

THE HIGH COURT

[2003 No. 6794P]

BETWEEN

JAMES O'MAHONY

PLAINTIFF

AND

PATRICK O'CONNOR BUILDERS (WATERFORD) LIMITED, PATRICK O'CONNOR, POC CONSTRUCTION LIMITED, AQUALINE ENGINEERING LIMITED, FENWAL POOLS LIMITED, EASTERN REGIONAL CONSULTANCY SERVICES LIMITED, BREFFNI McGRANE AND TERENCE McSWEENEY

DEFENDANTS

Judgment of Mr. Justice Clarke delivered 1st March, 2005.

1. The subject matter of the above proceedings overlaps with the subject matter of two other sets of proceedings currently before the court. In one such proceedings the plaintiffs are Aqualine Engineering Limited (the fourth named defendant herein), the defendant is Patrick O'Connor (the second named defendant herein) while the plaintiff in these proceedings is a third party. Those proceedings bear Record No. 2002/6060P and will be referred to hereafter as "the Aqualine proceedings". In the other such proceedings bearing record No. 2002 1045S Patrick O'Connor (the second named defendant herein) is plaintiff and James O'Mahony (the plaintiff herein) is defendant. Those proceedings will be referred to hereafter as "the O'Connor proceedings". When the question as to whether all of the relevant proceedings should be linked came before the Supreme Court on 2nd July, 2004 the court ordered that each of the three proceedings should be so linked and should be heard in this court by the same judge and in accordance with the directions of that judge in default of agreement between the parties. The court order further notes a recommendation that the proceedings be assigned to a judge of this court for the purposes of case management. When, on foot of that recommendation, the matter was listed before the President of this court he directed that the now linked cases should be assigned to me for the purposes of such case management.
2. Subsequent to that a number of hearings have taken place at which both formal and informal business has been conducted. The informal business has consisted of a discussion between the representatives of the various parties as to the best methods that might be adopted for the timely and efficient resolution of the various issues which arise in each of the proceedings. The formal business has consisted of the hearing of various interlocutory motions concerning such matters as particulars and discovery. In particular I have directed that insofar as possible these proceedings will be used as a vehicle for the determination of as many issues as possible. Certainly where the same issue arises in both these proceedings and one of the other proceedings it is intended that the issue will be determined in these proceedings.
3. In order to understand the issue which I now have to decide it is necessary to set out in brief terms the range of issues which fall to be resolved in these linked proceedings. Each of the proceedings arise out of a significant building contract in which the plaintiff in these proceedings was the employer with the defendants being variously the building contractors employed in respect of the contract, specialist contractors employed in relation to the building of a swimming pool as part of the overall project, and various parties who are alleged to have acted in the course of the contract as engineers and architects.
4. However the specific matter which I now have to decide stems from the defence and counterclaim filed on behalf of the first three named defendants (whom I shall refer to as "the O'Connor defendants") which, amongst other things, pleads at paragraph 9 that the plaintiff and the second named defendant, having been unable to agree as to the value of the works carried out on foot of the building contract, agreed an independent valuer to whom was given the role of valuing the works. It is further contended that the valuer concerned furnished his valuation and determined a sum which was found to be due and owing from the plaintiff to the defendant. As well as the above matters being pleaded in the defence a counterclaim is raised seeking the recovery of the balance of the sum specified in the valuer's report over and above the amount actually paid in respect of the works. That balance amounts to €1,606,934.06.
5. Before going on to consider the specific issues raised it is also important to note that while the above proceedings are brought in the name of James O'Mahony the commercial benefit (and indeed risk) of these proceedings is effectively in the hands of the plaintiff's insurance company who are maintaining the proceedings in his name on foot of a subrogation arrangement. Thus while Mr. O'Mahony is nominally the plaintiff in these proceedings and is also the defendant in the O'Connor proceedings and a third party in the Aqualine proceedings, in this case he has no commercial interest in the outcome of the proceedings whereas he does have a personal interest in the outcome of the other two proceedings. For that reason he is represented by different legal teams in this case (where he is a nominal plaintiff on behalf of his insurers) on the one hand as compared with the other two cases (where he is personally interested) on the other hand.
6. The specific issue that now arises concerns the appropriateness or otherwise of directing that a preliminary issue be tried as to the extent, to which the report of the independent expert binds some or all of the parties to these proceedings. When the matter was before me on the 18th January 2005 I made a suggestion that it might be appropriate for the parties to consider whether that issue should be tried as a preliminary issue. The order made on that occasion suggested that the parties attempt to agree on the issue by the 15th day of February, 2005. No objection was, at that stage, taken to that course of action.
7. When the matter came back before me on 15th February, 2005 counsel for the O'Connor defendants produced a draft of such a preliminary issue. The suggested wording was as follows:-

