Neutral Citation Number: [2011] IEHC 490

High Court

Commercial

2010 10074 P

Between

Mero-Schmidlin (UK) PLC

Plaintiff

and

Michael McNamara and Company, Cedartree Construction Limited, Bruce Shaw Project Management Limited, Bernard McNamara, John Balance, Paul Hanby, Paul Newman and John McGowan

Defendants

Judgment of Mr Justice Charleton delivered on the 13th day of December 2011

This is an application for a direction at the close of the plaintiff's case. It arises out of a large building project called 'McDonagh Junction' in Kilkenny where the second named defendant Cedartree Construction Ltd was the employer, the first named defendant Michael McNamara and Company was the main contractor, the third named defendant Bruce Shaw Project Management Limited was the project manager and the plaintiff was the subcontractor for a glass roof. The other defendants were employees of the first three named defendants. I will refer to that later.

The plaintiff alleges that the defendants conspired to keep it out of money due to it, approximately the unpaid half of the subcontract price in order to smooth future business relations or, in the alternative, to keep moneys due to the plaintiff for themselves.

Where the defendants on this kind of application indicate that they will go into evidence should the application be unsuccessful, the court should only grant a direction where there is no *prima facie* proof; where the defendants indicate that they will not give evidence, the task of the court is to analyse such evidence as has been given by the plaintiff in order to determine if proof amounting to a probability has been established. The court has a discretion to hear the defence case, should it be announced that there is to be one, before deciding on such an application. All of the defendants have stated that they will go into evidence should this application not be granted, so I bear this discretion in mind.

The entirety of the case made by the plaintiff has been based upon circumstantial evidence. I do not intend to repeat the analysis that I have made elsewhere as to the proper approach by a court trying a civil case based on such evidence. It suffices to say that a theory that a wrong has been committed against the plaintive is not enough; rather, the facts and circumstances upon which the case of conspiracy is made out must establish it as a probability; which probability will be destroyed in the event that on the same facts and circumstances some other equally probable explanation is available. This principle derives from the criminal law principle that a jury should not convict on circumstantial evidence unless that evidence establishes by undesigned coincidence and beyond a reasonable doubt that the accused is guilty and that no other reasonable hypothesis will fit the same circumstances. Where proof by probability is in issue, there may seem to be a logical trap in first deciding that the facts and circumstances prove a probability but then analysing the same material to see if anything else may be probable thereupon. That, however, is not so. The proper approach is to analyse the material in order to establish if a probability is established and then to return and re-analyse the material in order to attempt to find, as a safeguard, any other conclusion which might amount to a competing probability, thereby displacing any tentative finding of fact; see *Elliott Construction Ltd v Irish Asphalt Ltd* (High Court, unreported, 25 May 2011). Here I am concerned with whether there is *prima facie* proof only, that is to say a sufficiency of evidence which if not contradicted would allow a tribunal of fact to fairly conclude that there was a conspiracy. In that regard, I intend to concentrate on whether there is sufficient *prima facie* evidence of that tort.

A civil conspiracy occurs where two or more parties agree to further their interests to the detriment of another party by using unlawful means. That unlawful means can be the object of the conspiracy or it can be the mechanism whereby something apparently lawful is accomplished. In each case the essence of conspiracy as a tort is the coming together in a combination to agree on an illegality. It can also be the tort of conspiracy that a combination wilfully to do an act causing damage to a man in his trade or other interests is unlawful and if damage in fact is caused is actionable, unless the real and dominant purpose is to advance the lawful interests of the parties to that agreement in a manner in which they honestly believe that those interests would directly suffer if the action were not taken; see *Heuston – Salmond on Torts (*17th edition, 1977, para 138). It is the first kind of conspiracy which is relevant here. An agreement by an individual with his company can be a conspiracy as can an agreement between companies through individuals and an agreement between individuals and companies; *Taylor v Smyth* [1991] 1 IR 142.

There has been debate as to the nature of the claim taken by the plaintiff against the defendants. The plenary summons alleges various torts. I am satisfied that the claim before this Court is in conspiracy only. I accept the argument advanced on behalf of the defendants on this aspect of the application. In the letter of claim before the issue of proceedings, dated 12 October 2010, the solicitors for the plaintiff make explicit an allegation that an agreement by way of conspiracy was reached on about 1 July 2008 whereby it was agreed between the defendants, or on their behalf, that a full and final settlement of building debts between the parties to that agreement would be reached to include monies due to the plaintiff but, according to the letter, the monies due to the plaintiff would not be pursued. In evidence, Mr David Barrow on behalf of the plaintiff put forward his interpretation of the conspiracy, which was that on that date the parties agreed to the payment of the money that was due to the plaintiff but were determined that the plaintiff would never receive it because they would keep it for themselves, or one or other of them. His evidence was focused on conspiracy and that was what he was cross examined about. There were references to interference with contractual relations and breaches of duty. In the pleadings, the claim of conspiracy is squarely made as part of other pleas made of interference with contractual relations and of breach of duty. The alleged agreement is central to the allegation of interference with contractual relations made against the defendants; that is how the matter is pleaded, and properly so. Any such interference, if it occurred, happened not as an individual wrong but instead it is pleaded as part of the conspiracy of the defendants, as the means whereby the

alleged conspiracy to use unlawful means, through interference with contractual relations and breach of duty, was furthered. No criticism of the pleadings is advanced in that regard. It is clear from the initial letter that the wrong suffered by the client is reflected in the allegation of conspiracy as opposed to any other claim. The wrongs alleged in addition are the means whereby the agreed unlawful actions in furtherance of the conspiracy have been claimed to be taken.

