Neutral Citation Number [2012] IEHC 368

THE HIGH COURT

Record No. 2006/1833P

BETWEEN

DAVID ARNOLD

PLAINTIFF

AND

DUFFY MITCHELL O'DONOGHUE (A FIRM)

DEFENDANT

AND

AND BAM BUILDING LIMITED (FORMERLY KNOW AS ROHCON LIMITED)

THIRD PARTY

Final draft of Judgment of Mr. Justice Hedigan delivered the 4th day of

September, 2012

1. Application

1.1 This matter comes before the Court by way of an application for determination of a preliminary issue. The third party seeks:-

(i) a Declaration that the partial compromise and/or settlement, through correspondence in August 2007, and/or the subsequent determination and conclusion of the said arbitral proceedings between the plaintiff and the third party constitutes a release and/or accord such as to render operative, in these proceedings, the provisions of Section 17 (2) and/or 35(1)(h) of the Civil Liability Act, 1961 as amended;

(ii) a Declaration that the plaintiffs release and/or accord with, the third party and/or subsequent determination and conclusion of the said arbitral process, has released and discharged the third party from all claims by the plaintiff against the third party which either were, or could have been, or should have been taken, pursuant to the rule in *Henderson v Henderson* (1843) 3 Hare 100, by the plaintiff in the said arbitral proceedings, including, in particular, all such claims as have been made by the plaintiff against the defendant herein in respect of which the defendant and the third party are concurrent wrongdoers within the meaning of Part III of the Civil Liability Act, 1961;

(iii) a Declaration that, by reason of the plaintiffs said release of, or accord with, the third party, and/or by reason of the subsequent determination and conclusion of the said arbitral process, the plaintiff is, for the purpose of these proceedings, to be identified, pursuant to section 17(2) of the Civil Liability Act, 1961 as amended, with the third party in its continuing proceedings against the defendant in accordance with section 35 (1) (h) of the said Act;

(iv) a Declaration that the plaintiffs claim against the defendant to these proceedings is deemed, pursuant to Statute, to be reduced in accordance with the provisions of Section 17 (2) of the Civil Liability Act 1961 as amended, including, in particular, to the extent that the third party would have been otherwise liable to contribute if the plaintiffs total claim had been paid by the defendant.

(v) if necessary, a Declaration that, by reason of the Main Contract and Sub Contract provisions, the plaintiff has no entitlement in any event to recover against the third party any damages arising from alleged defective work or design on the part of SIAC.

(vi) a Declaration that the plaintiff's claim as against the defendant, to the extent that it seeks damages in respect of matter for which the third party would have been liable to contribute, but for said release and accord, and/or the subsequent determination and conclusion of the said arbitral process, accordingly discloses no bona fide or reasonable continuing cause of action and is to be struck out;

(vii) a Declaration that the third party can, accordingly, have no remaining or other liability to contribute in respect of the damages (if any) properly claimable herein by the Plaintiff as against the defendant;

(viii) a Declaration that the defendant's third party proceedings accordingly disclose no reasonable cause of action against the third party;

(ix) an Order directing that the defendant's third party proceedings be struck out and that the third party be released from the proceedings;

(x) further and other relief, and;

(xi) costs.

2. Parties

2.1 The plaintiff and the third party entered into a building contract dated 1st March, 1999 whereby the third party agreed to build a new office building at Ballymoss House, Sandyford Industrial Estate for the plaintiff. The defendant was the plaintiff's architect. SIAC

Architectural Limited (hereafter referred to as 'SIAC') was to be the nominated sub-contractor in respect of the cladding, curtain walling and windows of the development and a written sub-contract was put in place between the third party and SIAC.

3. Factual Background
3.1 The works proceeded and were completed in May 2000. During this time, the third party received Interim Certificates from the defendant in respect of monies due to it, including monies payable on account of submissions from SIAC. These certificates were honoured by the plaintiff.

