Neutral Citation Number: [2009] IEHC 358

THE HIGH COURT

COMMERCIAL

2009 925 S

BETWEEN

KILLERK LIMITED

PLAINTIFF

AND

SHANE HOULIHAN

DEFENDANT

JUDGMENT of Mr. Justice Kelly delivered on the 16th day of July, 2009

Background
On 15th June, 2007, a contract was executed between the plaintiff and the defendant under which the plaintiff agreed to construct the Tipperary Town Shopping Centre on behalf of the defendant.

Under the terms of clause 6.1 of that agreement, the defendant agreed to pay €12,200,000 plus VAT for the work in three stages.

An initial payment of €50,000 plus VAT was payable on the signing of the agreement. A second sum of €10,650,000 plus VAT was to be paid on the completion of the floor slabs, walls and roof of the building provided that such sum would not be payable by the defendant prior to 1st September, 2007.

A third sum of €1,300,000 plus VAT was to be paid on the date of completion of the development. It is this sum which is the subject of the plaintiff's claim.

The aforesaid stage payment sums did not take into account the payment of retention money of €200,000 which fell to be paid in accordance with clause 4.6 of the contract. That clause provided, in effect, for release of the retention monies twelve months following the issue of the certificate of practical completion if all defects and other faults had been remedied.

The defendant paid the €50,000 and VAT upon the signing of the agreement and the further sum of €10,650,000 and VAT on 18th October, 2007 following the completion of the structural elements of the building.

Possession and occupation of the building and its common areas was provided to the defendant in September 2007.

The architects appointed under the contract issued a certificate of practical completion on 21st September, 2007.

On 13th December, 2007, the plaintiff's solicitors wrote to the defendant's solicitors enclosing the final contractual documents which were scheduled to that letter and sought payment of €1,300,000 plus VAT of €175,500 in accordance with the terms of the contract. The letter of demand acknowledged that there were some snagging items outstanding but recited that it had between agreed between the parties that the retention sum of €200,000 would be adequate to cover any of those.

The defendant has not paid the €1,300,000 and VAT and resists this application for summary judgment. In addition he has brought an application pursuant to s. 5 of the Arbitration Act 1980, seeking to stay these proceedings so that they may be referred to arbitration.

I heard the application to stay and the application for summary judgment at a single hearing and this is my adjudication upon both applications.

Section 5 Application
Both sides have filed lengthy affidavits with enormous quantities of exhibits, much of the details of which have little to do with the issues which fall for determination on the two applications before me.

The defendant seeks to have these proceedings stayed having regard to clause 9.2 of the agreement of 15th June, 2007. That provides as follows:-

> *"Save and except where a specific dispute mechanism is provided for elsewhere in this agreement, if any dispute arising out of this agreement cannot be settled amicably between the parties within ten working days after written notice that such a situation exists, then, at the election of either party the matter shall be referred and finally resolved by arbitration. Any such arbitration shall be governed by the Arbitration Acts 1954 – 1998 as amended from time to time."*

That there is a dispute between the parties concerning a whole variety of issues which fall within the ambit of the arbitration clause cannot be denied having regard to the voluminous correspondence dealing with allegation and counter allegation concerning defective works of one sort or another. The real issue for determination on this application is whether the referral of these disputes to arbitration should preclude the plaintiff from being able to recover judgment and execute for it in respect of the final payment of €1,300,000 plus VAT provided for at clause 6.1.3 of the agreement.

Summary Judgment
The agreement of 15th June, 2007 is not in a standard form. That is not surprising given the fact that a third party, a Mr. Michael Woodlock is a party to the agreement. He is a director of the plaintiff but was also the owner of the site upon which the shopping

centre was built. It is common case that he has been paid his entitlements under a separate contract for the sale of the lands amounting to some €1,750,000. Under the agreement in suit he is described as "the Surety" and in that capacity has unconditionally and irrevocably guaranteed the obligations and duties of the plaintiff under it.