In addition, it has been argued on behalf of the plaintiff that beyond conspiracy there is a claim of negligence based on breach of duty. The extensive contract documents establish that there is no privity between the plaintiff and any other party than the first defendant; the relationship is that of subcontractor to main contractor. Clause 11 (F) of the subcontract between the plaintiff and the second named defendant allow the plaintiff to stand in the shoes of the first defendant as main contractor and to bring an action against the second defendant, as employer on the building works, in the same manner as if the contract were made with it. This provision is enabled where the plaintiff is dissatisfied with non-certification or under-certification of work, the task of the third named defendant. The relations between the parties are thus governed in such a way that the contract provisions and entitlement to arbitrate clauses preclude a special relationship that otherwise might be argued to give rise to a duty of care; *Pacific Associates v Baxter* [1990] 1QB 993. In that case there was in addition to the kind of arrangement of liabilities between co-workers on a building project a specific clause limiting liability. That, however, is not necessary where the relations between the parties exclude a special relationship giving rise to liability for breach of a duty of care through those relations being worked out and defined through contract. In that case at p 1072 Ralph Gibson LJ stated:

> The professional firms engaged in construction work as architects or engineers or surveyors, and the companies which carry out such work, are concerned to know whether in the relationships between contractor, employer and engineer under a contractual relationship like to that set out in this contract, but ignoring the disclaimer clause, the law imposes a duty of care on the engineer to the contractor, not to cause economic loss to the contractor in the process of certifying and of accepting or rejecting claims under the contract. Of course, each case will depend on its own facts and on the relevant provisions of the contract: see per Lord Morris of *Borth-y-Gest in Sutcliffe v Thackrah* [1974] AC 727, 752g. but it is likely that a large number of contracts are placed for construction or engineering works in which the contractual relationship of contractor and employer and the contractual duties of the engineer are substantially similar to those present in this case and it should be possible to determine whether in general a duty of care does or does not arise in such a case…[O]n the facts … there was "no express or implied undertaking of responsibility" (see per Lord Devlin in *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1964] AC 465, 530) on which the alleged liability of the engineer could be founded…

At p 1037 Russell LJ founded his concurring view on the contractual structure. He said this, with which I agree for the purpose of the contracts that I have analysed herein:

> In my opinion the following question is worthy of being posed. Given the contractual structure between the contractor and the employer, can it fairly be said that it was ever within the contemplation of the contractor that, outside the contract, it could pursue a remedy against the engineer? I do not believe that any representative of the contractor would have thought so for one moment, nor do I believe that from an entirely objective point of view the answer could be anything other than in the negative. The contractor in reality had its rights adequately protected by the terms of its bilateral contract with the employer. If the contractor had thought not, then it was at liberty to insist upon a tripartite contract before embarking on the work.

There have been other sets of proceedings prior to this one, and there is a further set of proceedings waiting. In this proceeding, the plaintiff has already obtained judgment in May 2011 against the first named defendant for €1.8 million on an undefended claim. Arising out of the slow sale of building works in 2007-2008, which I describe below, the main building contractor, the first named defendant was told in late 2008 that the employer, second named defendant, had a deficit problem. The first named defendant obtained judgment for, using round figures, €1.02 million against the second named defendant in early 2009. That did not include any monies owed to the plaintiff. On March 2nd of the same year the plaintiff sued the first named defendant for debt due to them as a subcontractor to it as main contractor and the second named defendant as employer on the building project in respect of work done for them and monies owed. On March 9th of that year the plaintiff was awarded judgment against the second named defendant requiring it to certify for works done for it and a declaration that this defendant had been unjustly enriched as a result of work done by the plaintiff to the tune of about €1.8 million including VAT. The claim of the plaintiff as subcontractor against the first named defendant as main contractor for debt went to arbitration. This did not turn out in the plaintiff's favour because the arbitrator held that though the first named defendant owed the plaintiff money, that such money was owed under a pay if paid contract; until the first named defendant was paid by the second named defendant for the work of the plaintiff, that defendant had no contractual liability to pay. This ruling was in March 2010. Then the plaintiff returned to its original proceedings; the declaration it had obtained against the second named defendant was turned into a money judgment by order of the High Court. That was appealed to the Supreme Court and overturned. The logic behind the order of the High Court is clear and attractive but is not open to me. I am confined to a claim in conspiracy. In addition, the third named defendant, as project managers of the development, pursued the ultimate owner of the development for fees due to them in their work. They obtained a judgment but that was cut down due to a creditors' arrangement to just over half. The first named defendant is now in receivership under the National Assets Management Agency. The second named defendant is pleaded in the statement of claim to be unable to meet any claim made.

These proceedings for conspiracy and other pleaded torts were initially launched against the three corporate defendants, the first, second and third named, but were later amended to bring in the other five defendants on the basis that the activities of the corporations were directed by them and that they personally entered into the conspiracy. In so far as I might be found to be incorrect as to a claim not being made in interference in contractual relations, holding as I do that this claim is pleaded as the means whereby the conspiracy was agreed to be effected by unlawful means, I would accept as a matter of principle that unless there is an assumption of personal responsibility on behalf of a director or employee so as to create a special relationship between that person and a plaintiff, that liability for acts done on behalf of a corporation rests with that entity: *Williams v Natural Life* [1998] 1 WLR 830. To that extent, there is no evidence of such an assumption of responsibility. Further, it is difficult, outside the claim of conspiracy made in this case, to see how individuals who at all times acted for corporate employers and in explicit terms under relevant notice in that regard through emails and headed notepaper, could ever be made liable for that tort. It is even more difficult to see how the liability in this case can be, as I have said, governed by anything other than contract relationships. Any breach of those contract relationships was effected through corporations fairly and explicitly displayed to the parties as the acting parties. I do not at all see a situation arising such as that which occurred in *Shinkwin v Quin-Con Ltd* [2001] 1 IR 514. There is no evidence of that kind on which I could see a prima facie case. It is different, of course, should the parties have entered into a conspiracy with the other defendants, whether as corporations or as individuals.