3.2 In September 2001, the defendant took the view that the work carried out by SIAC was defective and issued a further Interim Certificate through which they effectively de-certified the sum of €618,807.05 from the value of the monies otherwise due to the third party.

3.3 The third party had already paid SIAC in full for the sub-contract works, and the effect of the de-certification was to leave the third party out of pocket in respect of the de-certified monies, together with VAT.

3.4 The third party sued SIAC for the return of the monies by way of Summary Summons issued on the 13th December, 2001, but an application for summary judgment was rejected by the High Court on the 10th October, 2003. In the meantime, the plaintiff issued his own High Court proceedings in July 2002 directly against SIAC on foot of a collateral warranty provided to him by SIAC.

3.5 'Without prejudice' discussions took place between the plaintiff, the defendant, the third party and SIAC with a view to seeing whether a multi-party conciliation might take place which would resolve matters. Although the correspondence generated in this period was largely marked 'Without Prejudice', the plaintiff and the third party are agreeable to waiving that privilege for the purposes of the resolution of the within preliminary issue.

3.6 In correspondence during this period, the third party reiterated its position that the specification to which SIAC was working for the plaintiff and the defendant formed no part of its contract with the plaintiff and that the plaintiffs complaints concerning defective workmanship would have to be resolved with SIAC directly. The plaintiff continued to complain to the third party about the problems which he was encountering.

3.7 Ultimately the third party served a notice under Clause 38 (a) of the Building Contract by letter from its solicitors dated the 12th April, 2005 referring the dispute to conciliation. James O'Donoghue, architect, was duly appointed conciliator and, at his direction, the third party served a Statement of Case on the 26th September, 2005 on the plaintiffs solicitors, who thereafter participated in the conciliation to the limited extent of writing to the conciliator seeking adjournments before ultimately indicating in February 2007, that the plaintiff would not be participating in the conciliation process.

3.8 By letter dated 12th March, 2007, the third party referred the matters identified in the Notice of Dispute dated 12th April, 2005, to arbitration under Clause 38 (b) of the Building Contract.

3.9 After further negotiation, the disputed monies were put on joint deposit by the plaintiff in July 2006.

3.10 Ultimately, by letter from his solicitors dated 3rd August, 2007, the plaintiff confirmed that he was prepared to pay the money held on joint deposit out to the third party. The plaintiff proposed that the arbitration would continue only in respect of the issue of his liability to interest thereon.

3.11 By letter dated 14th August, 2007, the third party accepted the plaintiffs offer for payment of the monies in question, and agreed to confine the arbitration to the issue of interest and costs.

4. Submissions of the Third Party
4.1 The third party, as the moving party in this preliminary issue, submits that the partial compromise of the arbitration proceedings effected through this correspondence, and the subsequent determination of the arbitral process by the Final Award of the arbitrator on the issue of interest and costs, has the effect of constituting a release and/or accord pursuant to s. 17 of the Civil Liability Act, 1961 (hereafter referred to as 'the 1961 Act'), and that any further claim by the plaintiff against the third party in respect of the matters referred to arbitration is thus barred.

4.2 The third party claims that the plaintiff is to be identified with the settlement under s. 35(1)(h) of the Civil Liability Act, 1961, and cannot therefore claim against the defendant any sum in respect of alleged defective workmanship on the part of SIAC with regard to which the third party was also a concurrent wrongdoer. Accordingly, the third party argues that the defendant has no need or entitlement to claim indemnity in respect of such claim from the third party, against whom the defendant has issued third party proceedings in the above action.

4.3 The third party refers to Clause 38 of the Building Contract, which required the parties to refer any dispute to conciliation, and thereafter to arbitration, if conciliation failed to settle the dispute. The third party argues that the matters referred to arbitration were all of the matters referred to in the Notice to Refer dated 12th April, 2005, which included not only the entitlement of the third party to receive the monies de-certified by the defendant in September 2001 but also all issues concerning its liability for the alleged workmanship on the part of SIAC.

