Neutral Citation No. [2005] IEHC 47

THE HIGH COURT

RECORD No. 2003/1078 S

BETWEEN

CHADWICKS LIMITED

PLAINTIFF

AND
P. BYRNE ROOFING LIMITED

DEFENDANT

AND ALSO
THE HIGH COURT

RECORD No. 2003/1079 S

BETWEEN

CHADWICKS LIMITED

PLAINTIFF

AND
PATRICK BYRNE

DEFENDANT

Judgment of Mr. Justice Clarke delivered the 25th day of February, 2005

1. In these proceedings the plaintiffs seek to recover €89,029.34 as against P. Byrne Roofing Limited ("the defendant company") on foot of goods supplied and in respect of Mr. Byrne in the second proceedings on foot of a guarantee in respect of the indebtedness of the company.

2. Both matters came before the court by way of motion for summary judgment. The issue which I have to determine is as to whether, and if so to what extent, the defendants have established grounds so as to permit them to avoid judgment at this stage and have the matter remitted for plenary hearing.

3. While there is an assertion on the part of Mr. Byrne at para. 9 of an affidavit dated 20th October, 2003, sworn in the proceedings against him personally to the effect that he is advised that the guarantee upon which he is sued is invalid, that issue was not pursued at the hearing before me. However, the liability of Mr. Byrne on foot of the guarantee cannot exceed the liability of the company for goods supplied so that each of the points made by the company as to its defence to the claim against it are equably applicable to Mr. Byrne.

4. The real issue is, therefore, as to whether the company has established a sufficient basis for defending the action. Finally it should be noted that a variety of affidavits were sworn in both sets of proceedings both on behalf of the plaintiffs and the respective defendants. It was agreed in the course of the hearing before me that I could have regard to any affidavits so sworn in either proceedings even if technically that the relevant affidavit appeared to have been sworn in the other proceedings.

The Facts

5. It is common case that for the period between 1998 and the latter part of 2002 a course of business developed between the parties which was broadly along the lines deposed to by Pat Walsh, the group credit manager of the plaintiff company, as follows:-

> "Notwithstanding the sending of a specific invoice for a specific sum relating to the supply of an item or group of items the defendant company would ordinarily pay rolling amounts to the plaintiff in consideration for the supplies received. As such the defendant company would not discharge the specific invoices."

6. This process would appear to have continued without any dispute on either side. The plaintiff from time to time furnished invoices to the defendant company who in turn paid them on the rolling basis above described.

7. In early 2003, the defendant company was, on the basis of such invoices, apparently indebted to the plaintiffs in a sum which the plaintiffs contended amounted to €111,984.25. Correspondence thereafter ensued in the course of which the defendant company, through its solicitors, in a letter of 27th August, maintained three matters by way of defence as follows:-

> (1) It was contended that the plaintiff owed the defendant company a credit in respect of goods supplied by Tegral in the sum of €33,880.00.
>
> (2) It was contended that the invoices reflected overcharging in the sum of €5,952.40.
>
> (3) Finally it was contended that certain of the goods the subject matter of the invoices had not in fact been received by the defendant company though, at that stage, the amount attributable to such invoices was not specified.

8. The Tegral issue was finally compromised which resulted in a reduction of the sum claimed from the initial amount of €111,984.25 to the sum now claimed of €89,029.34 representing a credit (inclusive of V.A.T.) of €22,954.00. While it was contended at the hearing that the manner in which the plaintiff had dealt with this issue on their affidavits was unsatisfactory it seems to me that the Tegral issue no longer remains of any relevance to the issues between the parties.

9. The real issue between the parties stems from the third contention referred to above. In order to understand this dispute it is necessary to set out the manner in which the plaintiff accepted orders for goods and effected delivery of the goods so ordered. In an affidavit of the 11th October, 2004, Mr. Patrick Walsh described it as follows:-

> "I say that when an order was phoned into our sales representative on behalf of the defendant company, the plaintiff company would produce a four part docket. The first part and third part of the docket (pink and yellow in colour respectively) would go with the goods when they were being delivered on site. The first part of the docket would be signed by a representative on behalf of the defendant company and the third part of the docket would remain with the goods on site. I say that occasionally and if there was nobody on site where the goods ordered by the defendant were being delivered to, the said goods would be left on site for the defendant. The first part of the docket would not be signed and it would be taken away by the driver of the goods but the third part of the docket would remain with the

goods. I say that the second part (white in colour) of the docket is the invoice which would have been posted out to the defendant company on a weekly basis. The fourth part (green in colour) of the docket is a copy of the invoice which remains with the plaintiff. I further say that statements were sent by the plaintiff to the defendant on a monthly basis."

