Neutral Citation Number: [2011] IEHC 338

THE HIGH COURT

COMMERCIAL

2008 4767 P

BETWEEN

JAMES ELLIOTT CONSTRUCTION LIMITED

PLAINTIFF

AND

IRISH ASPHALT LIMITED

DEFENDANT

Judgment of Mr. Justice Charleton delivered the 14th day of July 2011.

On May 25th 2011, judgment in favour of the plaintiff was pronounced on the issue of liability for the ruination of the Ballymun Central Youth Facility building. This was constructed by the plaintiff over 2004-2005. The Court decided that the cause of the condition of the building was pyrite heave and that the defendant, as supplier of the stone infill which had expanded, was in breach of contract of sale and answerable in damages. Central to the question of damages was the correct measurement of the cost to the plaintiff of rehabilitating the building. The plaintiff had undertaken this work in 2008-2009 at considerable expense. Huge additional monies were expended by the plaintiff on testing by experts in order to determine the cause of the damage to the building and on the costs of litigation. After the trial on liability, the parties then needed some time to prepare for the trial of the issue of damages. This was set for June 28th 2011, which was the 59th day of trial. The four days set aside for hearing were not needed because, in the meantime, the quantity surveyors for the plaintiff and the defendant met over several days and agreed on the correct measure of cost for the rehabilitation of the building. The Court much appreciates the efforts of all those involved. The 60th day of this case was on the 12th of July 2011 and was taken up in detailed argument on the issue of liability for costs and whether a stay should be put on the agreed order for damages and whatever order the Court might make as to liability for costs. This judgment addresses these issues.

Damages
The measure of damages is agreed at €2,659,114.05. Of this sum I understand that €359,114.05 relates to a payment to Ballymun Regeneration Limited, the employer on the building contract. The plaintiff has already rehabilitated the building out of its own resources of manpower and money. On the costs of litigation and the expenses of experts, the plaintiff has already paid out, and I am using round figures now, €2,400,000.00 and this sum is likely to be sought to be increased by 50% or so in the bill for taxation of costs which, if not agreed, will be submitted to the Taxing Master for expert adjudication. Thus, again using round figures, the plaintiff is currently out of pocket to the tune of €4,700,000.00 and because of a liability to Ballymun Regeneration Limited, that sum will increase to close to €5,100,000.00. The ultimate cost of the accumulation of damages and costs is said on behalf of the plaintiff to be close to €6,300,000.00.

Having decided that the defendant is liable, there will be a decree in damages in favour of the plaintiff for €2,659,114.05. I now consider in turn the issue of liability for costs and the question of a stay on those orders.

Costs
The recoverable costs include the costs of the case and each day of the trial, all costs which have been made costs in the cause by order of judges hearing preliminary applications together with the costs reserved to the trial judge, this Court, by deValera J. on 22 August 2008 and McKechnie J. on 18 February 2010. It is clear that whatever order I make will include all of those costs.

In Veolia Water UK plc and others v Fingal County Council [2006] IEHC 240, Clarke J analysed the proper approach which should be taken by a court deciding on the exercise of its inherent discretion as to costs following on a lengthy trial. This Court has followed the principles therein set out on prior occasions and proposes to do so in this instance as well. That analysis commends itself as encompassing prior decisions and reducing disparate authorities to a series of well-ordered propositions which bring predictability to the uncomfortable area of judicial discretion as to costs following on trial. There follows the costs principles set out in that judgment by Clarke J:

> 2.1 It is trite to state that in recent times litigation has become more complex. Amongst the consequences of an increased complexity in litigation are:-
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> > (i) That litigation as a whole (including interlocutory steps) has become more expensive so that much more turns upon the precise order for costs which may be made at the end of such litigation, or in respect of significant interlocutory matters; and
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> > (ii) That it is increasingly the case that numbers of relatively discreet issues arise in the course of litigation so that it is possible to form a view as to whether the result of the litigation as a whole (or, indeed, the result of an individual interlocutory application) might not properly provide the sole basis for the award of costs in respect of the matter determined, having regard to the fact that not all of the issues canvassed at the hearing may have been determined in favour of the party ultimately succeeding on the substantive issue or issues.
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> 2.2 It seems to me that having regard, in particular, to the very substantial sums of money that may be at stake when a court is considering how to award costs, it is incumbent on the court, at least in complex cases, to at least give consideration to whether it is necessary to engage in a more detailed analysis of the precise circumstances giving rise to such costs having being incurred before awarding costs. Furthermore it seems to me to be incumbent on the court to

attempt to do justice to the parties by fashioning, where appropriate, orders of costs which do more than simply award costs to the winning side.