4.4 The third party submits that by correspondence in August 2007, the parties effected a partial compromise of the issues referred to arbitration. It is submitted that the plaintiff conceded his claim and must be taken as having acknowledged all the relevant assertions and entitlements of the third party.

4.5 The third party claims that, having failed to take issue with or dispute the matters asserted by the third party in its Notice to Refer or Statement of Case, the rule in *Henderson v Henderson* operates to preclude the plaintiff from ever seeking to revisit the matter again. It is further submitted that the rule in *Henderson* applies where parties have settled their disputes, rather than had them litigated through the courts.

4.6 The third party asserts that the defendant and the third party are "concurrent wrongdoers" within the meaning of s. 17 of the Civil Liability Act 1961 (hereafter referred to as 'the 1961 Act'). The third party further claims that the partial compromise of the arbitral proceedings constituted a "valid and complete accord" between the plaintiff and the third party within the meaning of s. 17 and that the conclusion of the arbitral proceedings had the effect that the plaintiff was no longer entitled to contend that the third

party bore any liability for the alleged defective workmanship of SIAC.

5. Submissions of the Plaintiff
5.1 The plaintiff, in his Defence on the Preliminary Issue, rejects the third party's claims and argues that the only dispute that was settled related to the plaintiffs liability to pay the sum in dispute to the third party, together with interest; and not any wider or other issue, such as the issue of the third party's liability to the plaintiff on account of the workmanship of SIAC.

5.2 The plaintiff further submits that, if the partial compromise and/or later conclusion of the arbitration did constitute a release and/or accord, it is unenforceable for want of consideration.

5.3 The plaintiff submits that, in order to show that a valid compromise exists, the asserting party must demonstrate that consideration exists, that a complete and certain agreement can be identified and that the parties intended to create legal relations. The plaintiff further argues that the existence of an actual or potential dispute is a prerequisite to the conclusion of a compromise.

6. Decision
6.1 Clause 38 (a) of the Building Contract provides:-

> "If a dispute arises between the parties with regard to any of the provisions of the contract such dispute shall be referred to conciliation in accordance with the Conciliation Procedure published by the Royal Institute of the Architects of Ireland in agreement with the Society of Chartered Surveyors and the Construction Industry Federation.
>
> If a settlement of the dispute is not reached under the conciliation procedures either party may refer the dispute to arbitration in accordance with Clause 38 (b)."

Under Clause 38 (a), any dispute between the parties was required to be referred to conciliation. When the plaintiff withdrew from the conciliation, the third party referred the matter to arbitration under Clause 38 (b), which provided that either party was entitled to refer "any dispute or difference" which had arisen between the parties to arbitration by giving notice of such dispute or difference.

6.2 With regard to the existence of a dispute, Russell in *Arbitration*, 23rd Ed., states as follows at para. 5.003:-

> "The court adopts an inclusive rather than a restrictive interpretation of what constitutes a dispute. Indeed, so long as it can reasonably be inferred that the claim is not admitted, that will suffice to constitute a dispute."

6.3 In *Amec Civil Engineering Limited v Secretary of State for Transport* (2005) 1 WLR 2339, Nix LJ stated at paras. 65-67:-

