot of the original meeting which Mr.Devlin had with Mr.O'Mahony and Mr.Ryan he (Mr.Devlin) arranged for two other quantity surveyors from his office to go to Garryhankard House. One of those was a Mr.McClurey who gave evidence. Mr.McClurey indicated that he had an initial meeting with Mr.O'Mahony at which he discussed a variety of complaints that Mr.O'Mahony had, apparently, previously made to Mr.Devlin concerning the way in which the building had been constructed. These complaints had been, apparently, written down by Mr.Devlin as notes and were produced in evidence. Mr.McClurey's evidence was that he went briefly through those matters with Mr.O'Mahony. While Mr.O'Mahony indicated that he had no recollection of meeting with Mr.McClurey he did not dispute the fact that such a meeting could well have taken place. I am satisfied that a meeting, as described by Mr.McClurey, did, in fact, take place.

8.2 On foot of the measurements and other observations taken, a valuation exercise was conducted under the general control of Mr.Devlin. It would appear that that valuation took somewhat longer than Mr.Devlin had originally envisaged and was not complete until early May. It is also common case that neither Mr.Devlin nor anyone from his office was in contact with either Mr.O'Mahony or Mr.Cotter during this period save for an initial courtesy contact with Mr.Cotter which did not deal with any matters of substance and the brief meeting between Mr.McClurey and Mr.O'Mahony referred to above. Mr.Devlin's stated reason for conducting the process in this way was that it was his intention to ensure that he had ascertained the entirety of Mr.O'Connor's claim so as to preclude Mr.O'Connor from making any further claim in breach of Mr.O'Mahony's stipulation that Mr.O'Connor should not be permitted to claim any extras to compensate for sums ruled out by Mr.Devlin. I accept Mr.Devlin's evidence in that regard. Neither does it seem to me that that requirement is in anyway inconsistent with the arrangements set out in the January letters. While it is true to state that Mr.O'Mahony in his letter of 12th of February indicated that he wished to have Mr.Cotter consulted throughout the process it is not clear to me as to what real consultation was required until item 6 of the process set out in the January letters was reached. Each of the earlier items involve Mr.Devlin and his team looking at and valuing plans or actual works as measured by them. Insofar as some additional consultation was necessary during that process with Mr.O'Connor or Mr.Ryan, same was only necessary for the purposes of ensuring that the totality of their claim was included in the initial valuation.

8.3 In any event as a result of the completion of items 1 to 5 Mr.Devlin produced the interim report. While that report, is not, in its terms, described as an interim report its status can be gleaned from paragraph 5.0 of same which states as follows:-

"As outlined in our letter of 29.01.02 we have valued the completed works. This report is being issued to the client and the contractor. We would recommend that both parties spend a short period of seven days or less to consider its content. We would propose to arrange a series of meetings conducted on the same day at a location convenient to all parties, perhaps in Dublin, to consider comments and issue a final recommendation. I shall be in touch with each party in the near future to arrange a date and a venue"

8.4 Complaint is made on behalf of Mr.O'Mahony that the process outlined in the January letters did not envisage the making of such a report. I am afraid I cannot agree. The process envisages an analysis of drawings and site measurements together with a valuation of the results thereof. This is to be followed by consultation with the parties. It is clear therefore that what was envisaged was that Mr.Devlin would complete an initial exercise which would involve him in analysing plans and measuring the works together with valuing same. While the January letters do not expressly state that the result of the measurement, analysis and valuation was to be put in a formal report it seems to me that the process clearly envisaged some form of formal recording of the results of that part of the process. It was, therefore, in my view, well within Mr.Devlin's discretion in complying with the process which he had outlined in the January letters to incorporate the findings of the analysis, measurement and valuation (conducted as required by items 1 to 5 of the letters) into a report and give same to the parties as the basis for the consultation process contemplated at item 6 of those letters. To this point, it seems to me, the process was clearly conducted within the bounds of what was set out by Mr.Devlin in the January letters. After this point significant difficulties were, however, encountered in that process.

9. The process breaks down

9.1 Mr.O'Mahony gave evidence that he was dissatisfied with the receipt of the interim report. His stated basis for such dissatisfaction was, he said, the failure of Mr.Devlin to consult with Mr.Cotter in the process which led up to the formulation of that report. However for the reasons indicated above (para.8.2) I am not satisfied that Mr.O'Mahony had any legitimate complaint with the process actually adopted by Mr.Devlin of that ground. Furthermore, whatever may have been Mr.O'Mahony's level of dissatisfaction, no intimation was given to Mr.Devlin (or to Mr.O'Connor) of any such dissatisfaction.

