Neutral Citation Number: [2007] IEHC 130

THE HIGH COURT

[2001 No. 247 S]

BETWEEN

JOHN K. ROGERS TRADING AS JOHN ROGERS ENGINEERING

PLAINTIFF

AND
IARALCO LIMITED

DEFENDANTS

Judgment of Mr. Justice O'Neill delivered the 16th March, 2007

1. The plaintiff is an engineer and had an engineering business. The defendants are a German owned company registered in Ireland and manufacture parts for motor cars. They have contracts in that regard with Audi, Volvo, VW and Porsche.

2. In May, 1999 the defendants subcontracted work to the plaintiff. This work involved the sending of certain car body parts.

3. This arrangement obviously worked well, notwithstanding some complaints by the defendants concerning the plaintiff's adherence to the defendants' payment terms.

4. In October, 2000 the defendants wished to subcontract additional work. This was the polishing of Magne Bumpers and the cutting of rubber strips. Agreement was reached between the plaintiff and defendants for this work to be taken on by the plaintiff.

5. Unfortunately this additional work, very quickly turned out to be the undoing of the entire commercial relationship between the two.

6. On the 27th March, 2001, when that relationship was clearly over the plaintiff sent five invoices to the defendants claiming the sums that are now sought in these proceedings, save for credit being given for the sum of IR £27,104 paid by the defendants to the plaintiff on foot of a settlement of injunction proceedings taken by the defendants against the plaintiff on the 29th March, 2001 and settled on the 30th March, 2001.

7. I propose to deal with the claims made in these proceedings by reference to those invoices.

8. Before so doing I should say that where a conflict of evidence exists, I prefer the evidence of Mr. Anderson and Mr. Balfer.

9. The first of these invoices is invoice number 9311004 which is for the sum of IR£15,000 and is claimed as a balance due for the polishing work on the Magne Bumpers.

10. It was common case that the plaintiff took up this work in November, 2000. Because the work was more complex than that hitherto undertaken by the plaintiff there was an initial training or trial period of about 3 weeks during which the plaintiff worked on scrap parts. Also because of the uncertainty concerning performance the parties did not agree on a price for the work, at the beginning. I am satisfied that there was an understanding that the plaintiff would be paid a price which covered his costs and a normal profit margin.

11. The defendants via Mr. Anderson conducted an exercise to ascertain the defendants' costs for doing this work, which had been done in-house by the defendants. Mr. Anderson estimated this at 87p per unit. Having regard to the fact that the defendants were subcontracting this work their expectation was that the plaintiff could do this work for a similar price.

12. In this regard it is clear that a yawning gulf opened up between the expectations of the parties.

13. On the 8th December, 2000 the plaintiff presented to the defendants a breakdown of his costs for doing this work. This put the cost per unit at 1.81 each. Buffing and sanding added a further .30 bringing the total cost to 2.11 per unit. If one adds 20% to that you get a figure of 2.53 per unit which is the figure requested by the plaintiff. Comparing this to the 87p which was the defendants expectation, clearly, there was going to be a difficultly in arriving at an agreed price.

14. The plaintiff attended at the defendants' premises on the last day for business before Christmas 2000. He requested an urgent payment to enable him to meet his wage bill. After some checking and with Mr. Anderson's agreement he was given a cheque for in excess of IR£16,000 which was calculated on the basis of 87p per unit and an arrangement was made to sort out a price after Christmas.

15. Unfortunately the plaintiff suffered a bout of ill health after Christmas. A meeting did not take place until the 22nd January, 2001. At this meeting the issue of the price to be paid for this polishing work was discussed. The plaintiff demanded a sum of IR£45,000 which he said in evidence was a calculation of the cost of the work to him without any profit. The defendants requested a detailed breakdown of his costs. The plaintiff agreed to supply this and on the 23rd January, 2001 he submitted a document which set out his costs amounting to IR£36,340.75p together with supporting documentation.

16. A further meeting took place on the 31st January, 2001. At that meeting the plaintiff was offered IR£25,000 which he refused. I am satisfied that the discussion was such as to raise in the minds of the defendants an apprehension that the plaintiff would not continue supply and would withhold materials in his possession the property of the defendants and required for producing the defendants' parts.

17. A break was requested in the meeting to enable the defendants to discuss the situation amongst themselves.

18. Following this, the defendants offered the plaintiff IR£30,000 for this work provided he would forthwith furnish an invoice in full and final settlement of this claim.