It is important to concisely put this into context. The plaintiff company supplies a specialist form of subcontracting in glasswork and they are very good at that job. Things can, however, go wrong. Typical of the work they do is the job in question here. The job

which the second named defendant had employed the first named defendant to build was a shopping centre and residential development in Kilkenny, to be called McDonagh Junction. The plaintiff was asked to roof in glass a large courtyard between buildings in the older part of an existing complex of a once derelict workhouse. I am going to use round figures in this judgment, as they give a better view of the overall picture. The total cost of the development was around €115 million and the subcontract sum due to the plaintiff was around €3 million plus VAT. For their work they have been paid about €1.4 million. They claim to be owed about €1.6 million and VAT, which brings it to € 1.8 million. This specialist subcontract work of the plaintiff involved putting up steel trees with branches supporting a concave structure of glass over an open area between retail buildings. In this ambiance of light and space people can trade and supply refreshments. Each of the panes of glass was large. While continual sunshine is rare in Ireland, it must nonetheless be provided for. The panes of glass were in two layers and in between there was a treatment for ultraviolet penetration, a 'California layer', and a dotting pattern that would keep out around half of the light. This job would be outside the normal experience of even a large building contractor and the plaintiff was therefore the specialist subcontractor of the first named defendant for this project. A firm of architects, who are not defendants, were initially employed by the second defendant, as developer, to oversee the work. Normally, a firm of architects would do the certification on a large building project; thereby enabling the contractor and its subcontractors to be paid. In this project, that task was taken over by the third named defendant. Another firm of a similar name were the quantity surveyors. In so far as it matters, I do not see any difference between these two firms. I see them as being identical in these The fifth named defendant worked for the third named defendant. The fourth named defendant was an important person in the first named defendant as was the eighth named defendant. The sixth and seventh defendants were important people in the second named defendant.

None of what follows would have happened but for an exchange of ideas between the architects and the plaintiff as to whether it was possible to have smaller dots within the panes of glass over the courtyard. At the time of this discussion, the architects had been taken over by the first named defendant as contractor's architect. In due course what had been a 20 mm dot was changed to a very much smaller 4 mm dot. The glass was not manufactured by the plaintiff, but by two companies in England called Romag and Buckleberry. Occluding dots are put onto glass by a photographic type of process. Because of the size of the panes of glass to be used, photographic film was not large enough to fit over each pane in order to imprint the dots. There was therefore overlap on that film when two sheets were fitted together in order to treat the entire surface. On that area of overlap, the dots were microscopically different in size in comparison with the areas where a single film could be used. When the glass was put up over the courtyard, clear bands of darker shading, running horizontally or vertically, appeared in an obvious fashion. This is an aesthetic problem, but it was nonetheless a serious issue. As I have said, in round figures, the plaintiff was to be paid €3 million for this job. At the time in the dispute as to the banding issue broke out, the plaintiff had been paid just shy of half that amount. In August 2007, it became apparent that the glass was not as the second named defendant or the third named defendant expected. On 27 August of that year the resident architect rejected the glass. Following that, the plaintiff wrote to Romag requiring them to take back the glass, explicitly stating that it was defective and that they should just come and pick it up from Kilkenny. It was made plain to the plaintiff that the glass was not acceptable. Because of the interaction between the architect and the plaintiff in ordering the glass, the case is now made that the glass condition was not the responsibility of the plaintiff. I cannot accept that. Once the defect became known, the responsibility for it was that of the plaintiff and the plaintiff alone. There was correspondence lasting over a period of a year, with four different meetings between the interested parties on 17 October 2007, 9 July 2008, 22 August 2008 and 15 September 2008, in order to try and resolve the glass issue in terms of either removal or an abatement of the price due to the plaintiff. The evidence for the plaintiff has been that this correspondence, and these meetings, did not amount to genuine attempts to resolve the differences between the developer, the main contractor, the representative of the employer and the plaintiff. The plaintiff is painted as without fault in these negotiations. I need to return to that proposition.

Other factors also need to be brought into the mix. The plaintiff did not pay Romag for the glass, and that account remains outstanding in a sum of around €300,000. The plaintiff was asked for an alternative design specification but did not respond. The plaintiff was asked to pick up a glass sample in Kilkenny with the same size dot size but did not choose to do so. During the latter part of these events, the plaintiff began to be advised by outside parties and came to the conclusion, ultimately, in September 2010 that a conspiracy was in operation to deprive it of its money or to steal its money. The evidence on behalf of the plaintiff was that the issue of payment was constantly being put off with excuses being made not to pay and that these activities amounted to dishonesty. It is said that the court should draw inferences positively against the defendants to support the allegation of conspiracy because these excuses were so flimsy and transparently unsound. There are, it seems to me, some important factors to be added in here. In the event that the second named defendant, as developer, instructed the first named defendant as main contractor, to change the dot size in this glass, under the contract such an instruction would have amounted to a variation. It has been made explicit in evidence to the court that in such an event the plaintiff would expect to be paid on that basis; and would therefore be due what would amount to a considerable sum for removing all of the glass and replacing it. These factors make it very difficult for the Court to come to the conclusion that all of the to-ing and fro-ing complained of amounted to a concerted action in furtherance of a conspiracy by the defendants as is alleged. Furthermore, the first named defendant at all times submitted the account of the plaintiff to the second named defendant for payment. In October 2008, the third named defendant and the plaintiff agreed a final account of monies due to the plaintiff in the sum of €1.6 million, but this was subject to abatement. This is claimed not to have been genuine. In reality, correspondence immediately thereafter from the fifth named defendant on behalf of the third named defendant to the paying party sought a sum of money in early course allowing for a discount of €600,000 on the defective glass but clearly and genuinely seeking to obtain a payment for the plaintiff of around €1 million. Later, in 2009, following the collapse of the unsupported property marked in Ireland, when a bank became involved, there was nothing apart from prudence which led that bank to require that such defects issues as remained must be cleared up. An allowance in support terms was made for under €1 million, but that allowance was nonetheless made and made in circumstances which bear no suggestion of bad faith.