9.2 Thereafter Mr.Devlin made a significant number of attempts to arrange for the contemplated consultation process. There can be no doubt but that Mr.O'Mahony failed completely to cooperate in anyway with those attempts. Mr.Devlin gave evidence, which I accept, and which is in significant part verified by documentation, of numerous attempts to arrange a meeting with Mr.O'Mahony and/or Mr.Cotter. It is clear on the evidence that up and until October Mr.Cotter did not even have instructions from Mr.O'Mahony sufficient to allow him to engage in meaningful consultation with Mr.Devlin. In those circumstances I have to say that I find Mr.O'Mahony's complaint about the failure to consult with Mr.Cotter to be quite extraordinary. It is also very easy to understand Mr.Devlin's frustration when, having being told to contact Mr.Cotter, and having done so, he was informed by Mr.Cotter that he (Mr.Cotter) did not have instructions.

9.3 Part of Mr.O'Mahony's explanation for this state of events was a contention that Mr.O'Connor was, likewise, not focused upon bringing the process to a conclusion. The reason why he says this was so requires brief reference to the fact that Mr.O'Mahony and Mr.O'Connor were, at the relevant time, engaged in a significant development of apartments at City West. This project would appear to have run to a significant number of millions of pounds and had, by the middle of 2002, run into serious difficulties. There seems little doubt but that relations between Mr.O'Mahony and Mr.O'Connor were beginning to unravel at this stage. Furthermore there is little doubt but that a significant amount of time and attention had to be paid by both Mr.O'Mahony and Mr.O'Connor to attempts to rescue the venture at City West. However I do not accept Mr.O'Mahony's evidence to the effect that Mr.O'Connor agreed with him (Mr.O'Mahony) that it was appropriate to leave Mr.Devlin on, as it were, the long finger. I come to this view not least because it is clear that at a time when Mr.O'Mahony suggested that Mr.O'Connor continued to be happy not to focus on the Garryhankard House final account, it is clear that Mr.O'Connor had gone to his own solicitors and arranged for correspondence to be sent to Mr.O'Mahony concerning payment. I do not, therefore, accept that Mr.O'Connor was complacent in the lack of cooperation with Mr.Devlin in arranging the consultation necessary to comply with item 6 in Mr.Devlin's process. I also place significant reliance on the fact that none of Mr.Devlin's evidence is consistent with him having any complaint concerning a lack of cooperation on Mr.O'Connor's part and, indeed, his correspondence bears only the opposite meaning.

9.4 There was, however, one brief meeting between all relevant parties, during this period. It is common case that such an event occurred at Mr. O'Connor's offices at City West on the 2nd October, 2002. It is also common case that Mr. O'Connor was present together with Mr. O'Mahony and Mr. Cotter. Furthermore it is clear that all three were there, at least initially, and principally, for the purposes of dealing with the problems that had developed in relation to City West. It is equally clear that Mr. O'Connor had invited Mr. Devlin to attend and that Mr. Devlin did so in the company of a colleague Gordon Foley. However no consultation in relation to Garryhankard House in fact took place. Mr. O'Connor and Mr. O'Mahony have given conflicting accounts as to the reasons why that happened. It does not appear to me to be necessary to resolve those disputes save to note that I am satisfied that Mr. O'Connor was not attempting to avoid any meeting.

It is also common case that on that, occasion, Mr. Cotter spoke very briefly to Mr. Devlin and indicated that he would get someone in his office to review the interim report within "a couple of weeks" and get back to Mr. Devlin. It is also accepted that it was only on that day (some 5 months after the interim report) that Mr. Cotter was first instructed to engage with Mr. Devlin.

9.5 Unfortunately it was well into November before Mr. Cotter completed his review. In the meantime no one on Mr. O'Mahony's side had taken the trouble to inform Mr. Devlin that further delay was going to occur. Understandably frustrated, Mr. Devlin wrote a letter to both parties on 25th November, 2002, which noted that he (Mr. Devlin) had had no contact from Mr. O'Mahony or Mr. Cotter and that it was necessary to bring his work to a conclusion. That letter also noted that Mr. Devlin had corresponded and attempted to set up meetings over a long period but that although Mr. O'Connor was keen to attend he (Mr. Devlin) had been unable to get Mr. O'Mahony or Mr. Cotter to assist him. Having referred to the original report, and the suggestion of a short period for consideration and consultation, Mr. Devlin went on to indicate that he was never of the opinion that the proposed consultations would significantly change his conclusions but felt that such a procedure would be appropriate.