> "The words "dispute" and "difference" are ordinary words of the English language. They are not terms of art. It may be useful in many circumstances to determine the existence of a dispute by reference to a claim which has not been admitted within a reasonable time to respond; but it would be a mistake in my judgment to gloss the word "dispute" in such a way. I would be very cautious about accepting that either a "claim" or a "reasonable time to respond" was in either case a condition precedent to the establishment of a dispute.
>
> Secondly, however, like most words, "dispute" takes its flavour from its context. Where arbitration clauses are concerned, the word has on the whole caused little trouble. If arbitration has been claimed and it emerges that there is after all no dispute because the claim is admitted, there is unlikely to be any dispute about the question of whether there had been any dispute to take to arbitration. And if the claim is disputed, any argument that the arbitration had not been justified because at the time it was invoked there had not been any dispute is, it seems to me, unlikely to find a receptive audience (although it appears that it did in *Cruden Construction Ltd v Commission for the New Towns* [1995] 2 Lloyd's Rep 387). So it is that in this arbitration context the real challenge to the existence of a "dispute" has arisen where a party seeking summary judgment in the courts has been met by a request for a stay to arbitration and the claimant has wanted to argue that an unanswerable claim cannot be a real dispute. In that context it was held in *Hayter v Nelson* [1990] 2 Lloyd's Rep 265 that for the purposes of section 1 of the Arbitration Act 1975 "there is not in fact any dispute" where a claim is unanswerable, even if disputed. However, for the purposes of section 9 of the Arbitration Act 1996, from which that particular language had been dropped, this court held, applying *Ellerine Bros (Pty) Ltd v Klinger* [1982] 1 WLR 1375, that an unadmitted claim gave rise to a dispute, however unanswerable such a claim might be: see *Halki Shipping Corpn v Sopex Oils Ltd* [1998] 1 WLR 726.
>
> It follows that in the arbitration context it is possible and sensible to give to the word "dispute" a broad meaning in the sense that a dispute may readily be found or inferred in the absence of an acceptance of liability, a fortiori because the arbitration process itself is the best place to determine whether or not the claim is admitted or not."

6.4 It is clear from the facts here that prior to the referral to arbitration in March 2007, the plaintiff failed to admit or concede the matters asserted by the third party in its Notice to Refer dated 12th April, 2005, as amplified in its Statement of Case delivered on 26th September, 2005. The plaintiff was aware of what the third party regarded as being in dispute and failed to accept the third party's position. This failure was sufficient to constitute a "dispute or difference" capable of being referred to arbitration and which was, in fact, duly so referred. The plaintiffs argument to the effect that the only matter in dispute concerned his obligation to repay the de-certified monies plus interest is, to my mind, not correct. The matters put in issue by the third party included the question of any alleged liabiltiy on the part of the third party for defective workmanship of SIAC.

6.5 It is worth noting at this juncture the exchange of correspondence between the solicitors for the plaintiff and the solicitors for the third party in August 2007, which effected a partial compromise of the issues referred to arbitration. By letter of 3rd August, 2007, the solicitors for the plaintiff wrote to the solicitors for the third party in the following terms:-

> "In relation to your claim as against our client. Our client is prepared to pay the principal sum of €891,796.15 which we are presently holding on joint deposit account between our two respective firms. We have asked Bank of Scotland to forward us the forms necessary to release those monies. As you are aware it will require the joint signatories of the person's name by each of our firms.
>
> In relation to your client's claim for interest in addition to the principal sum, our client does not admit that he has any liability in relation to same and we propose that you would proceed with the Arbitration only in relation to this point."

6.6 By letter of 14th August, 2007, the solicitors for the third party wrote to the solicitors for the plaintiff in the following terms:-

> "We hereby accept your offer for payment of the principle [sic] of €891 ,796.15 and to confine the arbitration simply to the issue of interest payable on that sum and costs. We would suggest that an arbitration confined to the issue of interest could be dealt with simply by the exchange of witness submissions followed by the exchange of reply submissions dealing with anything new arising out of the others submissions. Do you agree?"

The sum of €891,796.15 was paid on 17th September, 2007 and the issue of contractual interest was subsequently determined by the arbitrator and the sum on foot of same paid on 4th November, 2008.

6.7 The canons of contract construction are well understood and have been set out by the Supreme Court in *Analog Devices BV v. Zurich Insurance Company* [2005] 1 IR 274, where the court adopted the following statement of principles relating to contractual interpretation as set out by Lord Hoffman in the House of Lords decision in ***I. C. S. v. West Bromwich B.S***. [1998] 1 WLR 896 at pp. 912 to 913:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be next mentioned, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Limited v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.