2.3 Having said the above it seems to me that two matters traditionally taken into account by the courts in the award of costs remain of the highest significance and require to be re-emphasised.

2.4 The first is that costs always remain discretionary and anything which is said concerning the principles which ought normally to apply in considering the award or refusal of costs should be subject to the caveat that the court always remains open to the suggestion that, by virtue of special or unusual circumstances, it is appropriate to depart from what otherwise might be the normal course in respect of an order for costs in a particular case. What I am about to outline is, therefore, in my view, properly described as the default position which should apply in the absence of such special or unusual circumstances. It should not be taken as, in anyway, diminishing the courts entitlement to depart from such a position in an appropriate case.

2.5 Secondly the overriding starting position should remain that costs should follow the event. Parties who are required to bring a case to court in order to secure their rights are, prima facie, entitled to the reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings. Similarly it seems to me that the courts generally (and the Commercial Court in particular) should be prepared to deal with the costs of contested interlocutory applications on the basis of an analysis of whether there were proper grounds for bringing, on the one hand, or resisting, on the other hand, the relevant application. In that context it may be appropriate to distinguish the case of a routine application which would have to be brought in any event as part of the ordinary course of the proceedings and which is not contested to the extent that the costs of the application are increased. In such a case it may well be appropriate that the costs either be reserved to the trial judge or be made costs in the cause.

2.6 Where, as is increasingly the case, an interlocutory application of significance to the interests of the parties and the conduct of the litigation, is the subject of significant dispute, such applications frequently require to be listed in a manner similar to the listing of full hearings. In such cases it is appropriate, in general terms, to consider the costs of such applications as stand alone items to be assessed by virtue of the "event" being the issue which is determined by the interlocutory application.

2.7 Before departing from this latter aspect of the matter it is worth noting that there are certain cases where even a determination as to what the "event" is, may be a matter of some complexity. For reasons which I will address in due course this case is one of them.

2.8 However, as indicated above, it seems to me that the starting point of any consideration of costs has to be to identify what the "event" is and, thereby, identify the winning party. In the ordinary way, if the moving party required to bring either the proceedings as a whole (where the costs of the litigation as a whole are under consideration) or a particular interlocutory application (where those costs are involved) in order to secure a substantive or procedural entitlement, which could not be obtained without the hearing concerned, then that party will be regarded as having succeeded even if not successful on every point. The proceedings, or the relevant application as the case may be, will have been justified by the result. Where the winning party has not succeeded on all issues which were argued before the court then it seems to me that, ordinarily, the court should consider whether it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful.

2.9 Where the court is so satisfied, then the court should attempt, as best it can, to reflect that fact in its order for costs. Where the matter before the court involved oral evidence and where the evidence of certain witnesses was directed solely towards an issue upon which the party who was, in the overall sense, successful, failed, then it seems to me that, ordinarily, the court should disallow any costs attributable to such witnesses and, indeed, should provide, by way of set off, for the recovery by the unsuccessful party of the costs attributable to any witnesses which it was forced to call in respect of the same issue. A similar approach should apply to any discrete item of expenditure incurred solely in respect of an issue upon which the otherwise successful party failed.

2.10 Similarly where it is clear that the length of the trial of whatever issues were before the court was increased by virtue of the raising of issues upon which the party who was successful in an overall sense, failed, then the court should, again ordinarily, award to the successful party an amount of costs which reflects not only that that party should be refused costs attributable to any such elongated hearing, but should also have to, in effect, pay costs to the unsuccessful party in relation to whatever portion of the hearing the court assesses was attributable to the issue upon which the winning party was unsuccessful.

