Neutral Citation: [2014] IEHC 188

THE HIGH COURT

[2013 No. 1757 S]

BETWEEN

CREEDON CONSTRUCTION LIMITED

PLAINTIFF

AND

ALAN KENNY AND EMMA CLAIRE MULLALLY

DEFENDANTS

JUDGMENT of Mr. Justice Barrett delivered on the 1st day of April, 2014

1. This is an application for summary judgment brought by Creedon Construction Limited, the plaintiff, in respect of €31,136.60 that it claims remains owing to it from Mr Kenny and Ms Mullally, the defendants, being the unpaid value of works and services provided in the construction of a dwelling-house pursuant to a building contract dated 12th October, 2012. A related order for costs and interest is also sought. Originally a larger amount, €52,956.60, was claimed by way of summary summons. However, following the issuance of the summary summons the defendants made a payment of €21,820 to the plaintiff, thus reducing the amount sought to that currently in issue. Any views expressed in this judgment are tentative in terms of the strength or weakness of any case that might be made by either side at plenary hearing.

2. It might perhaps be contended that the bringing of the present proceedings is somewhat unusual in that clause 23(b) of the building contract considered hereafter provides for the arbitration of:

> *"any dispute or difference ...between the Employer and the Contractor, either during the progress of the Works or after the determination of the employment of the Contractor under the Contract or the abandonment or breach of the Contract or as to any matter or thing arising thereunder".*

3. However, notwithstanding this clause, it appears that all of the issues arising between the parties to these proceedings are being litigated, or are being threatened to be litigated, in court, and no objection appears to have been raised by either side to this fact. Given that this is so, the court infers that the parties should be considered, despite the arbitration clause in the building agreement, to have agreed subsequently, whether expressly or impliedly, that the matters raised in the instant proceedings should go to litigation.

Facts

4. The facts underpinning these proceedings are relatively simple. On 12th October, 2012, the parties to the proceedings entered into a short-form RIAI Agreement and Schedule of Conditions of Building Contract - SF88, in respect of a new dwelling-house and garage. It was agreed in this contract that practical completion of the agreed works would be effected by 29th March, 2012. It appears that this date was entered in error into the building contract and that the correct date for practical completion was in fact 29th March, 2013. By that date the works had not been completed, though it is not clear that this was entirely the responsibility of Creedon Construction. In any event a delay in completion is so foreseeable an eventuality that express provision is made in the building contract as to just such a circumstance, clause 5 providing that:

> *"If it becomes apparent that the Works will not be completed by the date of Practical Completion as set out in the Articles of Agreement for reasons beyond the control of the Contractor, then the Contractor shall so notify the Architect who shall make, in writing, such extension of the time for Practical Completion as he may consider reasonable."*

5. There is some suggestion in the affidavit evidence that in fact an alternative practical completion date of 12th April, 2013, *i.e.* two weeks after the initially agreed date, was agreed between Creedon Construction and Mr. Billy Murtagh, the designated Architect under the building agreement and the agent of the defendants. However, on 28th March, 2013, Creedon Construction was informed in writing by Mr. Murtagh that the defendants wished to terminate the contract on 29th March, 2013, being the original date of practical completion that had been agreed upon in the building agreement. Mr. Murtagh further indicated that *"Any works not completed as of this date will become the responsibility of the clients themselves to complete*." The court has no reason to doubt that Mr. Murtagh in this regard was accurately reflecting the wishes of the defendants. Notably, the purported termination was not done in accordance with the relevant provision of the building contract (clause 21) and the court concludes that the contract continues to subsist between the parties.

6. Following Mr Murtagh's communication, Creedon Construction, on 29th March, 2013, issued to him in his capacity as the designated Architect, a final valuation for works that had been completed to that time but not yet paid for. Pursuant to clause 12 of the building agreement:

> *"The Architect shall on the application of the Contractor, at intervals of not less than four weeks certify interim payments to the Contractor in respect of the value of the Works properly executed less a retention of 10% and less any previous amounts certified and the Employer shall pay to the Contractor the amount so certified within 10 days of receipt of the Certificate."*

7. Consistent, it appears, with this clause, Mr Murtagh subsequently issued a 'recommendation for payment'. The court has not had sight of this recommendation. However, a letter of 4th April, 2013, from the defendants' solicitors to Creedon Construction clearly acknowledges the existence of the recommendation, disputing as it does certain amounts referred to in the recommendation.