(5) The 'Rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would, nevertheless, conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v. Salen Rederierna A.B.* [1985] A.C. 191, at p. 201:

> 'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'"

6.8 In this regard, the Court refers to the third party's Notice to Refer dated 12th April, 2005 and the Statement of Case delivered on 26th September, 2005. The third party's assertions in these documents was not assented to or conceded by the plaintiff. The "dispute or difference" between the parties resulting from the documents constituted the subject matter of the arbitration. The third party had, from the outset, asserted that the appropriate remedy for the plaintiff in respect of defective workmanship was to pursue SIAC directly.

6.9 In *Allied Marine Transport Limited v Vale De Rio Doce Navegacao ("The Leonidas D")* (1985) I W.L.R. 925, GoffL.J. stated:-

> "We recognise, of course, that there may be circumstances in which, for some special reason, parties may agree to abandon a reference while leaving the claim intact - for example, if they decide to bring an arbitration to an end so that the matter can be resumed before different arbitrators, or before the court. But if parties simply agree to bring an arbitration to an end - to drop hands, so to speak -the ordinary inference must be that they intend that the relevant claim or claims should also go."

Although in that case, Goff L.J. was discussing a scenario where both parties agreed to "drop hands", the same reasoning applies equally where only one party chooses not to further contest the arbirtation, as was the case here. In effect, the plaintiff failed to contest and instead chose to concede his claim. The "ordinary inference" must be that any relevant argument that he might have sought or been expected to offer must also be regarded as having been abandoned.

6.10 The rule in *Henderson v. Henderson* (1843) 3 Hare 100 is well established and well known. Wigram VC stated:-

"Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because, they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

6.11 In *A.A. v The Medical Council*, [2003] 4 IR 302, Hardiman J quoted with approval the following passage from *Johnson v Gore Wood & Co. (A Firm),* (2002) 2 AC I:-

> "*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."

6.12 The rule operates to preclude parties from seeking to reopen not only matters which have been expressly made the subject of a compromise between them, but also all related and ancillary disputes and issues which could have been, and should have been, brought forward as part of the dispute which formed the subject matter of the compromise.

6.13 It is accepted that the rule in *Henderson v Henderson* should not be applied across the board, with no regard to the circumstances of the case. In A.A., Hardiman J stated:-

> "Rules or principles so described cannot, in their nature, be applied in an automatic, or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the courts for the determination of his civil rights or liabilities."

However, the plaintiff in the case at hand has not pointed to any circumstances which would militate against applying the rule in *Henderson v. Henderson*. On the evidence before the Court, it is clear that the partial compromise whereby the plaintiff conceded the third party's entitlement to the monies in dispute has the effect of precluding the plaintiff from seeking to revisit the matter.

6.14 S. 17 of the Civil Liability Act, 1961 provides:-

> "(1) The release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are to be discharged.
>
> (2) If no such intention is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers in accordance with paragraph (h) of subsection (1) of section 35; and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total claim shall be reduced, or to the extent that the wrongdoer with whom the release or accord was made would have been liable to contribute if the plaintiffs total claim had been paid by the other wrongdoers, whichever of those three amounts is the greatest.
>
> (3) For the purpose of this Part, the taking of money out of court that has been paid in by a defendant shall be deemed to be an accord and satisfaction with him."

6.15 S. 11 of the 1961 Act provides:-

> "(1) For the purpose of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (in this Part called the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them.
>
> (2) Without prejudice to the generality of subsection (1) of this section-
>
> (a) persons may become concurrent wrongdoers as a result of vicarious liability of one for another, breach of joint duty, conspiracy, concerted action to a common end or independent acts causing the same damage;
>
> (b) the wrong on the part of one or both may be a tort, breach of contract or breach of trust, or any combination of them;
>
> (c) it is immaterial whether the acts constituting concurrent wrongs are contemporaneous or successive."

