Neutral Citation Number: [2006] IEHC 20

THE HIGH COURT
COMMERCIAL

[2004 No. 738 S]

BETWEEN

THOMAS POWDERLY

PLAINTIFF

AND
PATRICK McDONAGH AND ANN McDONAGH

DEFENDANTS

Judgment of Mr. Justice Kelly delivered the 31st day of January, 2006

Introduction
1. In 1999 the defendants purchased Corbalton Hall, Skryne, Co. Meath. This is a period house constructed between 1790 and 1801 under the design and supervision of the architect Francis Johnston.

2. They decided to carry out substantial renovation work on the house. It is a protected structure. The plaintiff contends that the defendants intended to spend approximately €25 million on the renovation works. Whether that figure be accurate or not it is quite clear that, even by today's standards, the works in question were going to be very costly and indeed have proved to be so to date.

3. The defendants commissioned an architect and quantity surveyor to advise them and they in turn made contact with the plaintiff who was retained as the main contractor for the works.

4. Despite the large sums of money involved it is remarkable that no written contract was executed to govern the relationship between the plaintiff and the defendants.

5. The defendants believed that the principal works to be undertaken by the plaintiff would be governed by the articles of agreement and conditions of contract published by the Royal Institute of Architects of Ireland (1996 Edition) for use when quantities do not form part of the contract. Indeed support for that understanding is to be found in a letter dated 11th July, 2002, from the defendants' then architect to the plaintiff which confirmed the intention of the defendants to enter a formal contract with the plaintiff for a sum of €5.95 million including V.A.T. The letter pointed out that formal contract documents would be assembled and tabled for signing by all parties as soon as possible thereafter. Whilst the letter does not mention the form of contract to be entered into it clearly envisaged a formal written agreement being executed. In the event, no such agreement was executed. Furthermore, according to the plaintiff's evidence, he was retained the previous August and was actually on site and working since 10th September, 2001.

6. The lack of a formal written contract governing the relationship between the plaintiff and the defendants has not assisted in the resolution of the disputes which have now occurred.

7. At this stage it appears that the plaintiff has been paid in excess of €9.8 million. His contract has been terminated by the defendants. They believe that they have overpaid him and that a reasonable estimate of the value of the works carried out to date is €7.845 million.

8. The plaintiff disagrees and brings these proceedings for the recovery of €2,803,763.99 which he says is due to him from the defendants.

These proceedings
9. On 22nd June, 2004 these proceedings were commenced by summary summons.

10. It was not until 25th April, 2005 that a motion was brought before the Master seeking leave to enter final judgment. That motion was made returnable for 8th June, 2005. It was adjourned and on 22nd June, 2005 the defendant brought a motion to the Court seeking to stay the proceedings pursuant to the provisions of s. 5(1) of the Arbitration Act 1980. That motion was made returnable for 11th July, 2005.

11. On 20th July, 2005 the plaintiff brought a motion returnable for 25th July, 2005 seeking to have the proceedings entered into the Commercial List.

12. Notwithstanding the delay in bringing such an application I admitted the proceedings and gave directions concerning an exchange of affidavits so as to enable the application to stay the proceedings be heard at the earliest opportunity.

13. I heard the motion seeking a stay of the proceedings on 17th October, 2005 and refused the order sought. I did so because I was not satisfied that the defendants had demonstrated the existence of any binding agreement to arbitrate their differences.

14. On that occasion I also gave directions for the exchange of the necessary affidavits to enable the motion for judgment to be heard. The motion was heard by me last month and this is my judgment upon it.

The claim for summary judgment
15. The plaintiff does not seek to recover by way of summary judgment the entire of the money in respect of which the proceedings have been brought.

16. The full sum of €2,803,763.99 claimed in the summary summons is broken up into three parts.

17. The first is a sum of €1,333,720.85 which is allegedly due on foot of an architect's certificate of 10th May, 2004.

18. A sum of €1,134,767.62 is claimed in respect of works allegedly carried out by the plaintiff for the defendants during the period 1st March, 2004 to 11th May, 2004. (Apparently incorrectly claimed in the summons as being due in respect of the period 1st April, 2004 to 11 May, 2004).

19. The third part of the claim is for €335,275.52 in respect of a sum allegedly due for retention monies retained by the defendants which, following the termination of the contract, is allegedly due to the plaintiff.