A great deal of time has been spent on the issue as to who was responsible for the defective glass. Whereas this is not determinative of the issue of conspiracy, it is important that I express a view. In structuring large building projects, it is important that the parties can reach a clear conclusion as to which party will be responsible should any defect occur. A failure or inadequacy in materials can arise from improper choice or from improper manufacture or from improper design. Many different specialties may be involved in a large project and each of these will depend on the other to some extent. A defect can occur notwithstanding a specialist subcontractor being engaged. Defining responsibility in that event is the task of those who write the contract, or contracts, in order to reflect the intention of the parties. Some of these parties may lack knowledge as to the properties of steel structures, or bricks, or roofing material, or tiles or glass. If, for example, a contract is made that a particular material should be durable over a particular period of years, then the party supplying under that agreement assumes precisely that defined liability. The main contractor in bringing in specialised subcontractors is entitled to rely on their skill and knowledge and is entitled to proceed to structure the interrelationship of contracts so that what is supplied by a subcontractor will be the responsibility of that subcontractor alone. An architect, acting on behalf of an employer or on behalf of a main contractor is entitled to specify a particular material and to rely on the subcontractor to supply that material; provided that the form of the contract so provides. Here, the relevant subcontract clause which binds the plaintiff in its relationship with the first named defendant as main contractor, and is ultimately the description of responsibility upon which the second named defendant, as developer, is entitled to rely and to seek to enforce through the proper use of the contract provisions with the main contractor, is clause 6.6.4. Under the heading of "surface treatments generally", it is provided that "All

applied coatings (e.g. low emissivity coatings or frittings) shall be uniform in tone, hue, colour, texture, pattern and opacity and shall provide a consistent appearance to the glazed units. Any noticeable difference between one unit and another will not be permitted, unless expressly specified."

This clause clearly delineates the reposing of responsibility in the plaintiff for the glass quality. No matter who was responsible ultimately for the banding appearance in the glass, Buckleberry or Romag or the plaintiff, and no matter who was told what, the clause is effective in terms of its plain words. It may be likened to a repair clause in a lease. In that instance, the condition of the building on demise does not matter or how the defect in it arose; what matters is the nature of the responsibility undertaken by the tenant. In this clause the responsibility undertaken by the plaintiff as subcontractor was to supply a glass for the courtyard roof which was uniform in appearance. It was not. No issue of real argument in respect of responsibility could arise. This had previously been defined by the contract. An argument might be made that the defect was not very important: but that argument becomes untenable in the context of the choice of the plaintiff to provide a product of excellent quality. Thereafter, had the glass not been rejected, which it was, an argument might be made as to abatement. Were I to try and sort out the contract dispute, which is not before me, as between the plaintiff and the first named and second named defendants, that latter course might arise under a contract clause to which I shall shortly refer, it might be remarked that the determination by the plaintiff to avoid the considerable costs of removing and replacing the glass, to a possible cost of possibly close to the amount the plaintiff was owed, but to seek an abatement eventually resulted in the agreement of 22 October 2008 with the third named defendant but even this was subject to a further agreement as to the correct level of abatement. The plaintiff was responsible for the glass defect and it was serious and it should not have occurred. It was reasonable to require the replacement of the glass.

I now want to put the contract provisions referred to in their necessary context.

The sub contract between the first named defendant McNamara and Company and the plaintiff is dated 5 January 2007. This provides, at clause 1 of the subcontract, that the plaintiff is deemed to have notice of all the provisions of the main contract except for prices. Clause 2 obliges the subcontractor to complete the works to the reasonable satisfaction of the contractor and of the architect/engineer at the time being under the main contract and "in conformity with the reasonable directions and requirements of the… programme agreed between the contractor and the subcontractor and approved by the architect/engineer, who in any case of default in carrying out the program may himself directed the order in which the subcontract works shall be carried out." It is not unreasonable to interpret this clause as enabling the contractor, the first named defendant, to give a direction to remove and replace faulty materials. Under clause 3 the subcontractor agrees to comply with the provisions of the main contract and with the express provisions of the subcontract as if all the clauses of both were set out in one document. Clause 6 provides that where the contractor requires or authorises in writing any variation of or omissions from the subcontract works, or issues any instruction of the architect/engineer or issues any verbal instruction or direction involving a variation, to be confirmed in writing within five days, these are to be carried out. As I have previously implied; variations are not free, they must be paid for because they are outside what is initially agreed. Clause 7 provides that any delay renders the subcontractor liable in damages. Defects are provided for in clause 8. This reads:

The subcontractor shall within a reasonable time after receipt by him from the contractor or the architect's/engineer's or agents instructions or a copy thereof relating to the same, make good all defects, shrinkages or other faults in the subcontract works due to faulty materials or bad workmanship which the contractor (whether at his own cost are not) shall be liable to make good under the main contract. Provided that where the contractor is liable to make good such defects, shrinkages or other faults, but not at his own cost, then the contractor shall secure a similar benefit to the subcontractor and shall account to the subcontractor for any money actually received by him in respect of same.

An issue has arisen, and here I am grateful for the expert assistance of Gerard O'Sullivan, quantity surveyor and barrister, as to how this clause operates. It is reasonable to argue that in the event of defective works, that a subcontractor may be docked the cost of defective goods. It can be argued that those defective goods when forming part of a larger job, such as a roof, should cause a devaluation by way of certificate in themselves but that the subcontractor should not be docked the costs of replacement as under clause 8 that subcontractor is liable to make them good at his own cost. However, another view is possible. It is also arguable that where the parties, as here, agree the continuation of the work pending replacement for the purposes of early functionality, given the problem of delay and the time coming up to Christmas at which this occurred, that this operates as a new contract between the parties. Another view is also available that the cost of replacement, not just the cost of the defective material, may be withheld. The point made on behalf of the plaintiff is not so strong of itself as to advance a claim of conspiracy. Under clause 11 the contractor is obliged, after receipt of the subcontractor's detailed progress statement, the subcontractor having applied to the architect for a certificate of payment and the inclusion of the amount of the value of the works and any variation as authorised for the benefit of the subcontractor, to forward such certificate for payment. As a matter of fact, at all material times throughout the course of the controversy that has been before me, it is apparent that the first named defendant, as main contractor, at all times was properly applying for the payment by the second named defendant, as employer, of what was due to the plaintiff a subcontractor. This included the uncertified glass works. In consequence, this includes the full remaining cost of the roof at €1.6 million plus VAT.

