Neutral Citation Number: [2010] IEHC 215

THE HIGH COURT

2010 1156 S

BETWEEN

JEREMIAH GALVIN, COLM GALVIN AND DENISH GALVIN AND GALVIN DEVELOPMENTS (KILLARNEY) LTD.

PLAINTIFF

AND

SOUTER ENTERPRISES LTD., JOHN SHEE AND JOSEPH HANRAHAN

DEFENDANT

2010 1155 S

BETWEEN

GALVIN DEVELOPMENTS (KILLARNEY) LTD.

PLAINTIFF

AND

SOUTER ENTERPRISES LTD T/A COOLEGREAN DEVELOPMENTS (TOGETHER WITH GALVIN DEVELOPMENTS (KILLARNEY) LTD)

DEFENDANT

JUDGMENT of Mr. Justice Charleton delivered on the 8th day of June, 2010.

1. This is a motion for summary judgment. In each case affidavits claiming to show a defence in good faith have been filed. The issue before the Court is whether or not such affidavits disclose a reasonable prospect of a defence or whether it is very clear that there is no defence to the proceedings. In the event of a reasonable prospect of a defence being shown then the Court must not proceed to summary judgment. In the event that it is very clear that there is no defence, and further legal argument on the issues between the parties will not assist, then the Court may proceed to enter judgment against the defendant.

2. It seems to me to be appropriate to consider record no. 2010 / 1155S first. In doing so, however, it is to be noted that the two cases are interlinked. The interlinking of the cases, however, does not, to my mind, establish that any reasonable prospect of a defence that may be established in one of the cases is necessarily applicable to the other.

3. In record no. 2010/1155S the plaintiff was appointed as a contractor under a standard form of building agreement which was dated 27th April, 2007.

4. The background to this entire matter, and the link between the two cases, is the development of lands at Coolegrean in Killarney. A building project was agreed between the defendant and the plaintiff whereby the lands were to be developed in two phases. The first consisted of a nursing home and 81 small dwellings which were to be used as retirement homes by the elderly. This development has been built and it took up around four acres of land. The second phase has never been built and would have consisted of an ordinary residential scheme over about thirteen acres. The nursing home was completed within time and was sold on 31st December, 2008, to a group of investors. As I understand it, however, very little market interest was shown in the small retirement units. The nursing home was leased back to a related company of the defendant and it is carrying on the business of nursing home services. The nursing home was planned to have 56 beds. The retirement village apparently comprises an apartment block with 66 small flats where there is the possibility of assistance and then 15 small bungalows where retired people might live more independently. All of the contract works that comprise this scheme were completed in November, 2008. As I understand it, the financial difficulties between the parties arise by virtue of the lack of interest in the retirement village units, as opposed to the nursing home.

5. Pursuant to the building agreement, ten architects interim certificates were issued and the balance claimed to be due on these amount to €1,394,640 plus VAT @ 13.5%. In addition the sum of €82,484.39 is claimed plus VAT. Clause 35 (b) of the Building Agreement provides that once an architects certificate has been issued to the contractor that payment of the sum certified must be made by the defendant, described in the building contract as the employer, within seven days. Murray O'Laoire Architects issued ten certificates in that regard. I have examined each of these certificates and they amount to €12,748,656.58 excluding VAT. The plaintiff has been paid an amount of €7,981,007, leaving a balance due of €4,389,240. Under the terms of the agreement the liability that arises is divided equally between the plaintiff and the defendant. This emerges from the fact that the plaintiff is not only the contractor but is a partner in the enterprise. In consequence, liability has to be split 50:50 as between the parties. Therefore the balance due was €2,194,640 before that division was applied. On 18th November, 2008, the defendant paid €800,000 and on 20th November, 2008, the defendant paid €250,000 and on 12th December, 2008, the defendant paid €200,000 and finally on 31st December, 2008, the defendant paid €150,000. The plaintiff, in their capacity, has paid the sum of €2 million. In consequence, the sum of €1,394,640 is due, barring a potentially credible defence, under the architects' certificates.