8. On 10th May, 2013, at the behest of the defendants, Kelliher and Associates, a firm of quantity surveyors, issued a "Cost Appraisal Report" pursuant to a review and costing of works done at the site where Creedon Construction had been engaged in the works that are at the centre of this dispute. This review concluded that the value of works done but not paid for was €21,820.45, which amount

was subsequently paid by the defendants to Creedon Construction. There has been some dispute between the parties as to why quantity surveyors were engaged by the defendants in respect of a fixed-price contract but to this the second-named defendant offers a reasonable explanation in her affidavit evidence stating that "*I say that when it became obvious that certain work was defective in May 2013 we were obliged to mitigate our loss and employ a quantity surveyor to determine what was needed to complete the project properly*."

Summary judgment and cross-claims

9. The defendants have made a number of allegations as to the adequacy of the work done by Creedon Construction. These allegations concern substantive issues of fact, largely grounded on the professional report of Kelliher and Associates. That said, the allegations raised are more in the nature of a cross-claim or counterclaim, rather than a defence to the summary proceedings. What is the court to do in a case where a defendant raises a cross-claim in defence to a motion for summary judgment? The classic case in this regard is the Supreme Court decision in *Prendergast v. Biddle* (Unreported, Supreme Court, 31st July, 1957), the principles identified in that case having latterly been considered by Clarke J. in *McGrath v. Driscoll* [2006] IEHC 195 and *Moohan v. S & R Motors (Donegal) Limited* [2007] IEHC 435. In *McGrath*, Clarke J. distinguished between (a) a cross-claim that is so connected to the plaintiffs claim that it can be set off and provides a defence to same, and (b) a claim that is independent of the plaintiffs claim and in fact forms a counterclaim. In *Moohan*, Clarke J. was presented with facts not dissimilar to those in the present proceedings. There the plaintiff was claiming monies that were due pursuant to architects' certificates and the cross-claim was concerned with alleged defects in workmanship. Summarising the approach to be adopted by a court where a defendant raises a cross claim, Clarke J. stated as follows:

> *"(a) it is firstly necessary to determine whether the defendant has established a defence as such to the plaintiff's 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 but also arise in circumstances where, on the basis of the defendant's 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 entire proportion of) the claim ...*
>
> *(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 in...Prendergast v. Biddle."*

10. Clarke J. concluded in that case that a set-off was available, the default position being that a party is entitled to a set-off in equity in relation to any crossclaim arising out of the same contract. Thus, per Clarke J., at 660:

> *"[I]f 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."*

Clarke J. found no evidence of such displacement in the RIAI contract in issue in that dispute. In the present proceedings, as in *Moohan*, a set-off in equity occurs in that the plaintiffs asserted cross-claim arises out of the same contract as the defendant's claim, and so the defendant must, consistent with *Moohan,* be considered to have established a defence as such to the plaintiffs claim. There is nothing in the evidence before the court that suggests it would be inequitable to allow this asserted set-off. In the present proceedings, as in *Moohan*, there is no evidence of displacement of the equitable set off in the terms of the building contract itself.

Conclusion

11. The court considers that the defendant has established a *prima facie* defence to the summary proceedings and thus that the issues arising between the parties are not susceptible to relief by way of summary proceeding but ought instead to be referred to plenary hearing. Notwithstanding that it has reached this conclusion the court notes that the amount now in dispute between the parties, though not insignificant, is nonetheless sufficiently small that the parties might be better advised to consider whether some alternative resolution can be arrived at between them, rather than engaging further in costly court proceedings. The parties nonetheless remain free to proceed to plenary hearing should they so wish.