20. There was an extensive exchange of affidavits with many issues debated. As a result of that exchange it is accepted by the plaintiff that a significant portion of his claim cannot attract summary judgment and will have to be remitted to plenary hearing. However, in respect of two elements of the claim he contends that the defendants have not demonstrated any triable issue by way of defence and that summary judgment should be granted to him.

21. The first sum in respect of which summary judgment is now sought is one of €645,886.62. That is said to be due on foot of the architect's certificate issued on 10th May, 2004. The total sum specified in that certificate is the €1,333,720.85 which I have already described as being the first part of the plaintiff's claim. However, that sum is inclusive of €687,834.23 payable to sub contractors. The defendants have informed the plaintiff that they have in fact discharged all of the monies due to those sub contractors. He accepts that this is so, although he contends that he has seen no evidence of such payment. Giving credit for that payment therefore the balance which is allegedly due is €645,886.62.

22. The next sum in respect of which summary judgment is claimed is one of €564,180 being part of the amount claimed in respect of works carried out by the plaintiff from 1st March, 2004 to 11th May, 2004. It is said that this amount is one which was acknowledged by the defendants' agent as being approved by him and being due to the plaintiff.

23. I will have to examine each of these claims in turn to ascertain whether summary judgment is available to the plaintiff in respect of them. Before doing so I should mention the line of defence which is being taken by the defendants.

24. Apart from denying that the plaintiff is entitled to summary judgment for reasons which I will address presently the defendants also contend that they will be both defending and counterclaiming in these proceedings.

25. First, they contend that there are substantial defects in the works which have been carried out by the plaintiff.

26. Secondly, in so far as he makes a claim for retention monies, they contend that they are not due at the present time in the light of the defects in question.

27. Thirdly, they contend that the claim in respect of sub contractors cannot arise as they have been paid directly.

28. Fourthly, there is a claim that the plaintiff has overcharged the defendants. They contend that the number of hours worked has been inflated and they contend that they are entitled to a discount for under-productivity.

The claim on foot of the architect's certificate

29. The evidence demonstrates that throughout the period when the plaintiff worked on the defendants' property he did so on foot of plans and drawings prepared by the defendants' then architects and engineers. He alleges that throughout the building works he was invited to just three site meetings with those architects and engineers and was not given plans or drawings prepared by them.

30. There was a clerk of works employed directly by the defendants on site at all relevant times. The plaintiff says that it was necessary for him, his foreman and his workmen to examine any plans and drawings in the site office used by that clerk of works. The plaintiff and his workmen were under the supervision of that clerk of works.

31. The plaintiff says that the arrangement made between him and the defendants was that he was to be paid on a "time and materials" basis. This involved his workmen "clocking in" and "clocking out" at the site. Each hour worked by each workman was calculated as were the materials supplied.

32. Every four to six weeks he assembled the calculations of hours worked and invoices from suppliers and a schedule of claim was sent to a quantity surveyor retained by the defendants. A discussion would take place between the plaintiff's quantity surveyor and those of the defendants and after such negotiations a figure would be agreed upon. The defendants' quantity surveyor would then send a recommendation to the defendants' then architects and on foot of that a certificate for payment and a cheque in satisfaction in the amount appearing on that certificate would follow from the defendants. It is on foot of one such certificate that the first part of this claim is made.

33. On 11th May, 2004, the plaintiff and his workmen were instructed by the clerk of works and the defendants' then architects that they were to leave the building site that day and take their equipment with them. No prior notice of termination was allegedly given and he says that the defendants also terminated the employment of their then architects, clerk of works and quantity surveyor at the same time. The reason given to the plaintiffs for this termination was allegedly fundamental defects discovered in the building of a forty foot tower.

34. Prior to this termination of the plaintiff's retainer, the architect's certificate underpinning the claim for €645,886.62 was issued.

35. The certificate in question is one issued by the Royal Institute of the Architects of Ireland. It purports to be a certificate for payment giving the defendants' then architects name and address at its top. The employer is identified as the defendants and the contractor as the plaintiff. It contains an issue date and a valuation date and gives the instalment number as 28/29. The form of the certificate reads as follows:-

> *"I hearby certify that in accordance with the terms of the contract dated _____ for the works described as Corbalton Hall – restoration and refurbishment for which the contract sum is _____ payments as detailed below are due:"*

36. The certificate then sets out the value of the works completed and makes a deduction for retention showing a balance of €9,857,493.49 of which €8,680,592.31 has already been certified. That gives a balance due to the contractor of €1,176,901.18 plus V.A.T. of €156,819.67.

