Neutral Citation Number: [2006] IEHC 362

THE HIGH COURT

2001 No. 5884P

BETWEEN

TERENCE LINNIE

PLAINTIFF

AND
PAUL MURPHY

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 13th day of November, 2008.

1. The source of these proceedings is a very unusual agreement in writing entered into between the defendant of the one part and the plaintiff of the other part on 2nd April, 2000. In entering into the agreement each of the parties had the advice of the firm of solicitors who acted for him in these proceedings.

2. At the time the defendant was the owner of a house in Ranelagh, Dublin, 6, No. 4 Walkers Cottages (the premises). Nine months previously the defendant had embarked on an ambitious project to extend and renovate the premises. On the evidence, it would appear that he had not employed a contractor but had run the project himself, engaging direct labour and tradesmen. By the end of March 2000, he had run out of money, the works were incomplete and the premises were, in fact, a mere shell. It was against that background that he sought out a building contractor to complete the works. He was introduced to the plaintiff, a building contractor, through a mutual friend. The plaintiff, rather reluctantly, according to himself, agreed to take on the job. That led to the signing of the agreement dated 2nd April, 2000.

3. There were two schedules attached to the agreement. It was provided that the plaintiff would complete the renovation and building work at the premises in accordance with the works set out in schedule 1, which listed 23 items. It was expressly stipulated that the plaintiff would not be responsible for the supply of fittings and completion of the works set out in schedule 2. It was also provided that any previous work carried out by the defendant or his agents would be deemed the responsibility of the defendant, the newly built extension, the supply and fitting of steel, the supply and fitting of pipes and services and damp proofing to the original house and the extension being specified.

4. The unusual feature of the agreement was the manner in which the contract price payable to the plaintiff was to be determined. It was to be 12% of the net sale price of the premises. The agreement provided that the premises would be put on the market for sale "immediately after the completion of the building and renovation work at a reasonable standard". It was provided that "the sale price" should be deemed the market price received for the premises less:-

> (a) The redemption value of the mortgage in favour of First Active Building Society to which the premises were subject; and
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> (b) The fees and outlays of the defendant's solicitors in relation to the sale of the premises.

5. The agreement provided that the necessary work would be completed by 15th June, 2000 or on an agreed alternative date. I am satisfied that time was not of the essence in relation to the completion date and it was never made of the essence. It was envisaged that there would be an immediate sale following completion of the works to a reasonable standard and that the plaintiff would be paid the agreed contract price on the closing of the sale.

6. It is not clear on the evidence as to whether at the time of the signing of the agreement the plaintiff did any reasonable assessment of what the contract price would be. He certainly moved as early as the end of May 2000 to ascertain what the premises were likely to achieve on the market and introduced a local firm of auctioneers in Ranelagh to the premises with a view to a sale. I think it is reasonable to assume that the defendant went along with this. What is not clear is whether at the time the plaintiff made any assessment of the deductions which were to be made from the sale price, namely, the monies due to First Active Building Society and the fees in connection with the sale. On the basis of the valuation of Kelly Properties given on 29th May, 2000 and of the evidence adduced at the hearing of the action that there was IR£65,000 owing to First Active, in my view, admittedly on a speculative basis, it would be on the optimistic side to assess a contract price in the region of €50,000.

7. As was provided for in the agreement, the plaintiff was given possession of the premises to carry out the works. In fact, the evidence is that the plaintiff got possession about a week before the agreement was signed. I am satisfied that at that stage the premises were wholly uninhabitable.