"Is the valuation attached hereto and furnished in or about May 2002 binding as between the plaintiff (James O'Mahony) and the second named defendant (Patrick O'Connor) and, if so, is the plaintiff (James O'Mahony) entitled to bring a separate claim in respect of alleged defects in the works, the subject matter of the valuation, against Patrick O'Connor?"
8. The valuation attached was a copy of the report of TMV Consultants.
9. Objection to the direction of such a preliminary issue was, on that occasion, taken by counsel acting on behalf of James O'Mahony in these proceedings (and thus for the reasons indicated above being counsel principally concerned with the interests of the insurers of James O'Mahony).
10. In substance the objection to the proposed course of action stemmed from a contention that irrespective of the findings that the court might make in relation to the legal effect of the valuation same could not, it was contended, bind the plaintiff in relation to the claim made in these proceedings. As appears from the statement of claim in this case the substance of the claim against the various

defendants is based on a contention that they were, in different respects, responsible for the fact that the swimming pool portion of the building contract was completed in a manner which left the swimming pool in, it is said, a wholly unacceptable state with resultant leaking, water penetration cracking and the like. As a consequence, it is contended (at paragraph 26) that it was necessary that a new shell be constructed inside the existing shell with various consequences. The amount claimed is the amount paid on foot of the policy of insurance being €576,451.00. The argument of counsel for the plaintiff was to the effect that even if the views of the valuer bound the plaintiff as to the value of the works actually done on his behalf by the O'Connor defendants (including taking into account any defect) it could not be said, it was claimed, to cover any amount that might be found to be due for remedial works or for consequential loss of the type being claimed in these proceedings. However it is equally clear that the O'Connor defendants maintain, through their counsel, that that is precisely what the effect of the valuation is.

11. There seems to me, therefore, at a theoretical level to be three possibilities:-

- (a) that the valuation does not bind the parties at all;
- (b) that the valuation binds the plaintiff and the O'Connor defendants in relation to the value of the work done but not so as to exclude any entitlement of the plaintiff to pursue a claim for remedial works or consequential loss; or
- (c) that the valuation is such that binds the parties even to the extent of excluding such claims for remedial works or consequential loss.

12. Given that I will, in any event, have to consider those contentions it does not seem to me to be appropriate to express any view at this stage as to the merits of the arguments that might be put forward on either side.

13. The fact is that these issues arise in the proceedings and, it seems to me, the only question which I have to answer at this stage is as to whether it would be more convenient to have those matters determined as a preliminary issue.

14. The court has a wide discretion to determine the most efficacious way of hearing the issues in a case. In general terms it seems to me that the appropriate test to be applied in considering whether to direct that a preliminary issue should be tried is to consider, on the one hand, the possible saving in court time and expense to the parties that might be achieved by the trial of a preliminary issue having regard to the possible results of such a preliminary trial. Against that needs to be set the possibility that the direction of a preliminary issue may, in fact, in certain cases, elongate proceedings by requiring the same materials to be gone over on a subsequent occasion particularly if the result of the preliminary issue is such as not to bring the proceedings substantially to an end.

15. Finally regard has to be had to the question as to the extent to which it might be necessary to go into the merits of many of the issues that would arise in a full hearing, in order to come to fair conclusions in respect of the preliminary issue. For example in certain cases where it is suggested that an issue under the statute of limitations should be tried as a preliminary issue it may be clear that it would be difficult to resolve such an issue (for example where the same is largely dependent on the time when a cause of action accrued) without going into, in some detail, the merits of the case itself.

16. Applying those principles to this case, it seems to me there is a significant benefit to be gained from directing a preliminary issue of the type suggested. Clearly it would be inappropriate to make any predictions as to the likely outcome of the trial of such an issue. However if it is resolved in favour of the O'Connor defendants then a great deal of technical, complex and lengthy evidence will be saved in that it would, in those circumstances, not be necessary to go into many, if not all, of the merits of the alleged defects in building and the consequences thereof.

17. On the other hand if the preliminary issue is resolved in favour of Mr. O'Mahony it does not seem to me that there will be any significant overlap between the evidence and arguments that would need to be led or made for the purposes of resolving the preliminary issue with the evidence and arguments that would need to be dealt with at the substantive trial. They are largely discreet issues. The question of the extent, if any, of the binding effect of the valuation would need to be determined at the trial in any event. Whatever portion of the case was taken up with dealing with that issue would be saved by its being tried as a preliminary issue and it is, therefore, unlikely that the combined length of the preliminary issue and a separate substantive trial would be significantly greater than a hearing of the substantive issue and the preliminary issue at the same time.

18. In those circumstances it seems to me that the interests of expedition and the effective use of court time would be met by directing a preliminary issue.

19. I do, however, believe that there is some merit in the contentions made by counsel for Mr. O'Mahony to the effect that the current draft of the preliminary issues suggested on behalf of the O'Connor defendants does not adequately raise the particular issue which, on the basis of his argument, clearly is likely to be central to the considerations of the court on the preliminary issue, that is to say the question of whether the valuation, in all the circumstances of the case, is such as to bind not merely the value of the works carried out (including any defects) but also any claim which might be made by or through Mr. O'Mahony concerning the cost of remedial works and any consequential losses.

20. I would therefore propose directing a preliminary issue which would include as item 1 the issue as suggested on behalf of the O'Connor defendants and referred to above but would add a second issue as follows:-

- "2. In the event that the valuation referred to at 1. above is found to be binding is the plaintiff entitled to maintain proceedings in respect of damages claimed relating to remedial works which allegedly required to be carried out by virtue of alleged defects and/or consequential loss flowing from such alleged defects".

21. I will hear the parties further as to whether any other of the parties to these proceedings should be entitled to be heard.