37. The certificate then identifies the amount due for payment by the employer to the contractor in the sum of €1,333,720.85. It is signed by the defendants' then architect who is described as being a member of the Royal Institute of the Architects of Ireland.

Architects certificates

38. The issue as to whether a defendant is entitled to counterclaim or set-off other claims against monies due on foot of an architect's certificate issued in favour of a contractor is one which has occupied judicial attention for many years.

39. Perhaps the best analysis of the position is contained in the judgment of Murphy J. in *P.J. Hegarty & Sons Limited v. Royal Liver*

Friendly Society [1985] I.R. 524.

40. The high water mark of judicial dicta on the topic from the plaintiff's point of view is that expressed by Lord Denning M.R. in *Dawnays Limited v. F.G. Minter Limited* [1971] 1 W.L.R. 1205. There he said:-

> *"Every businessman knows the reason why interim certificates are issued and why they have to be honoured. It is so that the sub contractor can have the money in hand to get on with his work and the further work he has to do. Take this very case. The sub contractor has had to expend his money on steel work and labour. He is out of pocket. He probably has an overdraft at the bank. He cannot go on unless he is paid for what he does, as he does it. An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross claims, whether good or bad – except so far as the contract specifically provides. Otherwise any main contractor could always get out of payment by making all sorts of unfounded cross claims."*

41. In respect of that passage Murphy J. said:-

> *"Whilst the passage cited may contain good commercial sense and indeed represent an attractive example of the staccato prose style of the distinguished former Master of the Rolls, it would seem to suggest that an important legal inference should be drawn from the needs of the parties rather than their deeds. In any event the passage quoted was unanimously rejected in all of the speeches in the House of Lords in Modern Engineering v. Gilbert Ash [1974] AC 689 and, more importantly, by the President of the High Court in John Sisk & Son Limited v. Lawter Products BV [Unreported, High Court, Finlay P., 13th November, 1976]. Lord Diplock, while recognising that cash flow was a matter of importance to building contractors, pointed out that it was likewise of importance in a range of industries or occupations ranging from ship building to shop keeping and was, perhaps, critical of the emphasis placed by Lord Denning on that consideration when he stated (at p. 718) as follows:-*
>
> > *'It is not to be supposed that so elementary an economic proposition as the need for cash flow in business enterprises escaped the attention of judges throughout the 130 years which had elapsed between Mondel v. Steele and Dawnays' case in 1971 or of the legislature itself when it passed the Sale of Goods Act in 1893.'*

42. A not dissimilar criticism appears in the speech of Lord Salmon at p.724 as follows:-

> *'My lords, I cann ot help thinking that building contractors and sub contractors and architects advising building owners know far more about the building trade than I or, indeed any judges can hope to do. I am not prepared to approach any contract on the presupposition that the parties must have meant to exclude or curtail the right of set-off. I am content to consider the language of each contract and see whether it has done so'."*

43. This last comment is apposite. Most, if not all, of the cases dealing with architects' certificates have been ones where the certificate has been issued on foot of a formal written contract (generally in a standard form) which contains detailed provisions which may curtail or restrict or even exclude common law or equitable rights of set-off or the ability to raise a counterclaim to a duly issued architect's certificate. In the present case of course there is no such written agreement.

44. Murphy J. went on to consider the propositions to be gleaned from the decision of the House of Lords in *Modern Engineering v. Gilbert Ash*. He summarised them as follows:-

> *"1. That an amount included in a certificate (whether interim or final) does not constitute a debt of a particular character and enjoys no special immunity from any cross claim or right of set-off to which the debtor may be entitled.*
>
> *2. One starts with the presumption that each party to a building contract is entitled to all those remedies for its breach as would arise by operation of law including the remedy of setting up a breach of warranty in diminution or extinction of the price of materials supplied or work executed under the contract.*
>
> *3. Parties to building contracts or sub contracts, like the parties to any other type of contract, are entitled to incorporate in their contract any clause they please. There is nothing to prevent them from extinguishing, curtailing or enlarging the ordinary rights of set-off.*
>
> *4. Whether the parties have in fact curtailed or restricted the common law or equitable right of set-off depends upon the construction of the agreement between them."*

45. In the present case there is no written agreement between the parties. It is not therefore possible to look to a single document setting out the respective rights and entitlements of the parties. I must therefore examine whether there are terms in the contract between the plaintiff and the defendants to which the test adumbrated by Finlay P. in *John Sisk and Son Limited v. Lawter Products BV* can apply. He said:-