19. There was consensus that the plaintiff would not continue doing this work.

20. I am satisfied that the plaintiff agreed to accept IR£30,000 and to furnish the invoice as requested. The following day the plaintiff did send an invoice in the agreed terms and the defendants paid a cheque for just under IR£14,000 as the balance of the IR£30,000.

21. In the foregoing invoice furnished to the defendants on the 27th March, 2001, the plaintiff now seeks to recover the balance of IR£15,000, of the IR£45,000 initially claimed by him.

22. In making that claim in these proceedings he does so on the basis that there was duress which forced him to accept the IR£30,000.00. The nature of the duress alleged by the plaintiff in evidence was that the defendants knew that he needed the money to pay wages and that he was recovering from surgery.

23. In this regard the plaintiff places reliance on the case of *D & C Builders Limited v. Rees* [1965] 2 Q.B. at 617 a decision of the English Court of Appeal. This case is authority to the effect that where a creditor accepts a lesser sum than the amount actually and lawfully due, in the absence of accord and satisfaction, or if not restrained by promissory estoppel, he is entitled to sue and recover the full amount of the debt due, and where there has been intimidation, there cannot be a true accord.

24. In my opinion the plaintiff's case differs markedly from the *D & C Builders Limited* case. In the first place, the sum claimed by the plaintiff i.e. IR£45,000 was not an undisputed amount due as a debt. This was what was claimed by the plaintiff, but it was at all times disputed by the defendants and ultimately it was compromised at the figure of IR£30,000.

25. Secondly the factors put forward by the plaintiff as constituting duress or intimidation could not amount to that. The fact that the plaintiff was under the pressure of having to pay wages could not fairly be viewed as a duress exercised by the defendants. In commercial life the pressure of having to pay wages is universal. Of course, in certain circumstances and because of the fragility of a business that pressure may be greater than in other circumstances. However the pressure to pay wages must be the most common factor underlying all commercial arrangements. Whether or not the defendants took advantage of the plaintiff's difficulties, is in my view wholly immaterial. These parties were at arms length to each other. Neither had any fiduciary duty to the other and hence each was entitled to make the best bargain they could, short of course, of culpable misrepresentation, which does not arise here.

26. In any event, I am not satisfied that the evidence establishes that the defendants did seek to take advantage of the plaintiff's difficulty with regard to the payment of his wage bill. It was clear from the evidence that the defendants had a genuine expectation of paying a price, somewhere in the region of what they estimated to be their own cost of doing this work. The plaintiff was claiming an amount which was approximately three times the defendant's estimate. The amount ultimately agreed i.e. IR£30,000 represents a price of 1.68 per unit i.e. almost double the defendants' own original estimate of cost, and in paying this price, I accept the evidence of Mr. Anderson, and Mr. Balfer that they felt somewhat hard done by but were willing to do so because of a feeling of vulnerability as to their own ability to continue supplying parts to the major car manufactures with whom they dealt, a feeling induced by the discussion at the meeting of the 31st January, 2001.

27. It is also interesting to note that if one factors in Mr. Abbott's major criticism of the defendants exercise to estimate the cost of doing this work, namely, that the production per hour was grossly over estimated, so that a worker was expected to complete 20 parts per hour whereas experience demonstrated that only half that production was attainable; if one accepted that Mr. Abbott's criticism was valid, instead of a cost of 87p per part one would end up with a cost of 1.70p per part, almost exactly what was ultimately paid by the defendants.

28. Thus in my view the plaintiff cannot assert duress on this ground.

29. The fact that the plaintiff had undergone surgery was unfortunate but there was nothing in the evidence to suggest that he had not sufficiently recovered to be competent to conduct the business of the meeting on the 31st January, 2001.

30. I am satisfied that these parties made a lawfully binding agreement on the 31st January, 2001 whereby the plaintiff agreed to accept IR£30,000 in settlement of his claim in respect of the Magne Bumper polishing. He cannot now go back on that agreement so as to recover the sum of IR£15,000 claimed, and so in my view this sum is not recoverable.

31. The next invoice number 933100B was for the sum of IR£18,221.25p. This was for the difference between a price of 7.50 and 3.620 per unit for strips of rubber cut and packaged by the plaintiff.

32. The agreement for this work was made late in October, 2000 and work began at the beginning of November, 2000. It is common case that a price of 3.62 per unit was agreed. The plaintiff's complaint is that the work turned out to be different from and greater than that demonstrated when he agreed to take on this work.