8. That leads to an issue which was not pleaded, as it should have been if it was to be pursued by the defendant, and which was raised for the first time at the hearing of the action. It was submitted by counsel for the defendant that the premises constituted a "family home" within the meaning of the Family Home Protection Act 1976, as amended, and that as the agreement did not have the prior written consent of the spouse of the defendant, insofar as the contract provided for payment of the contract price out of the proceeds of sale of the premises, the contract was void. On the evidence, I am satisfied that as of March and April 2000, the premises did not constitute the family home of the defendant and his wife within the meaning of the Act of 1976 because the defendant, his wife and children were ordinarily resident elsewhere, that is to say, in an apartment at Booterstown Avenue. The defendant's evidence was that he commenced his extension and refurbishment project in June 1999. The family moved out of the premises to rented accommodation in August 1999 and remained there at all times thereafter. I am satisfied that by the time it became apparent that the defendant had run out of money and was not in a position to complete the work himself around March 2000, both the defendant and his wife had accepted the reality of the situation that they were never going to move back into the premises. Accordingly, I consider that they could not be said to be ordinarily resident in the premises. If contrary to the conclusion I have reached, the premises did constitute the family home of the defendant's wife as of 2nd April, 2000, the absence of her prior written consent to the agreement would have avoided the element of the agreement which provided that the premises would be sold and the contract price discharged out of the proceeds of sale. However, that would not absolve the defendant from liability to the plaintiff in contract or in quasi-contract for the performance by the plaintiff of his end of the bargain. Finally, on this point, there is a reference in the defendant's written submissions to a motion brought on behalf of the defendant's wife, Michelle Manley, to be joined in these proceedings as a notice party and it is stated that it was not known what transpired on foot of the application. I have checked the file in the Central Office and the position is that by notice of motion dated 13th July, 2004, Ms. Manley, who was represented by Brian Duncan, solicitor, applied to be joined as a notice party to these proceedings. By order of this Court (Johnson J.) made on 26th July, 2004, the application was refused.

9. The works were not completed on 15th June, 2000 and trundled on through the summer. The plaintiff ascribed the delay to

"unseen" works, which I understand to mean matters which were not covered in schedule 1 which were discovered in the course of the works and had to be dealt with. It would appear that the defendant did not at any time complain about the delay in completing the works.

10. The works stopped around the end of September or the beginning of October, 2000. The two crucial questions of fact which arise in these proceedings are why the works stopped and what remained to be done when the works stopped and the plaintiff's involvement with the premises ceased.

11. On the first question, the plaintiff's version of events was that the defendant's wife wanted to move into the premises with her children around September 2000. The plaintiff was shocked. He contacted the defendant, who assured him that he would deal with the situation. Ms. Manley moved into the house with her children over a weekend late in September, 2000, at a time when the house was a work in progress and "snagging" had still to be done. Subsequently the plaintiff met the defendant and Ms. Manley and it was agreed that the plaintiff would finish the work. The plaintiff went back to the premises in late September to finish "snagging". However, there was tension between Ms. Manley and him. She did not want him in the house. The plaintiff made contact with the defendant to agree a "snagging" list. Everybody agreed, including Ms. Manley, that the plaintiff would come back to do the "snagging" work. The plaintiff tried to come back. While working on floor tiles he was locked out. Ms. Manley denied him access and said she did not want him there. He returned again to the premises but he was not let it. He tried to arrange for his brother, Joseph Linnie, a carpenter, to finish the "snagging" but Mr. Linnie was not allowed in to do the "snagging". I infer from the evidence that at that stage the plaintiff realised that the premises were not going to be sold. Ms. Manley's version of the circumstances in which she moved into the premises was that the landlord of the apartment at Booterstown Avenue wanted her and her family to move out. She met with the plaintiff and Mr. Joseph Linnie on the 27th September, 2000. The plaintiff agreed that the family could move back into the premises while the work was completed. The family moved back in the following weekend with the agreement of the plaintiff. On the 12th October, 2000, she arrived home to find the plaintiff leaving with the cement mixer. He said he would back on Sunday to do the floor in the hall. That was the last time she saw him. Ms. Manley stated that the plaintiff was not excluded. She also contended that Joseph Linnie was not excluded and she implied that he did not try very hard to gain admittance.

12. By mid-October, 2000, the plaintiff had put the matter into the hands of his solicitor. His solicitor wrote to the defendant on 19th October, 2000, alleging that the defendant was not complying with the terms of the agreement and threatening that, if the premises were not put on the market for sale immediately or, alternatively, if all monies outstanding to the plaintiff were not paid, the plaintiff would have no choice but to issue proceedings in this Court. The defendant's response, which was dated 23rd October, 2000, but which was not received by the plaintiff's solicitors until 5th December, 2000, alleged that the plaintiff had abandoned the work. It was contended that a considerable amount of work remained to be completed. It was stated that the defendant intended to engage a surveyor to examine the work and to advise what remedial or additional works would be required. The plaintiff's solicitors' response in a letter of 6th December, 2000, was that the plaintiff was willing to discuss the possibility of completing the work, but he had been refused access. The defendant responded by letter dated 19th December, 2000, stating that he had put the matter in the hands of Arthur Lyons and Associates, Quantity Surveyors.