6. The claim in relation to €82,484 plus VAT arises pursuant to the retention clauses in the agreement. I am satisfied that, following on the certificate of practical completion of 19th December, 2008, whereby 43.6% of the works were certified as being practically complete, the contractor was entitled to the release of retention monies in the amount of €164,968.79. The liability of the defendant, in this regard, is again on a 50:50 basis and amounts to €82,484.39 plus VAT.

7. The defences sought to be raised in relation to these proceedings can be briefly stated. It is said that the certificates of the architects were not valid, and that therefore the amounts due were never liable to be paid. Secondly, it is said that the project was not adequately funded because there were was a failure to provide a total of €8 million pursuant to the arrangements between the parties. Thirdly, it is said that when the economic collapse of 2007-2008 became apparent, that the plaintiff continued with the works recklessly, thereby increasing liability as between the plaintiff and the defendant in their joint enterprise in an uncertain market. Finally, it is said that there is a right of set-off in respect of €167,609; again divided on a 50:50 basis. I must firstly say that I am satisfied that this last issue should be sent to plenary hearing. It is a matter in respect of which oral evidence is necessary. The parties are not in agreement as to the nature of that liability and are in a clear state of contention as to how it arises. Oral evidence on this matter is necessary and the Court is therefore not entitled to move to final judgment in that regard.

8. I will now deal with the other defences. I am satisfied that there is no basis upon which it could be said that the retention monies are not due. Clause 32 (4) of the Building Agreement provides:

> "The employer shall pay to the contractor one half of the relevant percentage of the sum then retained under clause 35 and the sum named in the appendix as the limit of the retention fund shall be reduced by one half of the relevant percentage –
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> (i) 10 working days after the date of the certificate of practical completion of the relevant part and
>
> (ii) again on the expiration of the defects liability period in respect of the relevant part of the issuing of the certificate of completion of making good the defects in respect of the relevant part, whichever is the later."

9. I have no doubt that the relevant retention monies must be released in the sum of €82,484. There have been no defects notified. It is now eighteen months since the certificate was issued on 19th December, 2008. The defects liability period has passed. The nursing home is up and running and functioning well, a fact not disputed by either party.

10. I turn next to the issue of whether there was a failure to provide funds on the part of the plaintiff. I am satisfied that this defence is not made out. Indeed, as the matter progressed, during the hearing it became apparent that while there might be a query in relation to some of the amounts, the issue of the loans was never addressed in such a way as to provide the prospect of a stateable defence. I accept the affidavit evidence of Jeremiah Galvin that security was provided in relation to loan facility amounts to at least €8 million, the sum the defendant contends is necessary for fulfilling the agreement. Tangible securities with a minimum value of €3 million were provided pursuant to a bank charge over 120 acres of farmland at Loughitane, Killarney, which at that time had a value in excess of €3 million. I am satisfied that by letter dated 28th March, 2007, that a requirement for a facility of €3 million on the part of AIB bank was substituted with a lien over a deposit account in the amount of €2.6 million, an actual sum of cash on deposit with the bank. In addition, €2 million was provided towards the purchase of the lands in the second phase of the development. These securities allowed for the full drawdown of the relevant banking facilities. There is no basis, within the papers furnished to the Court, upon which I can find that this defence is advanced in any credible way or that it has any reasonable prospect of succeeding.

11. This was a joint venture in which the plaintiff is not merely the contractor but is also the employer. This, it is argued, gives rise to a particular liability. It is said that at some particular time, which is not precisely specified, but which may relate to the severe difficulties within the European and American financial markets in the summer of 2007, or which may relate to the serious banking difficulties which emerged in stark form in this country in September, 2008. It is said that when one or other of those events occurred, because of the relationship between the parties, all building should have discontinued. This matter is governed by a contract between the parties, however, and it is a straightforward building contract. There is no evidence presented to the Court whereby it might be said there was some obligation to proceed cautiously. Rather, the building contract establishes that this project to build was an obligation that was unencumbered by any reference to market forces. Even if one takes the defence that has been eloquently proposed at its highest, it is difficult to imagine that anyone in Ireland would have foreseen at the time of the building agreement that a variation should be included in the contract to allow for the disintegration of market demand. There is no basis upon which it can be argued that a reasonable bystander would have regarded such a silent clause as obvious, leading to a tacit variation to nature of the agreement actually entered into. This defence is not made out.