The parts of the agreement which appear to me to be relevant on this application are as follows:-

> 1. The obligation to pay the €1,300,000 plus VAT created by clause 6.1.3 which provides for the payment of that sum *"on the date of completion of the development".*
>
> 2. The term *"completion date"* which is defined at clause 1.1 of the agreement as being *"the date ten working days following the issue of the certificate of practical completion of the building".* I cannot see that there is any difference between the *"date of completion"* in clause 6.1.3 and the definition of *"completion date"* in clause 1.1.
>
> 3. The term *"practical completion"* which is defined at clause 1.1 as being *"the day on which the developer's architects shall certify in writing that the building or as the case may be the development has been practically completed in accordance with the provisions of this agreement"*.
>
> 4. Practical completion which is the subject of an entire portion of the agreement running from clause 3.1 to 3.8.
>
> Under clause 3.1, the plaintiff's architect is to issue a certificate of practical completion of the building or the development.
>
> Under clause 3.2, the term *"practical completion"* is given another definition separate and apart from the definition which is contained in clause 1.1. Under clause 3.2 it means:-
>
> *"That the building or as the case may be the development has been completed in accordance with the design documents and the specifications to such a stage that the building or as the case may be the development can be taken over for its intended purposes and that any items of work or supply then outstanding or any defects then patent are of a trivial nature only and are such that their completion or rectification would not interfere with or interrupt such use or uses and that in the case of the building it is wind and water tight."*
>
> Clause 3.3 provides that subject to clause 3.6, the certificate of practical completion *"shall be binding on the parties hereto".*
>
> Clause 3.4 requires that the plaintiff's architects notify the defendant in writing not less than ten working days in advance of the date on which the building or development is likely to reach practical completion and on which date it is anticipated that the relevant certificate of practical completion shall issue. The defendant is given an entitlement to inspect the building or development before the anticipated date of practical completion.
>
> Under clause 3.5, the defendant is to notify the plaintiff's architects in writing within three working days of such joint inspection of any matter which the defendant considers should have attention prior to the issue of the relevant certificate of practical completion. Such a notification is termed an "Objection Notice".
>
> Clause 3.6 provides a mechanism for dealing with an Objection Notice including the involvement of an independent architect who is to adjudicate on the matter.
>
> Under clause 3.7 if the independent architect upholds the decision of the plaintiff's architect then the defendant is obliged to bear the costs of the referral to the independent architect.
>
> 5. I have already recited the arbitration clause contained at para. 9.2 of the agreement.
>
> 6. Clause 12 expressly preserves the defendant's common law rights. Rights obtained under the agreement are in addition to such rights.
>
> 7. Finally, clause 13 of the agreement contains an entire agreement clause.

Relevant Facts
It is common case that the certificate of practical completion was issued on 21st September, 2007. It incorrectly refers to the contract as bearing a date of August 2006. It certifies that the works were practically completed on 21st September, 2007 and contains the following note:-

> *"Snag list issued at practical completion stage outlining outstanding work which needs to be satisfactorily completed by contractor and certification regarding electrical, mechanical, structural, site services and fire safety to be certified by consultants."*

No written advance notification was given concerning the issue of this certificate because the defendant had already carried out a snagging inspection.

No objection notice as envisaged in the contract was delivered. The defendant delivered a snag list and it is the plaintiff's contention that all save some minor items were completed by December 2007 when the demand for the €1,300,000 plus VAT outstanding under the contract was made.

Thereafter, a stream of correspondence ensued. The defendant complained about, *inter alia*, the roof, block work, sprinkler system, gas tank, tarmacadam and a sewage system. At various stages invoices and estimates for work to be carried out were sent by the defendant to the plaintiff.

It appears that in June 2008 an offer was made by the defendant to pay €500,000 by way of payment on account but that was later withdrawn.

Subsequent to June 2008, the plaintiff was notified that remediation works to both the sewage system and the roof had been carried out and by December of that year all remediation had been completed.