Clause 11 variously provides:

> Fourteen days after the receipt by the contractor of any certificate from the architect/engineer the amount of certified therein to be due in respect of the subcontract works shall be due by the contractor to the subcontractor and the contractor shall within said time notified in writing to the subcontractor the amounts certified in the said certificate to be due to him, any authorised variations thereof less retention money, which shall mean in this contract the proportion attributable to the subcontract works of the money retained by the employer in accordance with the main contract and less a cash discount ...
>
> If the contractor shall fail to notify the subcontractor in accordance with the provisions of the foregoing subclause (B) then the contractor shall on demand to him by the subcontractor furnished to the subcontractor details of all monies certified for the subcontractor by the architect/engineer. Top If the contractor shall not furnish such details within 14 days after such demand the subcontractor shall be entitled to obtain these from the architect/engineer.
>
> Payments made to the contractor in respect of work done and materials used by the subcontractor shall until received by the subcontractor be deemed to be money or money's worth held in trust but without obligation to invest by the contractor for the subcontractor to be applied in records payment of the subcontractor's account, subject always to the rise of adjustment by the architect/engineer in the event of his certifying that adjustment is necessary.
>
> If the contractor does not paid to the subcontractor the amounts certified by any certificate issued by the architect/engineer to be due to the subcontractor within the period mentioned in subclause (B) thereof, then the

> subcontractor-may (without prejudice to any other right or remedy) apply to the employer for and the employer may make payment of the amounts certified to be due ... may, if payment has not been received within seven days after receipt of payment by the contractor or within 28 days of the date of issue of the architect's/engineer's certificate covering the amount due in respect of the subcontract works, after seven days notice to the contractor, suspend the works for a period of 14 days and upon the expiry of the period, unless payment shall have been made in the meantime by the contractor or by the employer direct, may determine the subcontractor's employment under the subcontract as from the date of such expiry. ... may, without prejudice to other rights are remedies after 28 days from the date of the issue of the certificate by the architect/engineered to the contractor covering the amount due in respect of the subcontract works, be entitled to charge interest to the contractor on the amount included in such certificate that current bank rate of interest on overdrafts until such time as payment is made by the contractor, or by the employer under subparagraph (I) of this paragraph.

There then follows a detailed procedure in the event of a dispute. This is clause 11 (F) and it provides:

> If the subcontractor shall feel aggrieved by the amounts certified by the architect/engineer or by his failure to certify or failure by the employer to honour his certificate in whole or in part within this time period stipulated in the main contract document, and then, subject to the subcontractor giving to the contractor such indemnity and security as the contractor shall reasonably require, the contractor shall allow the subcontractor to use the contractor's name and if necessary will join the subcontractor as claimant in any legal proceedings by the subcontractor in respect of the said matters complained of by the subcontractor.

This clause just quoted, the final paragraph of clause 3 defining relations between the parties and the arbitration provisions which follow in the contract, are the main reasons for me concluding that the relationship between the parties was not governed by a special relationship giving rise to liability in negligence due to a breach of duty but was instead governed by contract. It should also be remarked that when this dispute first arose as to the proper payment for the plaintiff of €1.6 million and whether an abatement could be applied instead of removal and replacement, Clause 11(F) enabled an immediate arbitration as to the appropriate certification, with the plaintiff standing in the shoes of the main contractor, as against the second named defendant. I remain puzzled by why this was not undertaken as by any other factor in the case. It was the appropriate response.

Clause 12 provides that the contractor is obliged, as far as it was legally possible, to obtain for the subcontractor all the rights and benefits of the main contract in so far as these are applicable to the subcontract works. Set off is provided for in clause 13. This allows the contractor to deduct from any monies due, any amount agreed by the subcontractor as due to the contractor or as is awarded in litigation or arbitration in favour of the contractor. The contractor is entitled to set off against any money due "the amount of any claim for loss and/or expense which has actually been incurred by the contractor by reason of any breach of or failure to observe the provisions of the subcontract by the subcontractor, provided the amount of such set-off has been quantified in detail and with reasonable accuracy by the contractor" in a notice in writing specifying this intention to set off a quantified amount which must be given not less than 17 days before the money becomes due and payable. The argument is that whereas the glass was defective and might have been set off that the cost of replacement was in the future. I see that argument but I do not see it as being so strong as to advance the claim of conspiracy between the defendants. I see a contrary view as also being at least arguable.

On 31 August 2006 there was a meeting between McNamara and Company, as contractor, and the plaintiff as subcontractor. This added a number of conditions to the contractual relationship between these parties. Among them was a clause which provided that the main contract conditions would override anything to the contrary in the subcontract conditions. Clause 34 states: "Notwithstanding anything to the contrary, we will not be liable for payment of monies due under the terms of the subcontract until seven days after we have received such payment from the employer". This had been preceded by an invitation to tender by letter dated 27 April 2006. Materials, goods and workmanship were provided for in the general conditions and contract particulars. These were to be in accordance with the standards and quality of workmanship "given within the other documents forming part of the Works package documents or by that given in instructions or directions issued in accordance with the provisions of the subcontract." Minimum requirements were then set out, but these were not to override any of the requirements of the subcontract or the other works package documents. Three subclauses are relevant and these are now set out:

> Where and to the extent that products, materials and workmanship are specified to be approved or the subcontractor is directed or instructed that they are to be approved, the same must be applied and executed in conformity with all such requirements and in respect of the stated or implied characteristics either to the approval of the architect or to match a sample approved by the architect.
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> Where samples are required for the approval of products or materials, the subcontractor shall submit samples or other evidence of suitability and should not confirm orders for or use product or materials until approval has been given. Approved samples shall be retained on site comparison with products and materials used in the subcontract works and the subcontractor shall remove them were no longer required by the contractor.
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> Inspection or any other action by the main contractor or client's representative must not be taken as approval of samples, materials or products of work unless approval is given in writing.