2.11 Thus, for example, in O'Mahony v. O'Connor Builders (Unreported, High Court, Clarke J. 22nd July, 2005) for the reasons set out in the judgment of that date, I concluded that the issue under consideration should be resolved in favour of the plaintiff (who was defendant on the issue concerned). However it is also clear from the judgment that in respect of a significant number of issues raised at the hearing I found against the plaintiff. At a subsequent hearing I concluded that the original hearing was lengthened by approximately one day by virtue of the fact that the plaintiff had raised those additional issues. The hearing took in total three days. In the circumstances I determined in respect of an application for costs that it was appropriate to award the plaintiff the costs of the issue but confined to a single day's hearing. That single day was calculated on the basis that the plaintiff was entitled, in general terms, to be regarded as the winner of the issue in that he had, as defendant on the issue, successfully resisted the making of the orders sought against him. However I was also of the view that the plaintiff was, prima facie, obliged to pay the defendant one day's costs to reflect the fact that the defendant had been, unnecessarily, put to the cost of an additional day's hearing by virtue of the plaintiff having raised unmeritorious issues.

2.12 Apart from the fact that such an approach seems to me, in general terms and subject to the overriding discretion to which I have already referred, to be calculated to meet the justice of similar cases, it also seems to me that such an approach has the merit of discouraging parties from raising additional unmeritorious issues. This applies to cases where a plaintiff may prolong litigation by relying on additional unmeritorious grounds further to the grounds upon which the plaintiff may be successful. It equally applies to a case, such as O'Mahony, where the defendant on the issue (i.e. the plaintiff in the overall proceedings) though successful in the overall sense in resisting the application, nonetheless prolonged the hearing by a significant margin by raising unmeritorious grounds of defence.

> 2.13 I adopted a similar approach to the costs of a hearing involving leave to seek judicial review of a planning decision which resulted in a judgment in Arklow Holidays v. An Bord Pleanála and Others (2006) IEHC 15. As appears from that judgment, the applicant obtained leave on some but not all grounds. An exercise similar to that adopted in relation to the costs in O'Mahony followed.
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> 2.14 It seems to me that an approach along those lines is appropriate in more complex litigation involving a variety of issues even where, in the overall sense, one party may be said to have succeeded and the other party may be said to have failed. Before leaving the general principle I should, however, add that it seems to me that an approach such as that which I applied in O'Mahony, and Arklow Holdings and which I propose applying in this case, may not be appropriate in more straightforward litigation, notwithstanding the fact that some element of a plaintiff's case or a defendant's defence may not have succeeded. The fact that such an additional issue was raised should only affect costs where the raising of the issue could, reasonably, be said to have affected the overall costs of the litigation to a material extent.

At the end of my judgment as to liability in this case, I attempted to summarise lengthy findings of fact in the following way:

> 268. Any one of the following pieces of evidences would have entitled the plaintiff to succeed: the monitoring results showing the floor slab rising while the foundations remain essentially static; the crystal heave evidence; the swelling tests; the state of the building showing heave coupled with failure of the infill material on crucial tests; or the chemical test results on the infill coupled with the necessity to remove it because of danger to concrete elements. Because of the state of the evidence, I have no option but to find in favour of the plaintiff on four of these five elements. Had there been only one finding for the plaintiff, I would still be obliged to find in favour of the plaintiff because a probability is thereby established. I have analysed the evidence separately in each of those blocs in order to come to that conclusion. I have based no conclusion, on this separate re-analysis of the evidence, on the bulk chemistry tests. I therefore hold for the plaintiff on the basis that the foundations are sufficient and stable coupled with the nature of the material under the floors; coupled with the monitoring results; coupled with the swell tests; coupled with the crystal heave evidence. Each of these is separate. Cumulatively, I also hold for the plaintiff in respect of any combination of these findings coupled with the foundation stability finding.
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> 269. The material supplied by Irish Asphalt to Elliott Construction was not of merchantable quality. Therefore, there was a breach of contract. In addition, the implied condition as to fitness for purpose was an obligation by Irish Asphalt to Elliott Construction under the contract. The material was not fit for purpose. The exclusion clause was not incorporated into the contract by the defendant as against this plaintiff. Even had it been, in the context of the case, it would be neither fair nor reasonable to enforce it.

The only issue on which I decided against the plaintiff in the course of the 58 day hearing as to liability was that related to damage to concrete foundational elements of the building due to leachage of sulphuric acid from the stone infill under the floors of the building. Consulting my notes on the trial, it is apparent that the controversy on that issue occupied less than a day of hearing, accumulating the evidence on both sides. I decided in favour of the expert on behalf of the defendant on a very narrow ground and without in any way dismissing what I regarded as a genuine opinion from the expert for the plaintiff as ill-considered; quite the opposite. This issue did not affect the overall costs of litigation to any material extent.

It follows that the plaintiff is entitled to the entirety of the costs.