10. In general terms the defendants do not dispute that the above was the practice. However they draw attention to the fact that some of the delivery dockets with which they have been furnished either are not signed or are signed by persons whom, it is contended, had no authority to acknowledge receipt of goods on behalf of the defendant company not being employees thereof. In relation to the general operation of that system, Mr. Byrne in an affidavit of 5th December, 2004, states that in the ongoing day to day business operation of his company, each individual invoice was not necessarily scrutinised as and when received and the system relied in part on a level of trust between the parties who have an ongoing relationship over a period of time. He goes on to state that the company did not do a full and forensic investigation of all the invoices sent by the defendant until the current dispute arose. On the basis of those investigations it is contended that certain goods were not in fact delivered to the company. In that regard it should be noted that at the hearing it was made clear that the defendants were not contesting that the defendant company ordered the goods in question or that the goods in question were in fact delivered to the sites specified in the order. What is in dispute is as to whether the goods were in fact delivered to the defendant company at that site. The distinction arises from the nature of the building business in which the defendant company was involved. It would operate in conjunction with other contractors on the same site. Therefore, it is contended, a delivery to the site itself did not necessarily entail the goods being placed into the custody of the defendant company. Both sides have filed lengthy affidavits analysing the disputed invoices. There does not appear to be any contest but that the total value of the contested invoices comes to sum €30,681.85. For reasons that I refer to later each of the disputed invoices refers to a period in or after November 2002. The defendant company therefore puts its defence on this basis:-

(a) In respect of that sum it has raised an arguable defence to the effect that goods to that value were not in fact delivered by the plaintiff in accordance with its contract with the defendant company;

(b) Arising from that fact it may, it is argued, reasonably be inferred that further failure to deliver occurred at a time prior to November, 2002, in respect of which the defendant company does not have adequate documentation to conduct an appropriate analysis.

11. The reason for the cut off date in November, 2002, stems from the fact that by virtue of the rolling account referred to above and the application by the plaintiffs, in accordance with normal practice, of any sums received to the longest outstanding debt, all sums invoiced in respect of a period prior to the commencement of November, 2002, have in fact been paid. The defendant company states that it does not have copies of the delivery documents prior to November 2002. Thus any case which the defendant company may wish to make in respect of such sums must amount to a contention that they were paid in circumstances where they should not have been paid.

12. It is against that factual background that I am required to determine whether the plaintiff is entitled to summary judgment.

The Law

13. In *Aer Rianta CPT -v- Ryan Air Limited* [2001] 4 I.R. 607, the Supreme Court in allowing the defendant's appeal in that case and remitting that action to plenary hearing indicated that a defendant's hurdle on a motion for summary judgment was a low one and the jurisdiction to grant such summary judgment was one to be used with care. In following the *National Westminster Bank Plc. -v- Daniel* [1993] 1 W.L.R. 1453, it was determined that it was for the court to decide whether the defence set out in the affidavits together with the documents exhibited therewith was credible or in other words whether there was a fair or reasonable probability of the defendant having a real or *bona fide* defence. Furthermore, the establishment of a fair and reasonable probability of the defendant having a real or *bona fide* defence was not the same thing as a defence which would probably succeed or even a defence whose success was not improbable. Ultimately in following *Crawford -v- Gillmor* [1891] 30 L.R.Ir 238, the court determined that the fundamental question to be posed on an application such as this remained:-

"Was it very clear that the defendant had no case? Was there either no issue to be tried or only issues which were simple and easily determined? Did the defendant's affidavits fail to disclose even an argument offence?"

14. It would seem that different considerations will arise insofar as a defence may be based on a contention of fact as opposed to a contention of law. Where the facts are in dispute the court should only grant summary judgment where either:-

(a) Even on the facts asserted by the defendant no defence would arise; or

(b) The facts asserted by the defendant amount to a mere assertion of a defence where there is no credible evidence for the defence which the defendant seeks to assert. *First National Commercial Bank Plc. -v- Anglin* [1996] 1 I.R. 75. Thus it may be clear that the facts asserted by the defendant cannot be true by reference to indisputable or cogent evidence and in the absence of any real evidence put forward by the defendant. In addition the disputed facts may turn upon a relatively straightforward construction of documents which the court is in as good a position to construe on a motion for summary judgment as on a full hearing.

15. Where the defence, at least in part, depends on an issue of law then it is a matter for the discretion of the court to determine whether that issue should be tried on the summary motion or remitted for further consideration at plenary hearing dependant, in the main, or whether the issue is sufficiently nett or straightforward to be easily determined within the confines of a summary judgment motion.