In all the circumstances he indicated that the contents of what he described as the assessment report should be regarded as final.

9.6 Mr. O'Mahony replied on 27th November and included in his letter a suggestion that there was a connection between the making final of the report as per Mr. Devlin's letter of 25th November and a motion for judgment which was, at the same time, before This Court. That matter is no longer pursued. The letter also contains an extraordinary suggestion to the effect that "my instructions are that you never met with Edward Cotter Partnership, you sought no details from them and made no effort to include them in your process". Given the extraordinary lengths to which Mr. Devlin had gone, to seek to consult with Mr. Cotter and Mr. O'Mahony, that statement is manifestly incorrect. When pressed on this matter in evidence Mr. O'Mahony indicated that the statement referred to the failure to consult with Mr. Cotter prior to the issuing of the interim report. However that is not what his letter says.

9.7 It should also be noted that Mr. Devlin did not, in advance of purporting to make his report final as per his letter of 25th November, write to the parties, and in particular Mr. O'Mahony and/or Mr. Cotter, setting a deadline and indicating that in the absence of compliance with the consultation process prior to that deadline he purposed making the report final. While fully understanding the undoubted frustration which Mr. Devlin felt and notwithstanding my findings of fact which place the entire blame for that undoubted frustration on Mr. O'Mahony's side, it is also necessary to consider the legal consequences of the failure to put the parties on notice that the report was going to become final in the event of a culpable absence of consultation within a specified time frame. It is now necessary to turn to the legal issues.

10. The Law

10.1 The legal considerations in this case are therefore applicable to the following circumstances:-

- (a) for the reasons indicated above Mr. O'Mahony and Mr. O'Connor had agreed that Mr. Devlin was to act in the valuation of the works at Garryhankard House in such a manner as to bind both parties.
- (b) the agreement at (a) extended to referring to Mr. Devlin any issues between Mr. O'Mahony and Mr. O'Connor as to the quality of the work, remedial works necessary, and disputes as to whether work had in fact been carried out by Mr. O'Connor.
- (c) Mr. Devlin did not envisage dealing with the issues at (b) save to the extent that he might facilitate discussions between the parties and be in a position to place a value (which would bind the parties) on any matters such as remedial works or works not to be attributed to Mr. O'Connor which were the subject of agreement.
- (d) Mr. Devlin complied fully with his interpretation of the process as set out in the January letters up to item 5 thereof. Mr. Devlin's interpretation was reasonable but was not the only possible interpretation of the letters.
- (e) Mr. Devlin was frustrated in carrying out item 6 of that process by reason solely of the failure of Mr. O'Mahony and Mr. Cotter to engage with him.
- (f) Mr. Devlin purported to make the content of the interim report final without placing either Mr. O'Mahony and Mr. O'Connor on notice that he intended so to do within a specified time frame.

10.2 There is no doubt that there is ample authority for the proposition that where parties agree to be bound by the report of an expert, such report cannot be challenged in the courts on the ground that mistakes have been made in its preparation unless it can be shown that the expert had departed from the instructions given to him in a material respect or had in some way acted in bad faith. *Jones and Others v. Sherwood Computer Services plc* (1992) 1 WLR 277. However that question does not seem to me to really be the issue in this case. If, as a result of a contract between Mr. O'Mahony and Mr. O'Connor, Mr. Devlin produced a report which complied with the process agreed between them, it seems clear that it would not be open to Mr. O'Mahony to attempt to go behind that report simply because he might contend that the report was wrong in some material respect. Mr. O'Mahony's challenge, in this case is, however, different. While he makes a number of complaints as to the process which I have, for the reasons indicated earlier, rejected, two matters remain for decision which are mixed questions of law and fact. They are:-

- (a) the extent to which the arrangements between Mr. O'Connor and Mr. O'Mahony can now be said to be binding by virtue of the fact that the process which was embarked upon by Mr. Devlin did not conform with what had originally been agreed between Mr. O'Connor and Mr. O'Mahony (this in turn requires a resolution of the two questions identified at para. 7.6 of this judgment); and
- (b) the extent to which the report of Mr. Devlin can be taken as final and, therefore, binding, having regard to the fact that the consultation process contemplated and agreed did not in fact take place in all the circumstances of the case but in particular by virtue of the fact that no deadline was imposed by putting the parties on notice that in the absence of

compliance with the directions of Mr.Devlin in relation to the consultation process the interim report would be treated as final on such deadline.