> *"I believe the true test to be not whether the common law right of set-off has, by the terms of the building contract been unequivocally excluded, but rather as to whether all the relevant terms of the building contract are in any particular event inconsistent with the exercise in that event of such a right of set-off."*

46. I am not persuaded that the contractual arrangements entered into here, which at this stage at any event, have to be gleaned from the voluminous affidavits which have been exchanged exclude any defence which the defendants may have, either at common law or equity and whether by way of set-off or counterclaim or otherwise. Insofar as such defences are sought to be asserted I am satisfied that the defendants have demonstrated a triable issue in respect of them. Accordingly, as their right to set-off and counterclaim have not been excluded they are entitled to rely on them in answer to the claim on foot of the architect's certificate.

47. It may be that at trial the issue of this certificate by the defendant's then architect in favour of the plaintiff may prove to be a powerful piece of evidence in support of the plaintiff's claim. But it does not, in my view, entitle the plaintiff to summary judgment having regard to the matters deposed to on affidavit by the defendants.

48. Accordingly I decline to grant summary judgment in respect of this part of the plaintiff's claim.

The second claim

49. This is part of a sum allegedly due in respect of works carried out from 1st March, 2004 to 11th May, 2004.

50. The basis of the claim to entitlement to summary judgment of this sum is to be found in an affidavit of Patrick Shanley, sworn on 2nd November, 2005.

51. Mr. Shanley is a chartered quantity surveyor retained by the defendants. He was not involved in the negotiations leading to the employment of the plaintiff nor was he engaged in the project at that time.

52. In the course of his affidavit he carries out an analysis on foot of what he describes as an "approximate reasonable estimate of costs" which he prepared dealing with this part of the claim. He says as follows:-

> *"In relation to the claim in respect of 1st March to 11th May, 2004, for which there is no certificate form, I have approached this as if I were now being asked as a building professional to deal with this claim. Analysis of such a claim involves two stages – firstly, I sought to confirm the figures in Mr. Powderly's claim i.e. whether if I were to allow him his full claim the figures would add up, and secondly, I would wish to apply my qualitative opinion in relation to the claim, based on what work I am instructed was advanced since the last 'certificate'. In relation to para.12 of Mr. Powderly's affidavit he is fundamentally mistaken as to the stage of this process that I attempted to initially deal with when he sent me figures. At that stage all I was trying to do was to see whether his claim adds up. I do not accept for a minute that even on a time and materials basis it is simply a matter of adding up the number of men on site and the hours. The builder has an overriding responsibility to progress the works and some element of productivity must be taken in assessing this claim.*
>
> *In dealing with the first aspect of this analysis, I have been asked to give my view as to whether all of the matters are properly claimed say and believe (sic) that if I were acting as the building professional to deal with the claim up to 11th May, 2004, I would allowed (sic) only a sum of €564,180 in respect of this head of claim instead of the sum of €788,962.97contended for by Mr. Powderly."*

53. He then goes on to set out a number of reasons for so concluding. At para.21 of the affidavit he goes on to say:-

> *"The combined effect of these deductions is to bring the gross sum for that period down to €564,180, I should stress that this would only finish the first (or arithmetic part of the exercise). Because of the failure to properly progress the works I would make a further deduction. However, this requires an analysis of the whole performance of the plaintiff's work and cannot be isolated to this one period between March and May, 2004. I believe that the overall hours claimed are wholly unjustified in terms of the work produced in respect of those man hours."*

54. The next part of his affidavit treats of what is alleged to be the defective work carried out by the plaintiff and the cost of remedying it. He points out that he was brought in by the defendants when they had serious problems with the work carried out on the project. He says that he has spent time analysing the defective works and the likely cost of remedying them. He exhibits a report which sets out costings in respect of the various heads. He concludes that the cost to the defendant of remedial works is €1,505,106.97. This sum does not include alleged overcharging on the part of the plaintiff.