The latest indication of costs in respect of the completion and remedial works is in a sum of €1,510,040. However, the only actual expenditure to date is the sum of €244,116. It has to be noticed that the value of the works alleged to be required to be done has grown throughout this lengthy exchange of correspondence to the figure where it now equates almost exactly with the quantum of the plaintiff's claim.

On the defendants' own case at least five invitations to arbitrate were extended to him, the last one dated 19th January, 2009, but he showed little appetite to accept until these proceedings began.

The Law
In *Aer Rianta C.P.T. v. Ryanair Limited* [2002] 1 ILRM 381, the Supreme Court determined the test to be applied in deciding whether a party should be given leave to defend an application for summary judgment. The test is as to whether, looking at the whole situation, the defendant has satisfied the court that there is a fair and reasonable probability that he has a real and *bona fide* defence. This does not mean that the party must establish that he has a defence which will probably succeed. Rather he must establish that it is probable that he has a *bona fide* defence.

In the present case, it is clear that the form of defence which is being relied upon amounts to a cross claim against the plaintiff. It is equally clear that it must be dealt with by arbitration.

Architects Certificates
The question of whether a set off on foot of a counterclaim is open to be made against Architects Certificates is one which has attracted the court's attention on numerous occasions over the last 35 years. The cases were comprehensively reviewed by Clarke J. in *Moohan v. S. & R. Motors Donegal Limited* [2007] I.E.H.C. 435. In that case he examined the decision of Finlay P. in *John Sisk and Sons Limited v. Lawter Products B.V.* (Unreported, High Court, 15th November, 1976), that of Murphy J. in *P.J. Hegarty and Sons v. Royal Liver Friendly Society* [1985] I.R. 524, that of Costello J. in *Rohan Construction Limited v. Antigen Limited* [1989] I.L.R.M. 783 and my own judgment in *Powderly v. McDonagh* [2006] I.E.H.C. 20.

He correctly concluded that the overall test which has be applied is whether as a matter of construction of the contract taken as a whole, it can properly be said that the parties have agreed that there can be no set off. He went on to say:-

> *"The default position is that a party is entitled to a set off in equity in relation to any cross claim arising out of the same contract. Thus if a builder is owed money on foot of a construction contract, the employer is prima facie entitled to a set off in equity, in principle, in respect of any defective works. The question which arises is as to whether that prima facie position has been displaced by the terms of the contract. There is no doubt but that the parties are free to agree that there will be no set off. The question is whether they have in fact done so. I am not satisfied that the balance of the authorities favours to an agreement to exclude a set off, at least, and this is the only issue relevant in this case, in circumstances where the contract is completed to the stage of a certificate of practical completion having been issued by the architect and where, therefore, any entitlement to arbitration on the part of the employer is immediate."*

In the case decided by Clarke J. he was satisfied that as a matter of construction of that contract, there was a *prima facie* entitlement to a set off in respect of any cross claim which could be maintained.