33. Specifically, the difference was, that instead of cutting rubber from a roll and throwing the cut strips into a large container, the plaintiff's workers were required to take strips from a container, cut them to the required length and then package them neatly in boxes that contained 96 strips each, these boxes in turn being labelled and packaged in a larger container. In addition, the plaintiff was required to store a stock of raw and finished material so that the defendants could draw off that stock as required.

34. It may be the case that some additional work was involved in this operation and was initially envisaged by the plaintiff. However, I am satisfied that the draft agreement which was furnished to the plaintiff in late October and in respect of which the plaintiff complained that the defendants could not be got to sign the same, did provide for doing the job in the manner of which the plaintiff now complains, and the plaintiff did the work in this way from the very beginning as evidenced by the earliest invoices furnished for it.

35. I am also satisfied that the plaintiff made no complaint whatsoever about the price of 3.62 until late in February 2001 notwithstanding that meetings took place between the parties on the 22nd January, 2001 and 31st January, 2001 where the plaintiff's grievance with the price in respect of another product i.e. the Magna Bumpers was comprehensively discussed.

36. As a result of his complaints and demands in late February, 2001 the defendants agreed to increase the price to 7.50 from the beginning of March, 2001 but refused to pay the addition retrospectively.

37. The sum of IR£18,221.25 is for the difference between 7.50 and 3.62 on all units produced back to the start of this operation at the beginning of November, 2000.

38. In my view there is no basis for this claim. The plaintiff agreed to a price of 3.62 and did not seek to renegotiate it until late February, 2001. If he was asked to do work between November 2000 and February, 2001 that he had not contracted to do he was entitled to refuse to do this work. He did not do that.

39. Nor indeed am I satisfied that the aspects of the work about which the plaintiff now complains were significantly beyond or additional to that which he had agreed to do.

40. I am satisfied that this aspect of the plaintiff's claim fails.

41. The next claim made was on invoice number 9311007 is for the sum of IR£13,087.59p, and is claimed as the cost of acquiring a variety of equipment for the purpose of the work done for the defendants.

42. The plaintiff claims that in early March, 2001 when negotiating the wind-up of their relationship the plaintiff says the defendants agreed to purchase back this equipment at what it had cost the plaintiff. The defendants say they did agree to purchase the equipment back, but not at cost, but at fair market value. The defendants say that for this purpose they commissioned a valuation of this equipment.

43. The plaintiff challenges whether the valuation obtained was in respect of the equipment of the plaintiff's. I am satisfied that on the balance of probability, the valuations obtained were in respect of the equipment which was in fact taken back by the defendants.

44. I prefer the evidence of the defendants on this question and I am satisfied that the defendants agreed to, only to pay fair market value for this equipment. The value placed on the equipment at the time was IR£1,380.

45. The defendants as part of the settlement of the 30th March, 2001 paid a sum of IR£5,000 on account, in respect of the amount to be paid for this equipment. It follows in my view that the defendants are entitled to recover the balance overpaid in respect of this equipment as is claimed in their counterclaim.

46. The next invoice, number 9311005 is for the sum of IR£3,288.82 which is claimed in respect of money allegedly held back by the defendants for defective parts applied by the plaintiff.

47. Beyond the bald assertion of this claim there was no evidence as to how and in respect of which invoices or goods this claims arises. The plaintiff has wholly failed to demonstrate how this claim arises. That being so this claim cannot succeed.

48. The final claim made by the plaintiff is for the sum of IR£15,000 and is in respect of a severance payment.

49. I am satisfied that the defendants did agree in early March, 2001 to pay a severance payment of IR£10,000 to the plaintiff but on condition that there was a smooth transfer back to the defendants of the functions subcontracted to the plaintiff.

50. For this purpose in my view it was necessary for the plaintiff to give back to the defendants all of their stocks of the defendants' materials.

51. Manifestly this did not happen. The plaintiff made the claims that are the subject matter of these proceedings by a series of invoices furnished on or about the 27th March, 2001 and declined to surrender the defendants' materials, claiming a lien on these in respect of the debts claimed to be due.

52. Whether the plaintiff was entitled to that lien or not is immaterial. Having found herein that he was not entitled to recover the sums claimed clearly he was not entitled to the lien claimed. The claim to a lien was in itself, however, wholly inconsistent with the smooth transfer, which was the condition which had to be fulfilled for the payment of the severance payment.

53. As this did not happen and as the defendants were compelled to seek injunctive relief to recover their materials, it is quite clear that the plaintiff was not entitled to the severance payment. That being so this claim fails also.

54. In conclusion I would dismiss the plaintiff's action and the defendants are entitled to judgment on their counterclaim for the euro equivalent of IR£3,865.00