In addition to these voluminous documents, a requirement specification of the employer was drawn up in April 2006. This applied to the glazed roof and the glazed wall and door elements. This is where all the trouble began. Clause 1.3 provided that the glazing contractor, and the plaintiff, would be entirely responsible for the roof achieving or exceeding the design and performance criteria. Clause 2.5.4 provided for the two panes of glass to be partially occluded by dots inserted by silk-screening, of fritting, between the layers of double-glazing. This was to cover the roof with 20 mm diameter dots on face one with an anti-slip finish colour to be agreed with the architect. Samples were to be submitted prior to manufacture for review "by the contract administrator". Clause 5.3.1 required the drawings were to be submitted so as to ensure that they conformed to the specification and contract documents. The purpose of this was to show that the proposed construction met the performance and visual requirements of the specification. It is provided that the production drawings of the glazing contractors were not likely to meet this requirement. Under clause 11 the plaintiff was to follow recommendations in the use of all materials, to the highest quality, and carry out the works in accordance with the requirements of the specification. I have already quoted clause 6.6.4 as it is central to the dispute which broke out. In my view it was not a dispute which should ever have broken out as the plaintiff had sole responsibility for the condition of the glass.

As a combination, these contract provisions support my finding that the plaintiff company was responsible for the condition of the glass. There is no sustainable argument to the contrary.

So much for the relevant contract provisions.

I turn now to the allegation of conspiracy. There has been a gigantic amount of evidence as to how various documents ought to be interpreted. This, at times, has impeded the course of the trial.

The meeting founding the alleged conspiracy was in fact held on 30 June 2008 and four people attended. On behalf of the first named defendant, the managing director John McGowan, the eighth named defendant, was present. In addition, the fourth named defendant was there as well on behalf of the first named defendant. The third named defendant, *Bruce Shaw Project Management Ltd*, was represented by its principal John Balance, who is the fifth named defendant. Finally, Paul Newman, the seventh named defendant, attended on behalf of the developer and employer *Cedartree Construction Ltd*, the second named defendant. It is to be noted that Paul Hanby, the sixth named defendant, was not there at all. In the statement of claim in this case it is alleged that the court should add him into the conspiracy because, as it pleads, it is reasonable to assume that others were acting for him. A court cannot act upon what is reasonable as an assumption. The court can only act upon proof of what is probable. In this instance I am analysing whether there is prima facie proof only. There is no case what ever made out against Paul Hanby and I want to say that now.

It must be remembered that this is not like a criminal case where one of the parties to a conspiracy has turned evidence for the State, having been in effect an accomplice to wrong but now presenting himself in a penitent light. An example of that would have been the breach of competition trial before Cooke J, as designated specialist civil and criminal competition law judge, in the Criminal Courts of Justice in *the People (DPP) v McNichoas and Others* in May 2011. No such accomplice testimony exists. Any proof of a conspiracy is based upon the interpretation of the interaction over the next two years from the date of the meeting of each of the defendants, and in particular the fourth named, fifth named, sixth named, seventh named and eighth named defendants as representing themselves and their corporate principals. It is argued on this basis that a conspiracy exists and it is urged on the court that the acts and declarations of the co-conspirators in furtherance of the conspiracy are admissible each against the other. Whereas this is a principle of criminal law, and is probably applicable to a civil conspiracy, without deciding that issue, the real question before the court is whether or not the documents referred to as evidencing the conspiracy, and the circumstances surrounding the actions and declarations of the conspirators, as so alleged, sufficiently establishes a prima facie case that a conspiracy to unlawfully deprive the plaintiff of its money ever existed. I am taking that principle of cross admissibility as stated for this purpose as making each such document admissible against each of the alleged conspirators because in thus acting I am taking the plaintiff's case, as I must, at its highest.

An interpretation has been placed on those documents to evidence on behalf of the plaintiff. Counter-interpretations have been put on behalf of the three groups of represented defendants. This is all very well. Either the evidence is sufficient of itself to establish a prima facie case of a conspiracy based on these documents, or it is not. Evidence can be given, for instance, to establish the factual matrix within which a disputed contract was made. Evidence can also be given of what might have been in the mind of a testator when making a will; the principle that the judge should construe the will by sitting in the testator's armchair, or construe the contract by placing himself or herself around the table where the contract is concluded. Thereby the words of a will, or in the same way the words of a contract, can be seen against the correct backdrop. Interpretation, however, can only go so far. If the plain wording of the documents evidencing a conspiracy is either inconsistent with the unlawful purpose alleged or does not establish *a prima facie* case, the plaintiff must fail.

I turn therefore to the more important documents exchanged between the alleged conspirators and placed before the court as evidencing that prima facie case of a conspiracy has been established. It is to be noted that hundreds of items of correspondence between the parties among themselves and with others have been referenced in argument before the Court. I have decided which of these is central to the best case that can be made of conspiracy. No argument has been left unconsidered. Possible interpretations have been aired over four weeks as to these, and lots and lots of other, documents and I am aware of them all.

I rely on the evidence of Mr O'Sullivan, and on commonsense, that there is nothing wrong with the employer, the employer's representative and the contractor meeting together towards the end of any large development job with a view to settling the final account. As of July 2008, around €5 million was due from the second named defendant to the first named defendant as a balance of the overall contract price of around €115million. The principles of the second-named and first named defendants were in correspondence with a view to setting up a meeting as the final payment, and as to amount given that there were claims as to delay and water damage, and as to the timescale in which payment would be made. Within the first named defendant a view given on behalf of John Ballance was exchanged to the effect that the plaintiff would be dealt with by him and his colleagues "and does not need to be part of the final account settlement. They will look for replacement, but may end up accepting corrective work and a credit." Even at this stage an alternative shaded glass is being discussed. It is apparent that a final resolution of the abatement or replacement issue had not been resolved. On the morning of 30 June 2008 an early e-mail mentions leaks within the roof. A later note indicates that "some items are being dispositioned ...Mero; Chesterbridge/ BSP will deal with Mero, including replacing the glass". A reduction in the contract price of € 500,000 had already been mooted by the employer, the second named defendant, but at the meeting a further reduction was sought by the employer of €150,000. Prior to the meeting an intention to withhold the Mero money is in evidence and that appears again in correspondence between those individuals within the third named defendant. That intention arises on any reasonable construction of the documents because of the problem and not from anything that could be suggested to be an improper purpose. Thus, on 2 July 2008 an e-mail between the parties sets out a memo of the final settlement. The revised final account was about €115 million and additional discounts from that amount have been negotiated. The e-mail proceeds to indicate that the "quantity surveyors on both sides will clear the actual amount outstanding now and the future release of retention ... we will work with you to resolve the Mero issue". On 3 July 2008 it is noted between the parties to the meeting that there was "a firm commitment to make the penultimate payments no later than five weeks from the date of the meeting last Monday. ... On Mero, we will continue to work with Chesterbridge and BSP to resolve the remaining issues, but the lead on these negotiations, and decisions on payment, glass replacement etc will be taken by Chesterbridge/BSP."