55. It is para.28 of Mr. Shanley's affidavit that the plaintiff particularly relies upon. It reads:-

> *"Having regard to all the information at my disposal and assessing the claim on a time and materials basis (the basis contended for by Mr. Powderly) I am of the view that the following gross sums can be claimed by Mr. Powderly -*

Exclusive of sub contractors	
Up to February, 2004	€646,886.42
March 1st to May 11th, 2004	€564,180.00
Retention	€205,454.86
Total	€1,415,521.20

> *As in my view the retention sum is not currently repayable, I believe the maximum gross claim of Mr. Powderly is €1,210,066.34. This sum would be some €295,040.63 less than the sum of €1,505,106.97 referred to in para.20 of this affidavit for which Mr. Powderly is liable in respect of defective work.*
>
> *Finally, as indicated above, this figure of €1,210,066.34 is set out by me applying only the first arithmetic analysis. In relation to the second stage, or qualitative analysis of the hours claimed by Mr. Powderly during the course of this project, I can find nothing to justify the overall hours claimed. The 'certificates' appear to me to represent only a calculation of the hours claimed. The hours claimed seem me to be wholly unjustified in terms of the work produced in respect of those man hours. I say and believe that if I were acting as the building professional to deal with the claims made, I would have made deductions in respect of the persistent failure to progress the works along the time scale envisaged. Unfortunately in the time available to me I have not yet been able to complete an audit of the work/time productivity. It cannot simply be done by looking at one or two months on their own but requires an analysis of the entire project. I anticipate that when that is completed I would advise a further reduction."*

56. The plaintiff criticises Mr. Shanley's report dealing with the nature of the defective works and points out that this is the first time that there has been any attempt to detail the possible claim that the defendants may have against him. He also points out that the vast majority of items in Mr. Shanley's report appear to relate to matters concerning sub contractors nominated to a very considerable extent by the defendants themselves. In respect of unfinished works the plaintiff points out that he was ordered off the site without warning and without being given the opportunity to finish the work which he was doing on 11th May, 2004. He also points out that in the affidavit of the first named defendant sworn on 28th November, 2005 he makes it clear that he does not see the plaintiff as the sole guilty party in relation to the situation. He says:-

> *"I wish to make it clear that I do not see him (the plaintiff) as the sole guilty party in relation to the situation at Corbalton Hall. I say and believe and am advised that some of the sub contractors have a case to answer. I am currently taking advice in relation to the main professionals involved."*

57. I am not satisfied that the averments made by Mr. Shanley amount to an admission that the defendants owe the plaintiff €564,180 and that they have no answer to that claim.

The test
58. In *Aer Rianta Cpt v. Ryanair Limited* [2002] 1 I.L.R.M. 381 the Supreme Court indicated that the test to be applied in deciding whether leave to defend should be granted on an application for summary judgment is whether, looking at the whole situation, the defendant has satisfied the court that there is a fair and reasonable probability that he has a real and *bona fide* defence.

59. That is the test which I apply in this case and am so satisfied.

60. Even if I am wrong in the conclusions which I reached concerning the lack of entitlement to summary judgment I would nonetheless still refuse summary judgment save one with a stay placed upon it. I would do so by reference to the decision of the Supreme Court in *Prendergast v. Biddle* [Unreported, Supreme Court, 21st July, 1957].

61. In that case Kingsmill Moore J. acknowledged that where a defendant admits a claim but raises a counterclaim it is difficult to reconcile the competing interests of the parties and to do justice between them. He said:-

> *"On the one hand it may be asked, why a plaintiff with a proved and perhaps uncontested claim should wait for a judgment or execution of judgment on this claim because the defendant asserts a plausible but unproved and contested counterclaim. On the other hand it may equally be asked why a defendant should be required to pay the plaintiff's demand when he asserts and may be able to prove that the plaintiff owes him a larger amount."*

62. Later in his judgment he said:-

> *"It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counterclaim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the defendant could show that the plaintiff was in embarrassed circumstances it might be considered a reason why the plaintiff should not be allowed to get judgment or execute judgment on his claim until after the counterclaim had been heard, for the plaintiff having received payment might use the money to pay his debts or otherwise dissipate it so that judgment on the counterclaim would be fruitless. I mention only some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of his discretion."*

63. Whilst it is true that the plaintiff here is in a less economically advantageous position than the defendant it nonetheless took him from 22nd June, 2004 until 25th April, 2005, to even bring the motion for summary judgment. Given that the case is now in the commercial list it ought to be possible to obtain a trial of this action not later than next term and so, having regard to the other matters alluded to in the judgment of Kingsmill-Moore J., I would in any event have been inclined to place a stay upon execution and registration of any judgment pending the ultimate determination of the proceedings. In the event, that does not arise because in my view neither upon the architect's certificate nor on the alleged admissions by the defendants' agent is the plaintiff able to demonstrate a case sufficient to warrant summary judgment being granted.

Conclusion
64. Summary judgment from the two amounts claimed is refused. The case will proceed to a plenary hearing in respect of the full amount claimed.