



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 57

Appeal No. 2014 No. 10 Exp

Kelly J.
Irvine J.
Hogan J.
BETWEEN/

EMCON SYSTEMS LIMITED

PLAINTIFF/RESPONDENT

AND

O'KANE ENGINEERING LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on 23rd day of March 2015

1. This is an appeal by the defendant, O'Kane Engineering Limited, ("O'Kane Engineering") against the decision of the High Court (Cross J.) delivered on 11th November 2014 as granted summary judgment to the plaintiffs in the sum of €71,890. In this appeal O'Kane Engineering have argued that Cross J. was in error in arriving at this conclusion and that he ought to have adjourned the matter for plenary hearing.

2. The background to this claim is that the plaintiff/respondent, Emcon Systems Limited ("Emcon"), was retained by O'Kane Engineering as the sub-contractor to supply and install a specialist emergency lighting system for that part of the Royal Hospital, Kilmainham, Dublin 7, which is now occupied by the Irish Museum of Modern Art. This was a major project and the ultimate employer was the Office of Public Works. The essence of the present dispute is that the defendant maintains that the plaintiff has not produced or proved invoices in relation to the supply of the goods to its satisfaction in accordance with the terms of the contract. O'Kane Engineering maintains that there are issues in relation to the amounts of individual items of this specialist lighting equipment that were actually supplied by the sub-contractor: it contends that not all of the invoices have been accounted for or that the batches of items so supplied that have reconciled as against these items.

3. There is no doubt but that the contract between the parties was invoiced based and required certification in the usual fashion. If matters stood at that point, it might well have been said that O'Kane Engineering had raised an arguable point of defence so far as the production and reconciliation of the invoices was concerned. The standard *Aer Rianta* test (*Aer Rianta CPT v. Ryanair Ltd.* [2001] IEHC 94, [2001] 4 I.R. 600) simply requires this Court to be satisfied that, in the words of Hardiman J. ([2001] 4 I.R. 600, 623):

"Is it 'very clear' that the defendant has no case?; is there either no issue to be tried or only issues which are simple and easily determined?; do the defendant's affidavits fail to disclose even an arguable defence?"

4. Viewed in isolation, perhaps, it might be said that the Court could not be satisfied that O'Kane Engineering had no case. Yet, as Hardiman J. remarked in *Aer Rianta*, there is also a category of cases involving applications for summary judgment where the issue of credibility may arise "rather starkly." As he explained:

"In [*National Westminster Bank v. Daniels* [1993] 1 W.L.R. 1453 the defence affidavits were mutually contradictory. In [*Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 21 the defendant's averments were flatly contradicted by those of the plaintiff's private detective which were accepted to be accurate. In [*First National Commercial Bank v. Anglin* [1996] 1 I.R. 75 the indisputable documentation of a commercial transaction rendered the alternatively chronology proposed by the defendant quite untenable.

I consider that the references in these cases to credibility and to fair and reasonable probability may be misleading if read without reference to their own unique facts. Read in context, I do not consider that the passages quoted either alter the well established criteria for the granting of summary judgment."

5. As will be seen, however, this is a case where the arguability of the suggested defence must be assessed by reference to underlying considerations of credibility. This is principally because the plaintiff, Emcon, has exhibited correspondence from the ultimate employer, the Office of Public Work which attests to the satisfactory manner by which it, qua sub-contractor, supplied the lighting systems. In a letter supplied to the plaintiff's solicitors in the context of these proceedings by the Chief Mechanical Electrical Engineer of the Office of Public Works, Mr. Jim O'Sullivan, it is stated that:

"....your client, EMCON Systems, were sub-contractors to O'Kane Engineering who were contracted by the Office of Public Works to carry out works in part of the Royal Hospital, Kilmainham, occupied by the Irish Museum of Modern Art.

The works carried out by EMCON Systems was completed entirely to the satisfaction of the Office of Public Works. The Consulting Engineering firm, Dervan Engineering, employed by the Office of Public Works to design and supervise the electrical works, approved the final work as handed over by EMCON Systems on the completion of the contract. The final costs of the works, including some adjustments to the tendered amounts, was agreed with EMCON Systems and O'Kane Engineering. The amount was included in the final agreed amount for the account for the contract and certified by the employer's representative in the contract. A copy of this final account is attached.

There are monies held on O'Kane Engineering on this contract for some snag items about works not yet completed but which costs are agreed and normal retentions. They confirm that none of the monies held are for any portion of the work undertaken by EMCON Systems."

6. This correspondence is of some importance in the context of any credibility assessment. If the ultimate employer is satisfied with the performance of these works and states (without contradiction) that the ultimate price was agreed between all the parties (*i.e.*, OPW, O'Kane Engineering and Emcon Systems), then, it might be asked, on what basis would the defendant contractor be entitled to withhold payment to the plaintiff sub-contractor? How could it be realistically said that Emcon Systems has not satisfactorily discharged its contractual functions?

7. In my view, it is for this very reason that this case comes within the category of cases identified by Hardiman J. in *Aer Rianta* where the arguability of a potential defence is entirely negated on credibility grounds. If, as in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 21 the defendants' account of what transpired at a critical meeting had been entirely negated by independent evidence the veracity of which was accepted or where, as in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 95 the indisputable chronology recorded by particular documents made the defendant's suggested defence quite "untenable", then the same may equally be said by analogy in respect of the proposed defence which O'Kane Engineering seek to advance in the light of the OPW correspondence.

8. In effect, therefore, the suggested defence based on unreconciled invoices and disputes as to quantities is rendered unreal by the unequivocal - and uncontradicted - statement made by the ultimate employer that the plaintiff sub-contractor discharged its obligations in a perfectly satisfactory way and that there had been agreement in relation to all matters on the part of the employer, contractor and sub-contractor.

9. In my view, therefore, this is accordingly one of the type of cases where the proposed defence cannot be realistically assessed to be credible in the particular sense envisaged by Hardiman J. in *Aer Rianta*.

Conclusions

10. Since I am of the view that O'Kane Engineering has not raised an argument which can realistically be regarded as credible, I would accordingly confirm the decision of Cross J. It follows that the order for summary judgment which has already made by the High Court must be affirmed.