Neutral Citation Number: [2011] IEHC 317

THE HIGH COURT

2010 120 MCA

BETWEEN

J. & G. McGOWAN ROOFING CONTRACTORS LTD.

PLAINTIFF

AND

MANLEY CONSTRUCTION LTD.

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 25th day of July, 2011.

1. The application which was before the Court on 4th July, 2011 and which is dealt with in this judgment was brought in these proceedings, which were initiated in 2010 under the Arbitration Acts 1954 – 1998. The outcome of the two applications which have already been determined in the substantive proceedings, which were heard by Murphy J., as reflected in the order of the Court of 7th March, 2011, which was perfected on 15th June, 2011, insofar as it is pertinent to the issues before this Court on this application, was that –

(a) it was ordered that the award of Anthony Hussey (the Arbitrator), made on 18th February, 2010 be enforced;

(b) it was ordered that the plaintiff (McGowan) do recover against the defendant (Manley) –

(i) the sum of €136,672.15,

(ii) interest on the sum of €88,150.86 at 8% *per* annum compounded yearly on 16th September from 7th March, 2011 to date of payment, and

(iii) simple interest on the sums of €23,962.86 and €21,215.75 at 8% *per* annum from 7th March, 2011 to date of payment; and

(c) it was ordered that McGowan recover against Manley the costs of the proceedings before the Court to be taxed in default of agreement.

2. The award dated 18th February, 2010 was an interim award. There were earlier High Court proceedings, which were referred to in the interim award, which were stayed. The defendant was ordered to pay the costs of those proceedings in the interim award, the costs to be taxed in default of agreement or measured by the arbitrator.

3. The Arbitrator made a final award on 15th September, 2010, in which he awarded –

(a) costs of the arbitration, to be taxed in default of agreement, to McGowan, and

(b) re-imbursement to McGowan of monies paid by McGowan in respect of arbitration fees and expenses, together with simple interest.

He also measured McGowan's costs of the High Court proceedings and he directed Manley to pay interest on the sum measured (€17,049.35) at 8% *per* annum. Unfortunately, having regard to the paucity of evidence before the Court, I am unclear as to how the sums set out at (b)(iii) in paragraph 1 above relate to the awards of the arbitrator, which will have to be clarified.

4. The application before the Court on 4th July, 2011 was brought by Mary Cowhey, solicitor, practising under the style and title of Mary Cowhey & Co. Solicitors (the applicant), who, as I understand the position, acted for McGowan in the earlier High Court proceedings, in the arbitration and on the applications in these proceedings before Murphy J.

5. There was proof of service of the application on McGowan and on Manley before the Court, but neither appeared on the hearing of the application. At the hearing of the application the position of McGowan and Manley as regards the application was represented as follows:

(a) Counsel for the applicant informed the Court that the applicant had been informed that Manley did not intend appearing on the hearing of the application.

(b) The Court was handed in a copy of an undated letter from McGowan (signed by Joseph McGowan, who was described as a director) addressed to the applicant, which acknowledged receipt of the notice of motion and the affidavit in respect of a hearing "on Monday 4th July next". The letter stated that the plaintiff did not intend appearing on the application and does not "seek taxation of costs sought by Mary Cowhey & Co., Solicitors". That letter should be exhibited on affidavit.

Because of the non-appearance of both parties to the substantive proceedings, I reserved judgment with a view to making clear the basis on which the Court is addressing the orders sought.

6. The primary reliefs claimed by the applicant are declarations that the applicant –

(a) has a lien (meaning a common law lien) over, and

(b) is entitled pursuant to the provisions of the Legal Practitioners (Ireland) Act 1876 (the Act of 1876) to a charge upon –

(i) the judgment, interest payments and costs ordered by the order of 7th March, 2011 made in these proceedings, and

(ii) such other sums (including costs) awarded and directed to be paid by Manley to McGowan in the final award dated 15th September, 2010 of the Arbitrator,

for the unpaid costs incurred by McGowan with the applicant (meaning costs for

which McGowan is liable to the applicant) in recovering such funds to include –

(I) the costs herein, and

(II) the costs of the prior arbitration.

The funds are characterised by the applicant as funds recovered by the exertions, efforts and instrumentality of the applicant in her grounding affidavit sworn on 17th June, 2011.