In the case at hand, the plaintiff is suing the defendant, who, in tum, has issued third party proceedings against the third party for damages and indemnity in respect of the defective workmanship of SIAC.

6.16 In *Lynch v. Beale* (The High Court, Unreported, 23rd November, 1974) Hamilton J held that a main contractor, his nominated sub-contractor, and the architect were all "concurrent wrongdoers" within the meaning of the 1961 Act in respect of loss sustained by a hotel owner due to the internal collapse of the hotel and the subsidence thereof, all alleged to have been caused by negligence and breach of contract on the part of all persons in the construction of the hotel in question. The circumstances that presented in *Lynch* are on all fours with this case, and following the logic in that decision, it would follow that the defendant, the third party and SIAC are all "concurrent wrongdoers" within the meaning of the 1961 Act.

6.17 An issue arises as to whether the conclusion of the arbitral proceedings constitute a "release of, or accord with, one concurrent wrongdoer" within the meaning of s. 17 of the 1961 Act.

6.18 It is well settled that an agreement in compromise of an action constitutes a valid accord. *Chitty on Contracts* (30th Ed.) states as follows at para. 22.013:-

> "In order to establish a valid compromise, it must be shown that there has been an agreement (accord) which is complete and certain in its terms and that consideration (satisfaction) has been given or promised in return for the promised or actual forbearance to pursue the claim. It is a good defence to an action for breach of contract to show that the cause of action has been validly compromised."

6.19 In *British Russian Gazette v Associated Newspapers Limited* (1933) 2 K.B. 616, Scrutton LJ stated as follows at p. 643:-

> "Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement for which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative."

6.20 In *El-Mir v Risk* (2005) N.S.W.C.A. 215, the Supreme Court of New South Wales stated:-

> "'The question whether there has been an accord and satisfaction is one of fact' (Day v McLea (1889) 22 QBD 610 at 613 per Lord Esher M.R. *Neuchatel Asphalte Company Limited v Barnett* (1957) 1 W.L.R. 356. It turns upon determining the parties' intentions, which may be discerned from the terms of any document said to constitute all or part of the agreement or in the surrounding circumstances..."

6.21 Pursuant to the *Leonidas D* decision, the ordinary inference to be drawn from a party 'dropping their hands' and bringing an arbitration to an end, is that they intend whatever relevant claim or defence they had, would have had or should have had, to the claim of the other party to be considered abandoned and gone, in the absence of any indication of a contrary intention.

6.22 The exchange of correspondence between the plaintiffs solicitors and the third party's solicitors of August 2007 operated as a valid acknowledgment by the plaintiff of the third party's claims in relation to the dispute referred to in the arbitration. There was a clear intention on the part of the plaintiff that he no longer intended to seek to advance the contention that the third party bore any liability for the alleged defective workmanship on the part of SIAC. In return, the third party agreed to accept the payment of the monies in dispute and to discontinue the "dispute or difference" which formed the basis of the arbitration.

6.23 The plaintiff has submitted that the third party did not provide valid consideration in return for the plaintiffs agreement to pay the disputed monies. However, the consideration provided was provided through the third party giving up its rights to have the issue of alleged liability to the plaintiff for the defective workmanship on the part of SIAC determined in the arbitral proceedings. The plaintiff was thereby released from his obligation to further partake in the arbitral process and to submit to the determination of the arbitrator in this regard.

6.24 In the circumstances, in my judgment, the partial compromise of the arbitral proceedings constituted a valid and complete accord between the plaintiff and the third party within the meaning of s. 17 of the 1961 Act. The conclusion of the arbitral proceedings has the effect that the plaintiff was thereafter no longer entitled to contend that the third party bears any liability for the alleged defective workmanship on the part of SIAC.

6.25 Accordingly, I would grant the relief sought herein by the third party and will hear counsel on the form of the order.