In dealing with the topic of set off he said this:-

> *"Where the nature of the defence put forward amounts to a form of cross claim slightly different considerations may apply. In those circumstances the court has a wider discretion. Where the defendant does not establish a bona fide defence to the claim as such, but maintains that he has a cross claim against the plaintiff, then the first question which needs to be determined is as to whether that cross claim would give rise to a defence in equity to the proceedings. It is clear from Prendergast v. Biddle (Unreported, Supreme Court, 21st July, 1957, Kingsmill Moore J.), that the test as to whether a cross claim gives rise to a defence in equity, depends on whether the cross claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set off is available so that the debt arising on the claim will be disallowed to the extent that the cross claim may be made out.*
>
> *On the other hand if the cross claim arises from some independent set of circumstances then the claim (unless it can be defended on separate grounds) will have to be allowed, but the defendant may be able to establish a counterclaim in due course, which may in whole or in part, be set against the claim. What the position is to be in the intervening period creates a difficulty as explained by Kingsmill Moore J., in Prendergast v. Biddle in the following terms:-*
>
> > 'On the one hand it may be asked, why a plaintiff with a proved and perhaps uncontested claim should wait for a judgment or execution of judgment on his claim because the defendant asserts a plausible but unproved and contested counterclaim. On the other hand it may equally be asked why a defendant should be required to pay the plaintiffs demand when he asserts and may be able to prove that the plaintiff owes him a larger amount.'
>
> *The courts discretion is to be exercised on the basis of the principles set out by Kingsmill Moore J. later in the course of the same judgment in the following terms:-*
>
> > 'It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counterclaim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the defendant could show that the plaintiff was in embarrassed circumstances it might be considered a reason why the plaintiff should not be allowed to get judgment, or execute judgment on his claim, until after the counterclaim had been heard, for the plaintiff having received payment might use the monies to pay his debts or otherwise dissipate it so the judgment on a counterclaim would be fruitless. I mention only some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of his discretion.'
>
> *It seems to me that it also follows that a court in determining whether a set off in equity may be available, so as to provide a defence to the claim itself, also has to have regard to the fact that the set off is equitable in nature and, it follows, a defendant seeking to assert such a set off must himself do equity."*

Clarke J. then considered what the overall approach should be in circumstances where a cross claim is raised. He said:-

"(a) It is firstly necessary to determine whether the defendant has established a defence as such to the plaintiffs claim. In order for the asserted cross claim to amount to a defence as such, it must arguably give rise to a set off in equity, and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendants case, it would not be inequitable to allow the asserted set off;

(b) If, and to the extent that, a prima facie case for such a set off arises the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);

(c) If the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in Prendergast v. Biddle."

This Case
The agreement entered into between the parties provided for the final payment to be made on foot of the architect's certificate of practical completion. Such certificate was *"binding on the parties"* (clause 3.3). That certificate was issued and has not been honoured.

I am not satisfied that under the terms of the contract the parties excluded a right of set off in respect of cross claims. In particular, Clause 12, expressly preserved the defendant's common law rights. It follows that insofar as there is a cross claim the defendant is entitled to an equitable set off in relation to it, since it arises out of the same contract. In the present case of course on the defendant's application the cross claim will be dealt with by means of arbitration. I must give effect to the arbitration clause pursuant to s. 5 of the Arbitration Act 1980. Arbitration is the preferred method of conflict resolution which was decided upon by the parties to the agreement.

It follows that there is an entitlement to the plaintiff to enter judgment for the sum claimed. The defendant may pursue his cross claim by arbitration. The question as to whether execution on that judgment should be stayed pending the arbitration is the issue which remains.

I have come to the conclusion that I should place a stay on execution and registration of that judgment in part until such time as the counterclaim is disposed of at arbitration.

The only actual expenditure to date is the sum of €244,116. Whilst the value of the cross claim is now placed at a sum of in excess of €1.5million, that sum has grown to that figure over a period of time and has only been quantified in any precise way in an affidavit sworn on the 29th April, 2009. Furthermore, it appears that the defendant did not accept a number of invitations to arbitrate at an earlier date and showed little enthusiasm for that until faced with the current litigation. The first request for arbitration by the plaintiff was made as long ago as May 2008.

The animadversion on the plaintiff's financial position contained at para. 47 of the defendant's last affidavit of 1st May, 2009 (wrongly dated 1st May, 2008) takes no account of the fact that Mr. Woodlock has guaranteed the obligations and duties of the plaintiff.

Taking all of these factors into account I will enter judgment in the sum claimed, but will place a stay on execution and registration in respect of €244,116, until the determination of an arbitration in respect of the cross claims now made by the defendant. I will give liberty to apply lest the defendant demonstrate any lethargy in getting on with the arbitration proceedings.

Judgment is entered for €1,475,580 with a stay on execution and registration in respect of €244,116 pending the result of the arbitration.