13. Having regard to the totality of the evidence, I think it is probable that when Ms. Manley moved back into the premises at the end of September, 2000, she was determined that the premises would not be sold to discharge the amount due to the plaintiff for the work he carried out. I think it is probable that she made life difficult for the plaintiff and that, because of her actions, he was justified in considering that he was excluded from the premises.

14. I think that the key to understanding what happened in October, 2000, is that Ms. Manley did not want the premises sold, whereas the plaintiff did so that he could receive what he was due under the agreement. The defendant, unfortunately, because of alcohol addiction, was unable to deal with the situation. I have no doubt that the proper conclusion to draw is that the plaintiff was excluded from the premises and that the situation was that the premises were not going to be put on the market for sale with a view to discharging the money due to the plaintiff under the agreement.

15. Turning to what remained to be done when the plaintiff was excluded, I would remark first that there was a mechanism in the agreement for resolution of "any dispute relating to work being completed". Clause 5 provided that such dispute should be decided "by an agreed Architect or Civil Engineer". Unfortunately, the parties did not resort to that dispute resolution mechanism.

16. What happened was that Arthur Lyons of the firm of Arthur Lyons and Associates met with James Linnie of Lindub Construction Services Limited, Civil and Structural Engineers, at the premises on 29th January, 2001. There was no engagement between them after that. Mr. James Linnie is the plaintiff's step-son, so that he can hardly be regarded as an independent expert. Mr. Lyons did not testify but Joseph Delaney of the firm of Arthur Lyons and Associates, whose evidence was that he viewed the premises two weeks after 21st January, 2001, did testify. His evidence was that the firm of Arthur Lyons and Associates were never actually retained by the defendant, they were never paid for their services, and all they did was draw up a discussion document of the work to be done to the premises setting out roughly in broad terms the cost of the works. It transpired that that list did not differentiate between what the plaintiff had contracted to do by reference to schedule 1 of the agreement and works that he had not contracted to do.

17. The evidence of Mr. James Linnie was that his understanding was that the meeting with Mr. Lyons was to prepare a list of outstanding matters "to bring the standoff to conclusion". Both professionals were to prepare a harmonised list of works for the plaintiff to do, but that did not happen. Mr. Linnie's evidence was that the works set out in schedule 1 were basically complete, except for a few items. He put a figure of IR£1,200 (€1,524) on the cost of completing the works.

18. The defendant, in his defence and counter-claim delivered on 28th June, 2002, counter claimed in the sum of €30,167 in respect of the cost of repairing damage alleged to have been caused by the plaintiff to the premises. Eventually, in a reply to a notice of particulars dated 9th July, 2004, the defendant furnished a list of works costed by Arthur Lyons and Associates as the make up of the figure of €30,167.

19. Mr. Delaney's evidence was that this was the list prepared by Arthur Lyons following his visit to the premises on 21st January, 2001, and that it was furnished to the defendant shortly thereafter so that he could sort out his problems with the plaintiff. I note that it is Ms. Manley's name which appears at the head of the list. In any event, it is patently obvious that the list includes work for which the plaintiff was not liable. Therefore it is clear on the evidence that the list was not constructed by reference to the plaintiff's contractual obligations under the agreement. Accordingly, it is of little relevance.

20. In relation to the works for which the plaintiff was liable and which remained to be done when the work ceased in October, 2000, I find that most of the work was done. However, I find it impossible to quantify the cost of what required to be done to complete the works and to bring them to the reasonable standard which the plaintiff contracted for. Mr. James Linnie in his report of 25th September, 2001 did not put any price on the works he considered remain to be done and the figure of IR£1,200 arose from his cross-

examination by the defendant's counsel more than seven and a half years after he had inspected the premises. Therefore, I find it very difficult to give that figure credence.

21. The basis of the plaintiff's claim at this juncture is that he is entitled to recover a reasonable sum for the works he did on a *quantum meruit* basis. The defendant's contention is that, as there was a price agreed in this case, a claim on a *quantum meruit* basis cannot be maintained.