10.3 It is also necessary to characterise the overall process which the parties agreed should be conducted by Mr.Devlin. In this context it is important to note the legal distinction between an arbitration properly so described and expert determination. Both forms of dispute resolution stem, of course, from an agreement between parties to refer an issue between them to the form of resolution specified in such agreement. Therefore to a significant extent the nature of the process will be determined by the agreement between the parties. However an arbitration involves, to a varying extent, some degree of adjudication by the arbitrator between the competing positions of the parties. At one extreme the process may very closely resemble a court hearing. On the other hand an expert is appointed to reach a decision which will be binding between the parties relying, at least in significant part, on his own skill. At its simplest parties may agree that property be purchased at a price to be determined by a nominated expert. The expert arrives at the price by the exercise of his own expertise. It seems to me that the appointment of Mr.Devlin constituted him an expert in that sense. He was therefore entitled to bring to bear his own expertise to the valuation entrusted to him. In *Expert Determination* (Third Edition by John Kendall) the author at paragraph 13.6.6 deals with the procedures properly followed by an expert in the following terms:-

"The procedure adopted by an expert may be less like the adversarial, party driven mechanisms of arbitration and litigation and more like an inquisitorial investigation. By these words is meant a freedom for the expert to initiate lines of enquiry with or without the involvement of the parties. The expert clause and/or the parties may preclude the expert from making independent investigations without involving the parties".

I agree that that passage represents the law in this jurisdiction. Ultimately the process which the expert is to engage in is the one specified in the agreement between the parties. However the default position is that the expert is free to initiate his own lines of enquiry and use his own expertise. He is only limited in that regard by express terms in the contract between the parties which conferred jurisdiction upon him and which may limit the extent of that freedom. Insofar as the process agreed requires him to consult with the parties he must do so and in so doing must act fairly.

10.4 In the following paragraph the author considers the position which arises where a party fails to comply with the expert's directions. The following is stated:-

"The expert can and should proceed to make the determination. Some expert clauses provide for this expressly, but it is an implied term of the procedure that both parties will cooperate in bringing the determination to a conclusion and is probably unnecessary in most cases".

In *Rajdef v. Becketts* (a firm) (1989) 2 E.G.L.R.144 the court held that a surveyor representing a tenant, who wished to object to an expert on the grounds of an alleged conflict of interest, but who failed to send representations within a two month time limit specified by the expert, was in default so that the expert concerned was found to have acted properly in proceeding to make the determination referred to him without having received representations from both parties. Having commented on that case the author of *Expert Determination* notes, correctly, in my view, that it is desirable that an expert, before proceeding to give a final determination, should give a defaulting party clear warning that that is what he or she proposes to do. Again it appears to me that the position set out in *Expert Determination* in that regard represents the law in this jurisdiction.

10.5 Therefore the process which an expert is required to engage in so as to reach a determination binding on the parties is primarily to be derived from and found in the agreement between those parties. However in the absence of express provision to the contrary the expert is entitled to pursue his own lines of enquiry and use his own skill and judgment without necessarily referring to the parties. To the extent that the process specified in the agreement between the parties requires or permits the expert to have regard to the view of and representations of the parties then the expert must do so. Where a party is in default of making the representations which the agreed process entitles them to make, the expert is entitled to reach a final determination without reference to such representations. Whether a point has been reached which entitles the expert to make a final determination without reference to the representations of a party in such circumstances depends on all the circumstances of the case and in particular the extent to which the party in default may be said to be in specific breach of a defined obligation to make representations in a particular manner or within a particular time scale. In the light of that legal position it is now necessary to turn to the two remaining issues referred to at paragraph 10.2 above.

11. Was there a binding arrangement which was complied with

11.1 Counsel for Mr.O'Mahony argues that there was, in substance, no binding agreement because of the differences between what he contended (and I have found) was the contemplated arrangement agreed between Mr.O'Mahony and Mr.O'Connor in December 2001 and the process actually embarked upon by Mr.Devlin. I accept that to the extent that the arrangement agreed in December 2001 might be found to be inconsistent with the process specified by Mr .Devlin in the January letters, then that original arrangement would necessarily have to be taken to have been amended by agreement between Mr.O'Connor and Mr.O'Mahony so as to bring their agreement into conformity with the process agreed with Mr.Devlin. For the reasons which I have set out above I am satisfied that the process which Mr.Devlin contemplated carrying out, and did, so far as he was let, in fact carry out, is consistent with the January letters. However it is equally fair to say that those letters are not, either, inconsistent with what I have found to have been agreed between Mr.O'Connor and Mr.O'Mahony the previous December. In reality the letters are silent as to the extent of the matters that could be raised and resolved (other than by agreement) during the consultation process.