12. The defence as regards the certificates is impossible to maintain. These certificates by the project's architects were valid. There is no technical defect in them. I am not satisfied, in any event, that a technical defect might arise in law to delay or deny liability for debt in circumstances where the parties are engaged in fulfilling a mutual obligation through reasonable notice. In addition to that, the defendant has paid amounts on foot of those certificates. There is no written query, and no contention of an oral query, that these amounts were not due; either for the argued-for reason or any reason at all. The defendant now seeks to avoid liability in that regard by reference to a defence that in my view is completely unstateable.

13. Therefore the plaintiff has established liability in respect of the ten architects interim certificates, as to the amount due taking into account the sums paid, of €1,394,640 plus VAT. In addition retention monies must be paid in the sum of €82,484 plus VAT.

14. I now turn to record no. 2010/1156S. In this case I feel compelled to reach a different conclusion. The plaintiff claims a sum of €1 million due on foot of the agreement which governs and defines the relations between the parties in the development of the nursing home, the retirement units and the proposed ordinary housing scheme. This is referred to as the co-ownership agreement and it is dated 18th January, 2007. Under clause 5.3.1 of this agreement, the co-ownership, which includes the parties to these proceedings, became liable to pay the sum of €2 million to the plaintiffs upon the sale of the nursing home which I have previously mentioned. The sale of the nursing home closed on 31st December, 2008 and, consequent upon the defendants and the plaintiffs having a 50:50 responsibility under the agreement, it is said that they are now liable to pay the sum of €1 million to the plaintiffs.

15. Under clause 5.3 of the agreement the repayment of the relevant loan is dealt with. Clause 5.3.1 provides:

> " The loan pursuant to clause 5.1.1 shall be repaid in full by the co-ownership to the Galvin co owners upon the receipt by the co-ownership of the purchase price upon the disposal of phase 1 to the investors as contemplated at recital C or earlier if the consent of the bank is obtained."

16. The relevant recital provides:

> "Hanrahan and Shee have established an expertise in the development, operation and disposal of healthcare facilities and associated residential care units. It is intended that the completed nursing home which is proposed to be developed on phase 1 of the co-ownership property will be disposed of to a partnership of investors who, in turn, will grant a lease of the said nursing home to Mowlam Healthcare Ltd. (an associated company of Mowlam) who operate a number of nursing

homes in Ireland."

17. Turning to the definition section of the co-ownership agreement I note that phase 1 is defined as the area comprising around 4 acres and consisting of the nursing home and retirement village and phase 2 is referred to as comprising around 12.9 acres upon which the parties intended to construct a residential development. That residential development, as I have previously mentioned, has never taken place.

18. The defence in relation to the co-ownership agreement that is proposed is that clause 5.1 is dependent upon the disposal of 25% of the residential units. This is made at least arguable by the terms of clause 5.3.2. This provides:

> "The collateral security pursuant to clause 5.1.2 shall be released upon the receipt by the co-ownership of the purchase price upon the disposal of the first 25% of the residential development in phase 2, or upon such earlier date as the bank shall agree."

19. This defence is made out as having a reasonable prospect of success. Other arguments have been advanced to the effect that there has been a breach by the plaintiffs of the variation of the agreement which removes the second and third named defendants from liability. I am not convinced that this defence is sufficiently statable. However, the law in relation to summary judgment requires me to simply make an order allowing for a plenary hearing. I am not entitled to confine the defendants to particular defences. On the defence that has been most strongly argued, however, an issue has arisen which is reasonably capable of being argued successfully whereby a serious issue in respect of the repayment of the liability of the defendants for €1 million is established. Although the co-ownership agreement was made on 8th January, 2007, and then amended on 18th January, 2007, the 14th February, 2007 and 28th March, 2007, the relevant conjunction of recital C and the express terms of paragraphs 5.1 and 5.3 render the argument of the defendant reasonably capable of success.

20. In consequence the proceedings in record no. 2010/1156S will be adjourned for plenary hearing.