7. Section 3 of the Act of 1876, which is quoted in the judgment of the Supreme Court in *Lismore Buildings Limited v. Bank of Ireland Finance Limited* (No. 2) [2000] 2 I.R. 316 at p. 318, insofar as is relevant for present purposes, provides:

> "In every case in which an attorney or solicitor shall be employed to prosecute or defend any … proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure or kind the same may be, which shall have been recovered or preserved though the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter or proceeding; and it shall be lawful for the court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges and expenses out of the said property as to such court or judge shall appear just and proper … ."

8. Section 32 of the Arbitration Act 1954 (the Act of 1954) provided as follows:

> "Section 3 of the [Act of 1876] (which empowers a Court before which any proceeding has been heard or is pending to charge property recovered or preserved in the proceeding with the payment of solicitors' costs) shall apply as if an arbitration were a proceeding in the Court, and the Court may make declarations and orders accordingly".

In the circumstances which prevail here, the application of s. 3 of the Act of 1876 by s. 32 of the Act of 1954 to the sums due to McGowan under the final award in the arbitration has been kept alive by operation of s. 4 of the Arbitration Act 2010, because the arbitration predated the commencement of the Arbitration Act 2010.

9. I am satisfied that, in principle, the applicant is entitled to the primary orders sought. However, there is a lack of clarity in relation to the funds to which the primary orders will relate, as indicated above. Further, in the light of what is stated in the undated letter from McGowan, it is pertinent to record that the position is that McGowan is only entitled to party and party costs against Manley, which Manley is entitled to have taxed, although the applicant is entitled to solicitor and client costs against her client, McGowan, and it may waive its entitlement to have those costs taxed.

10. Section 3 of the Act of 1876 provides that the solicitor shall be entitled to a charge "for the taxed costs, charges and expenses of or in reference to such suit, matter or proceeding". In O'Callaghan on *The Law on Solicitors in Ireland* (at para. 9.96) it is suggested that it is not necessary, or a precondition, that the costs be taxed before s. 3 operates; otherwise, it is suggested, the property which is the subject matter of the charging order might disappear before the order is made. The making of a charging order under s. 3 merely declares the right to a charge. The extent of the charge can be determined by the taking out of a summons for taxation. At para. 9.97 (*op. cit.)* it is suggested that it is good practice in all cases where costs are to be subsequently taxed to state a maximum limit of costs. In this regard, it was averred in paragraph 10 of the grounding affidavit of the applicant that the costs "so incurred" are €262,667.39, although the Bill of Costs was not exhibited. The applicant also averred that she did not anticipate that solicitor/client taxation between the applicant and McGowan would be necessary and the undated letter from McGowan bears that out. However, there is no averment that all the costs are unpaid, although I assume that such is the case. That will have to be clarified by affidavit.

11. The applicant has sought the following ancillary orders:

(a) an order directing Manley to pay the funds recoverable either pursuant to the order of 7th March, 2011 and the final award of the Arbitrator to the applicant, and

(b) an order giving the applicant liberty to enforce and execute against Manley any order made or which may be made by the Court for payment to the McGowan by the Manley; and

(c) liberty to McGowan and the applicant to apply in relation to taxation of costs incurred by McGowan with the applicant in recovering such funds.

12. I am satisfied that s. 3 empowers the Court to make the ancillary order sought at (a). I propose that at this stage the applicant should have liberty to apply in relation to the ancillary orders sought at (b) and (c). In relation to giving liberty to apply in relation to taxation of costs, this may not arise. In relation to giving liberty to enforce and execute orders against Manley, I think it would be preferable if the Court was clearly apprised of the nature of the enforcement or execution proposed before making such order.

13. Accordingly, subject to filing a supplemental affidavit –

(i) confirming that the costs are unpaid,

(ii) clarifying how the sums awarded by the arbitrator's awards relate to the order of 7th March, 2011 and identifying "such other sums (including costs)" as were awarded and directed to be paid in the final award (i.e. the sums not quantified in the order), and

(iii) exhibiting the undated letter from McGowan,

there will be an order –

(a) including both primary orders sought, but in each case subject to a maximum of €262,667.39;

(b) including the ancillary order referred to at (a) in paragraph 11; and

(c) giving the applicant liberty to apply in relation to the ancillary orders referred to at (b) and (c) in paragraph 11; and

(d) awarding the applicant the costs of this application, the costs to be taxed in default of agreement.

14. Finally, while I am satisfied that I have jurisdiction to make the order sought, it would have been a more efficient use of Court time if the application had been made to Murphy J., who had seisin, and is familiar with the facts, of the substantive applications.