I cannot see that this is wrong or is evidence of anything other than a continuing intention to try to work through a problem. The sum agreed at the meeting was €5 million to be paid within five weeks. This notional sum included €1.6 million due to Mero. The fourth named defendant and the eighth named defendant corresponded on 4 July 2008 and made reference to an e-mail concerning final settlement sent by the fifth named defendant. In that e-mail he refers to "the intention, as noted at the meeting, would be to make the penultimate payments to you within a maximum of five weeks." There is a reference back to this in the e-mail as the fourth point mentioned: "I am astounded at number four John Ballance minutes attached-"the intention is to make an ultimate payment of c€5 million within five weeks". My understanding was that they were confirming it would be paid in five weeks, and that this was when it would be scheduled. What is the payment period in the contract? Can we ensure that the quantity surveyors get together quickly to agree the final amount of payments certified as referred to in number 37."

It is argued that this is evidence of a conspiracy by the defendants to cause Cedartree Construction Ltd, the employer and second named defendant, to pay €5 million to Michael McNamara and Co, the main contractor and first named defendant, which some would include the €1.6 million due to the plaintiff and that the defendants would keep this money for themselves. This allegation is extremely improbable for a number of reasons.

Firstly, it is highly unlikely that the second named defendant would seek a reduction of €150,000 on the sum due by it while at the same time entering into a conspiracy to unnecessarily pay out €1.6 million in respect of the work on the glass canopy which would never be paid by the first named defendant and so kept by them, or kept substantially by them, while batting down the plaintiff to an unreasonable sum through stringing the dispute out. No one sensible would agree to that unless there was something in it for them. There is no evidence that there was any such benefit or prospective benefit. Conspicuously absent is any agreement to divvy up unlawfully retained monies. This alleged agreement would involve completely wasted monies from the point of view of the second named defendant.

Secondly, an e-mail of 4 July 2008 between the fourth named defendant and the eighth named defendant refers to the hope that something might be saved in monetary terms on other works to do with paving in the courtyard area under the glass roof and that this "will in some way alleviate the ambush last Monday". This is not indicative of a cosy agreement between the parties to the meeting to do the plaintiff down. Prior to the meeting of 30 July 2008 reference had been made in correspondence to a total due which would include a €1.6 million sum due to the plaintiff. On 18 July 2008, however, the sum due is reduced to take account of the fact that the money due to the plaintiff will not be claimed. It is clear from other correspondence that the nature of the glass and an issue as to leaking, for which the plaintiff was probably not entirely responsible but which was important, remained live from correspondence in the previous year.

I need to refer back at this stage. An e-mail sent by the third named defendant on 19 October 2007 indicated their attitude. This referred to the necessity to prepare a detailed estimate for the replacement of the glass. The e-mail goes on: "as advised the BSP/McN outline budget for the replacement of the glass is €1 - €1.5 million. At this point in time we will not be certifying additional monies until the parties to the contract resolve this issue." This correspondence does not rule out the future certification, when proper, of the sum due for the glass canopy. An earlier exchange on that day refers to defective glazing. It states an argument made on behalf of the plaintiff: "as per the comment in my e-mail yesterday: monies have been withheld for an alleged defect to the glazing, however at the meeting yesterday (Wednesday) the glass manufacturer stated that they did not accept that the glass was defective. We therefore consider that it is premature to deduct money from our certificate due to this matter." On 31 October 2007 the third named defendant had asked the plaintiff when they would be "issuing a method statement and program for the glass replacement as discussed at the last client meeting. As advised this information is required to enable us to prepare a detailed estimate for the glass replacement." The issues as to the glass and its replacement and the roof and the leaks through it continued to dog relations between the parties at the time of the conspiracy and well beyond. It was easily to be resolved by invoking the arbitration clause.

Returning to 2008, approximately 3 weeks after the alleged conspiracy meeting, the first named defendant wrote to the third named defendant confirming the agreement on the final account which had been reached in the sum of €115 million. A paragraph in the letter states: "We note the amounts for nominated sub-contractors are agreed on the basis of full consideration of all sums due to these subcontractors under the sub contracts." Was this an attempt by the first named defendant to get monies due to the plaintiff and keep it for themselves, or later divvy it up among the others? It is immediately apparent that this is not so. Both prior and subsequent correspondence indicates that the sum to be claimed does not include the money due to the plaintiff. An invoice issued by the first named defendant on 5 August 2008 makes reference to monies due "as per architect's certificate" and claims an amount due of €3.5 million. Certificate number 35 from the third named defendant of 6 August 2008 reflects that. It is hard to see that this was not the right way to proceed under the contract; as this specifies no payment until certification, but that the subcontractor if dissatisfied could invoke clause 11(F) of the subcontract and arbitrate any dispute on non-certification or under-certification with the employer directly. Reasons have been given in evidence for not invoking this clause: some of these are self-contradictory. Whereas it might be said that litigation of any kind is not a good manoeuvre in business, this dispute was very unlikely to go away. The clause should have been invoked by the plaintiff once it adopted the position that it was not going to replace the glass. Correspondence of 22 August 2008 indicates that an invoice had been submitted by the first named defendant based on the figures. I do not regard the e-mail of 21 August 2008 within the first named defendant as being evidence of conspiracy. No one can now remember what the e-mail meant. It reads, as between the fourth named defendant and the eighth named defendant: "Kindly advise who is looking after the Change for Paul Newmann, regarding 3.5 million payment." I am asked to take a meaning from this that "the change" referred to was the €1.6 million due to the plaintiff. There is no firm, or even sufficient, foundation here on which a court could begin to act. On 13 November 2008 an issue was raised that the first named defendant should begin legal proceedings against the second named defendant for an outstanding sum which would have included the €1.6 million due to the plaintiff. As it turned out, this did not happen. €2 million was paid on the 29 September to the first named defendant by parties associated with the second named defendant followed by a €100,000 payment on the 4 November 2008. On 17 November 2008 it is proposed to pursue a balance owing of about €1.02 million. This does not include the €1.6 million due to the plaintiff. This conspiracy allegation just does not hang together.