22. The Court has had the benefit of written submissions from counsel for the plaintiff and counsel for the defendant. There are undoubtedly jurisprudential points as to when entitlement to be paid on a *quantum meruit* basis for work done arises and what is the basis of the entitlement. However interesting, this is not the case in which to explore those points. Suffice it to say that there is ample authority for the proposition that there is an entitlement to be paid on a *quantum meruit* basis for work done where the contract has been terminated by breach. The following passage from *Chitty* on *Contract*, 29th ed., at para. 29-067 explains the principle:-

> "According to Winfield [Province of the Law of Tort (1931), p.p. 157-160] there is only one instance of *quantum meruit* which is properly regarded as restitutionary. Alderson B. put it as follows: 'Where one party has absolutely refused to perform, or has rendered himself incapable of performing, his part of the contract, he puts it in the power of the other party either to sue for breach of it, or to rescind the contract and sue on a *quantum meruit* for the work actually done'.
>
> Although the matter is not free from doubt the better view is that such a *quantum meruit* claim is grounded on the failure of consideration".

23. In this case, in my view, by excluding the plaintiff from the premises in October, 2000, and by effectively refusing to put the premises on the market for sale, the defendant was in breach of the agreement. The plaintiff was entitled to rescind the contract because of that breach and to sue for the work he actually did on a *quantum meruit* basis. On the peculiar facts of this case, given that the premises have never been sold, the contract price cannot be identified with any degree of certainty.

24. Before considering the quantum of the plaintiff's claim, there are two matters I wish to clarify. First, the defendant adduced evidence that he had paid the sum of IR£10,000 in cash to the plaintiff in respect of the works. I accept the plaintiff's evidence that he did not receive any payment in cash. Secondly, in my view, the plaintiff has not established evidentially that his counter-claim is maintainable. Moreover it is not maintainable because the basis on which the plaintiff is being remunerated is that he is being awarded a reasonable sum for the work he did under the agreement.

25. Accordingly, the remaining issue is determination of the sum to which the plaintiff is entitled on a *quantum meruit* basis. It was not until 12th June, 2001, that the plaintiff furnished his "detailed list of expenses incurred on contract" at the premises. That was after the plenary summons had issued (25th April, 2001) and nine months after the works ceased.

26. By way of general observation, I consider that the claim as itemised on the list of 12th June, 2001, is exaggerated.

27. I propose allowing the following items in full:-

- Item 1: purchases IR£7,438.00
- Items 4 and 5: payments to labourers IR£11,475.00
- Item 6: the plaintiff's remuneration IR£19,440.00
- Items 7, 9 and 10: hire of equipment, etc. IR£1,690.00
- Item 13: sub-contracting plumber IR£1,200.00
- Item 17: sub-contracting plastering contractor IR£4,500.00

The aggregate of the foregoing amounts allowed is IR£45,743.00.

28. I feel constrained to comment that I was somewhat sceptical about the claim in relation to payment to the labourers. In his evidence, the plaintiff described the two men in question as labourers, distinguishing them from the plasterer and the plumber who were sub-contractors. When I queried whether forms P60 in respect of them could be furnished, I was informed that they were sub-contractors. Copies of forms RCT48 were furnished. I have allowed the sums shown on those forms and, despite my scepticism, have ignored the fact that as originally itemised payments to the labourers included wages, holiday pay, Bank holiday payments, etc.

29. I propose allowing a sum of IR£5000 to cover the remaining items on the list of 12th June, 2001, I would comment on those items as follows:-

- Items 2 and 3: the claim in respect of telephone calls is grossly exorbitant.
- Item 8: the claim for £796 (Pounds) in respect of expenses incurred "re mens lunches, due to no facilities on site" is risible.
- Item 11: the claim for €3,400 for the cost of insurance and upkeep of van is exorbitant.
- Item 12: a claim for loss of profit in the sum of IR£10,000 is not sustainable when coupled with a claim for the plaintiff's remuneration at IR£19,440.
- Item 14: a claim for IR£3,000 in respect of miscellaneous expenses, which are not itemised, seems inflated.
- Item 15: if the plaintiff saw fit to pay his brother and a friend for "negotiating" with the defendant, I see no reason why liability for that payment should be foisted on the defendant.
- Item 16: the claim for extras on top of the claim for purchases seems excessive.

30. In summary, the total amount allowed on the *quantum meruit* claim is IR£50,743, equivalent to €64,430.

31. No proper basis was advanced on which the plaintiff would be entitled to pre-judgment interest. I note that nothing happened on the proceedings for more than three years between July, 2004 and September, 2007, when notice of intention to proceed was served.

32. There will be an award in the sum of €64,430 against the defendant.