Stay

Two issues impact on the decision of a court to grant a stay; what are the prospects for a successful outcome to an appeal, and where does the balance of convenience lie in favour or against such a stay. Under Order 58 rule 18 of the Rules of the Superior Courts, an appeal to the Supreme Court does not automatically operate as a stay on an order for damages or costs unless the High Court so orders, or the Supreme Court imposes a stay on appeal. Such an appeal may only be brought under rule 19 where an application has first been made to the High Court.

It has been argued for the defendant that this Court made serious errors in its judgment on liability. A gigantic notice of appeal has been drafted. The focus in oral argument was principally on 7 issues. I will concisely consider each in turn; concisely because I do not intend to operate as an appeal court against myself, and nor should I so approach the matter.

On the issue of sulphur, it is claimed that I misconstrued the relevant standards in favour of the plaintiff. At trial, two experts on each side, at least, gave a lengthy exegesis on the construction of the standards. My own analysis was uninfluenced by either side. Even still, it is apparent that there is an argument to be made both for my finding and against it. That, however, does not matter, as the decision against the defendant on liability for damage to the building could have been made apart from any such issue and based, for instance, on the monitoring evidence which over a year showed alarming, and otherwise inexplicable, swelling of the floor of the building.

Material analysis was another area. Because the samples were said to have passed the tests by the quarry five years before the infill had to be dug out, it is claimed that any test on the stone after five years in the ground under the building is irrelevant. That argument can be disposed of on the basis of the monitoring evidence. Of itself, furthermore, the argument is not convincing because any building product can be expected to have durability consistent with its purpose, and cannot be expected to be seriously harmful to property.

On minute scrutiny of the stone, it is said that the plaintiff produced not a single true expert to support the case, whereas the defendant's experts were of the first eminence. That is simply wrong.

On the swelling test, it is argued that the approach of those conducting the test was haphazard, that the entire testing protocol of the plaintiff's experts was made up on a random approach and that it was carried out on "home-made and cracked equipment". Well, there was certainly a crack in one of the concrete pipes as part of the equipment used but that, as I held in my judgment on liability, was caused by the swelling. Further, in the absence of the deliberate introduction of the relevant bacteria the swelling tests could be regarded as even more impressive than as stated in my judgment.

It was argued that the construction put by the Court on the statutory tests incorporated into contracts for sale as to conditions of merchantability and fitness for purpose was wrong. I really do not think so. The analysis presented in the judgment would not come as a surprise to any lawyer grounded in reality. Prior case law was relevant to an ancient statutory scheme which has been completely remoulded, and for very good reasons.

The Court should not, it is said, have dismissed the application of the exclusion clause in the contract of sale. While I am not at all persuaded that I was wrong about this point, and while it depended on an assessment of live witnesses and not simply documents, the relevant precedents are capable of argument in a number of different ways.

Finally, what the Court found was fair and reasonable as to the enforceability of the contract terms limiting liability is not on the case law to be easily disturbed on appeal, barring an error of principle, nonetheless that finding of law is capable of argument.

Anything can be argued, it may tritely be said, but how strong do such arguments have to be to pass the first stage of the test whereby the High Court should put a stay on an order for damages or costs? It is clear that the loosing party does not have to establish a probability of success on appeal, and my view is that it is not enough at the other end of the scale that an appeal is taken in good faith. A party to litigation should not be saddled with having to prove to the trial judge that she or he was wrong, or to demonstrate that as a probability by way of an appeal about an appeal before the Supreme Court, should the High Court refuse a stay. On the other hand, many people are self-deceptive or in extreme cases delusional about their own lives, and the course of the hearing and appeal of trials is replete with well intentioned litigants who are also simply wrong as to their view. The test, therefore, is whether a reasonable prospect of a contrary argument succeeding is shown as to any ground sought to be argued on appeal. This does not have to amount to a probability but it should be more than a bare possibility. Only the contract issues meet this test. To an extent, there is a slight divergence as to the meaning of what is good faith between the approach which I take and that taken by Clarke J. on the first limb of the test on the grant of a stay pending appeal in Danske Bank A/S trading as National Irish Bank v Niall McFadden [2010] IEHC 119. For completeness, I wish to quote his approach since I highly value his analysis and also because I agree completely with him on the second limb of the test:

> 2.1 It is clear from both Redmond v. Ireland & Anor [1992] 2 I.R. 362 and Irish Press Plc v. Ingersoll Irish Publications Limited [1995] 1 I.L.R.M. 117 that, in general terms, two broad issues will ordinarily arise for consideration in relation to whether a stay should be placed on an order of this Court pending appeal to the Supreme Court.
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> 2.2 The first issue is that, in order that a stay might be considered, any such appeal must be bona fide. For example, McCarthy J. in Redmond noted that a heavy responsibility lay on the legal advisers of those seeking a stay to assist the court on the reality of an appeal and also noted that appeals have been known in the past to have been brought for tactical rather than bona fide reasons.
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> 2.3 However, this issue does not arise in the current application. Counsel for NIB quite properly accepted that any appeal which might be brought in the circumstances of this case would be bona fide (while, of course, asserting that it would ultimately fail). Indeed, counsel himself drew attention to the fact that, on the issue of construction on which Mr. McFadden ultimately failed (despite succeeding on other issues), I had used the phrase "on balance" as a means of describing my view on relevant question. I am, therefore, satisfied that counsel was quite correct in characterising this as a case where, in the event of an appeal, any such appeal would be a genuine appeal with genuine issues to be determined by the Supreme Court. Indeed it is entirely possible that NIB might itself wish to cross appeal on the issues on which it was unsuccessful.
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> 2.4 Where the appeal is genuine, it seems clear from Ingersoll that the court should conduct a process analogous to the balance of convenience test which the court is required to apply in determining whether to grant an interlocutory injunction. It is obvious that a successful party in this Court may lose out to a greater or lesser extent and with a greater or lesser degree of permanency as a result of having a stay placed on any order obtained. Likewise, it is equally clear that an unsuccessful party who fails to obtain a stay, but who ultimately succeeds on appeal, may suffer, again to a greater or lesser extent and again with greater or lesser degree of permanency, as a result of the fact that a court order has been effective against them in the intervening period. In the words of McCarthy J. in Redmond the court is, in those circumstances, required to "maintain a balance so that justice will not be denied to either party".
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> 2.5 To those considerations I would add one further matter. In the context of the interlocutory injunction jurisprudence, I expressed the view in Evans v. I.R.F.B. Services (Ireland) Limited [2005] IEHC 107, that, in a case where there was significant potential detriment on both sides, it seemed to me "that it is necessary to consider whether there is any form of injunction which might meet, to the greatest possible extent, the legitimate concerns as to detriment of both parties". It seems to me that an analogous principle applies in the context of a stay. It may be that a stay on terms or the imposition of terms without a stay can ameliorate the potential detriment to both sides in the event that either a stay is granted and the appeal fails or a stay is not granted and the appeal succeeds.

The balancing exercise in favour of or against a stay in this case involves several factors. Firstly, the plaintiff as the party succeeding on the trial has born a burden that would have deterred most litigants. The plaintiff has honourably born the bulk of the expense of rehabilitating the building. Despite succeeding in the claim, it faces a delay in the prosecution of the appeal which will depend on the resources made available to an over-stretched Supreme Court, which is not sitting for this month because of the burden of existing work, and on the dispatch with which the constitutional and legislative arrangements are pursued in order to establish an intermediate appellate court. It is hard to predict that an appeal in this case will be heard, despite 11 other cases depending on it and thus establishing a measure of public interest, before 2013 at the earliest. Secondly, this is balanced against the declaration of a dividend by the defendant company in 2010 exceeding €3,000,000.00. The defendant says that it cannot pay, and that were any money to go to the plaintiff that those funds would never be recovered. I do not accept that the plaintiff will not be able to pay and I am sure that they will be aware of the necessity to make proper provision for this case in their accounts and will be appropriately advised as to whence any other course of action may lead. The plaintiff has born the burden of this litigation and of the rehabilitation of the building by a careful management of resources, and in the future can be predicted to act as prudently in business as it has in the past and in carrying through on a justified complaint.

Decision
Balancing these factors, a conditional stay is appropriate on the order for damages and costs. The defendant is to pay the plaintiff €1,000,000.00 in damages on account and to make a contribution of €500,000.00 towards the costs to date. This is to be done by close of business on the 28th day of October 2011. On that basis the orders as damages and costs will be stayed on an undertaking by the defendant, which I have already received through counsel, to mention the public interest in the case before the Supreme Court and to seek the earliest possible expedited appeal in that court's commercial list.