It is also argued that the timing of the revelation that there had been a final account meeting on 30 June 2008 is indicative of a conspiracy between the defendants. In that respect I have been referred to the affidavit of John McGowan sworn in the proceedings between the first named defendant and the second named defendant for the purpose of seeking summary judgement and dated 4 March 2009. This does not in any sensible way advance matters. The documents allegedly evidencing a conspiracy were supposed to have been exhibited in that affidavit but not read out in court, the plaintiff being present through a watching brief. This, however, is what often happens in a busy court list. In September 2010, having pressed for the release of relevant documents, including those to which I have made reference, these papers were formally discovered to the plaintiff.

Did the fact that there had been a final account settlement meeting come as a surprise to the plaintiff? There had been a meeting between representatives of some of the parties in Kilkenny on 22 August 2008. A note by David Barrow indicates that leaking had by then become more important than the banding issue. Another meeting had been held on 31 July 2008, prior to that meeting, where within the plaintiff a strategy had been involved to minimise the responsibility of the plaintiff in respect of the banding issue, to emphasise that no viable commercial alternative existed, and to press the position that the remedy for aesthetic defects lies in damages and not in replacement. As will have emerged from earlier references, the meeting in Kilkenny revolved around an alternative screen printing process. The document states:

To assist in defending Mero/Romag position in the forthcoming meeting with John Balance, Ken White is to produce a technical paper to dismiss the samples produced by Hall Print Solutions as being viable alternatives. David Barrow is to present this paper from Ken White at the meeting.

The fourth meeting took place near Heathrow airport in London on the 15 September 2008. It is clear that this meeting was held with a view to resolving the financial issues between the plaintiff and the main contractor and the employer, through the employer's representative. A note made by David Barrow at that meeting reads under the heading "review of nominated": "as BS has settled a/c with McN - problems of elongation payment etc." An offer of abatement was made by the plaintiff of €250,000 in return for a prompt payment of €1 million. This offer was not sufficient to settle matters between the parties. It was always unlikely that it would never have been as the glass had been charged by the plaintiff to the job at more like €600,000. The note quoted leads on its own to a

possible interpretation that the writer was aware that a final settlement had been reached between the first named defendant in the second named defendant. This was not treated with alarm by the plaintiff and nor is that surprising. I do not accept that an experienced contractor would find it sinister than a main contractor, the employer and the representative of the employer would seek to conclude a final account upon the practical completion of almost all the works in a major development. Neither is it suspicious that the total amount that would eventually be due would be tabled for agreement. Any reference to a penultimate payment does not exclude that whatever sum is eventually agreed in a disputed account with a subcontractor would be included in the ultimate payment that would incorporate retention moneys. On the contrary, this has not been established as being abnormal.

I am not impressed by this. Even less is the complete destruction of the surprise and concealment point, mooted as objectives of the conspirators, by reference to a letter written from David Barrow on behalf of the plaintiff to the first named defendant and dated 21 December 2009. One paragraph in this explicitly makes reference to the fact that the plaintiff had been told that there had been a final settlement of the main contractor's account: "Our understanding is McNamara have had their account settled in full by the Employer with the exception of the [Mero Schmidlin UK] nominated account."

The case of conspiracy falls apart. There was no conspiracy to abuse contractual relations to keep the plaintiff out of its money and there was no conspiracy to pay the first named defendant an effectively free sum of money from the second named defendant on the understanding that the plaintiff would never get it.

In this case, it is impossible not to have sympathy for the plaintiff. But that is not the only factor. This entire matter occurs against the backdrop of the over-ambitious projects in retail and residential accommodation that characterised the disastrous undermining of the Irish economy during the years 2000 – 2008. These projects could only be successful were there people to shop in them and reside in them. Those people could only have the kind of money to spend that was being asked for the rent of retail units and the sale of residential properties had they worked in industries or services of a productive kind. Through over-attractive and unreal prices for property, the economy was slewed away from production and towards an over-reliance on non-productive enterprises.

Many have lost heavily. The plaintiff cannot recover €1.6 million from the first named defendant, having been paid €1.4 million, because the first named defendant is now in receivership. The first named defendant is out of its contract money as developer at least €1 million and probably double that and more because of retention monies that remain outstanding. The second named defendant, the papers I have read in this case indicate, has had to rent the retail McDonagh Junction units cheaply or sell residential units at bargain prices and is a sorry entity as opposed to very profitable one. The third named defendant was owed substantial fees but had to take a discount due to a creditor's voluntary arrangement of about 48%. The National Assets Management Agency has taken over the first named defendant and the people of Ireland are the ultimate carriers of what is now a severe burden of debt. None of this makes any difference to the issue as to whether there is prima facie proof of a conspiracy.

It is all very unfortunate, but there was no conspiracy to unlawfully, by whatever means, deprive the plaintiff of what was due to it.

The order for costs which I shall make, having heard argument, is to award each of the defendants their costs as against the plaintiff as Order 99 of the Rules of the Superior Courts requires. On the unsuccessful motion for security for costs brought at the commencement of the action, over one and a half of the fourteen days of the trial, by the second named, sixth named and seventh named defendants, these costs are awarded to the plaintiff. Presumably, there can be a set off but the calculation of the balance is not for me. Since enforcement of court judgments has become easier within the European Union, the principles governing an application for a defendant against a foreign defendant should more concentrate on similar principles to those set out in s. 360 of the Companies Act 1963, as this application did. There will be a stay on the costs order but only for four months and any extension thereafter is a matter for the Supreme Court.