11.2 In all the circumstances it does not seem to me that the correspondence amounts to a clear variation in the arrangements previously agreed between Mr.O'Mahony and Mr.O'Connor such that there would have been removed from that agreement a requirement that the expert to be appointed would have power to bind in respect of issues relating to defects, remedial works, and whether work was actually carried out by or on behalf of Mr.O'Connor. In those circumstances I am driven to the conclusion that the process actually embarked upon by Mr.Devlin was different to that which was the subject of the agreement between Mr.O'Mahony and Mr.O'Connor. In coming to that view I would wish to make it clear that I do not, in so doing, express any criticism of Mr.Devlin. He did the job which he believed he had been employed to do insofar as he was let. Insofar as it was not the job which had been agreed Mr.O'Mahony and Mr.O'Connor it was not his fault that the extent of the job which he was being asked to do was not made clear to him. While it is often suggested that an excessive formality is unnecessarily introduced into binding commercial arrangements this case is a very good example of where a more formally negotiated reference to the expert concerned might well have made clear the differences in understanding between Mr.Devlin and, in particular, Mr.O'Mahony such as would have either led to a clear agreement as to what precisely Mr.Devlin's jurisdiction was to be or, alternatively, have led, in the absence of such agreement, to Mr.Devlin indicating that he could not do the job that was being suggested for him. Unfortunately that did not occur.

11.3 Under this heading it is therefore necessary to decide the consequences of such failure. In reality the issue comes down to one

of severance. There is no doubt that Mr. Devlin carried out part of the task that was agreed between the parties. He did not (because his role was not made clear to him) intend to and did not in fact carry out certain additional parts. The question that therefore arises is as to whether the results of what he did carry out are binding as and between the parties notwithstanding the fact that other parts of what had been agreed should be resolved by the process, were not in fact completed. I am not satisfied that it is possible to sever the agreement so as to render it binding as and between the parties to the extent that Mr. Devlin actually carried out his task leaving over the remaining portions of the task which Mr. O'Connor and Mr. O'Mahony had agreed should be referred to Mr. Devlin for determination by the court. In this regard it seems to me that the argument advanced on behalf of Mr. O'Mahony is correct. What was contemplated was a unified and complete process as a result of which a final figure which would have to be paid by Mr. O'Mahony to Mr. O'Connor would be arrived at. The parties did not contemplate an arrangement which would be partial and which could only reach a final figure in the event that the parties were subsequently able to agree on the fact of defective workmanship, the fact of the remedial works necessary to remedy any such defective workmanship, and the facts as to what was or was not done by or on behalf of Mr. O'Connor. In those circumstances I am driven to the conclusion that the agreement between the parties can not be severed in such a manner as to give effect to what was actually determined by Mr. Devlin.

12. Notice

12.1 Under this heading counsel for Mr. O'Mahony contends that an appropriate notice was not given by Mr. Devlin of his intention, in the absence of compliance with his reasonable requirements within some specified period, to treat his report as final. Such absence, it is said, is fatal. Again I agree. It is clear from the authorities referred to above that those cases where the court held that an expert's duty was to complete his report without the assistance of parties who had not complied with their obligations, arose in circumstances where those obligations had to be complied with within reasonable time limits specified by the expert. While it is true to state that Mr. Devlin did suggest (in the interim report) a very short time frame for the consultation process, it is clear that he, and Mr. O'Connor in practice, accepted, even though under some protest, a significant prolongation. In those circumstances it does not seem to me that it was open to Mr. Devlin to make his report final without giving the parties notice of his intention so to do, in the absence of compliance within a specified period of time of his requirements in relation to consultation.

12.2 In the light of the views which I have expressed as to the extent to which Mr. O'Mahony was significantly culpable for his failure to cooperate, I can fully understand Mr. Devlin's undoubted frustration. I nonetheless am, unfortunately, forced to conclude that Mr. Devlin should have placed Mr. O'Mahony upon notice of his intention to make the interim report final in the absence of compliance. Having regard to the unfortunate and lengthy history of his attempts to obtain such compliance a very short period indeed could reasonably have been specified. However the making of the report final without any such notice seems to me to be fatal to the contention that the report can validly be treated as final.

13. Conclusions

Therefore for the two reasons addressed at paras. 11 and 12 (and only those reasons) I am satisfied that Mr. O'Mahony is correct in his contention that the report is not binding in respect of any of the matters contained in it. What evidential weight might properly be attached to the findings in the report (if any) when the substantive issues between the parties concerning their entitlements and obligations arising out of the building contract come to be heard is a matter which I will leave to further determination in the course of such hearing.