16. Finally it may be observed that the defence may amount to a mixed question of law and fact in which case the court must exercise a judgment as to whether the factual matters in respect of which a credible dispute has been established combined with any legal issues which are not capable of being resolved on a summary judgment motion give rise to a fair or reasonable probability of the defendant having a real or *bona fide* defence.

Application to this Case

17. It was contended by counsel for the plaintiff that there was, in reality, no factual dispute in the case. In support of this proposition he indicated, doubtless correctly, that if the matter were to go to a plenary trial the plaintiff's evidence would be no different from that already before the court on affidavit on this motion. That is to say the plaintiff would produce its records and would have to deal with the situation that arises from the fact that some of the delivery dockets may not have been signed either at all or by a person who can be identified as a proper representative of the defendant company. However that analysis applies only to the plaintiff's case. The fact that the plaintiff will be able to establish (and indeed it is not contested) that an appropriate order was made and he may be able to establish that the goods the subject of the order were delivered to a site specified on the order form

may well establish a prima facie case against the defendant. However, it is open to the defendant to attempt to persuade the court that notwithstanding the above two matters the mixed question of law and fact as to the precise contractual obligations of the plaintiff in relation to delivery to a site where there were multiple contractors working thereon and compliance with such obligations should be determined in his favour with a resulting finding that the plaintiff had failed to comply with his contractual obligations as to delivery. Whether such a defence could succeed would depend on the detailed consideration by the court of such evidence as the defendant might offer as to the course of business between him and the plaintiff, perhaps the course of business in the industry generally, and also the factual situation on the ground in relation to the various sites to which the disputed deliveries were apparently made. In addition it appears that there may be evidence, which again will need to assessed, from the defendant company's quantity surveyor which may tend to suggest that a significantly greater volume of goods are recorded as having been delivered as per the records compared with those which were actually utilised in the building projects to which they were delivered.

18. In all the circumstances I am not prepared to hold that the defendant company has not made out an arguable case or a fair or reasonable probability of his having a real or *bona fide* defence in respect of the sum of €30,681.85. Having taken the view, therefore, that the case should go to plenary hearing I would follow the policy indicated by Hardiman J. in *Aer Rianta* where, in such circumstances, at p. 625 he indicated that it was not desirable for the court to enter further into the merits of the matter.

19. The defendant company (and as a knock-on effect Mr. Byrne in his personal action) face a more difficult task in respect of the balance of the claim.

20. Insofar as it is not contested that invoices were immediately supplied in respect of each item soon after its alleged delivery which invoices were not, as to their amount, or in any other respect questioned for some considerable period of time I do not believe that it is now open to the defendant to question the rates at which he was charged for the various goods. I am not satisfied that any real evidence has been presented on the hearing of this application which would cast, in those circumstances, any real doubt on the appropriate level of charging engaged in by the plaintiffs.

21. The defence to the balance of the claim (which amounts to a sum of €58,645.98) stems from an assumption that there may, in the period prior to November 2002, be instances of non-delivery of a type similar to that which is alleged to have occurred subsequent to that time. However in respect of any such alleged instances the defendant company faces additional difficulties.

22. Firstly not only was the relevant invoice not contested at the time but it was in fact paid. In order to accept that there may have been significant levels of failure to deliver sufficient to afford the defendant company a complete defence it would be necessary to accept that the plaintiff company had over a relatively lengthy period of time ordered goods, been invoiced in respect of them, paid those invoices on a rolling basis, had not in fact received the goods concerned, and had not in fact noticed the fact that a significant volume of goods had not been received but had been paid for.

23. I am not satisfied that any such defence (or more accurately counterclaim) is, in truth, credible in the sense in which that term is used in *Aer Rianta*. In those circumstances the plaintiff is entitled to judgment but the question remains as to whether the defendant is entitled to pursue a counter-claim. The question also arises as to whether in the discretion of the court there should be a stay upon execution in respect of the claim pending a resolution of the counter-claim.

24. Thus the height of the defendant companies entitlements seems to me to be to require it to be the subject of a judgment in the sum of €58,645.98 but remaining entitled to pursue, by way of counter-claim, any matters which it wished.

25. In all the circumstances of the case it would not appear to me to be appropriate to shut out the defendant from pursuing such counter-claim but having regard to the fact that the goods which it may be inferred the defendant will wish to claim were not delivered were subject to invoices in a timely fashion which were not questioned and in fact paid it would not seem to me to be appropriate to grant a stay.

26. In the circumstances it therefore appears to me that the appropriate order to make would be to grant the plaintiff judgment in that sum of €58,645.98 and to remit to plenary hearing the plaintiffs claim in respect of the balance of the sum claimed being €30,681.85 permitting the defendant, in addition to defending that claim, leave to bring by way of counter-claim any further issues which he wishes to maintain.