

THE HIGH COURT

2009 1980 S

BETWEEN

MICHAEL FEENEY CONTRACTORS AND

CIVIL ENGINEERING LIMITED

AND

FIONNUALA MURRAY ROBERTS

PLAINTIFFS

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 29th day of November, 2010

1. This is a sad and tragic case which, in many ways, represents a microcosm of the difficulties presently afflicting this State. The plaintiff company seeks summary judgment in the sum of €219,811.83 being the sum which it contends is that due from the defendant in respect of works and services provided by it in respect of the construction of a dwellinghouse at Cleggan, Co. Galway.

2. The present claim arises in the following way. By a written agreement dated 14th August, 2008 the parties agreed that the plaintiff would build and construct the house for the sum of €604,302.50. The defendant (who is an artist and an interior designer) and her husband had originally purchased the property in 2000 and they intended to build a house on the site for their retirement. It seems that securing planning permission for the construction of the house proved more difficult than they had envisaged, but planning permission was ultimately obtained in April 2008.

3. In the meantime, however, tragedy struck when it became clear in 2004 that the defendant's husband became very seriously ill. His medical condition has worsened in the meantime and it is clear that much of Ms. Murray-Roberts' time in the meantime has been taken up with caring for her husband and seeking to provide for him.

4. By the middle of 2008 Ms. Murray-Roberts was desperate to secure proper accommodation for her husband and to avoid the prospect of residential care, as they were living in rented accommodation in Dublin at the time. At this point she was introduced to a consulting engineer by a friend who herself had retained this engineer as the project manager for a development she (i.e., the friend) was undertaking. Ms. Murray-Roberts then engaged the engineer for the Cleggan project.

5. The engineer recommended that Ms. Murray-Roberts engage the plaintiff company as the building contractor and it seems that the engineer and the principal of the plaintiff had a good working relationship. The engineer undertook to negotiate a price for the development and Ms. Murray-Roberts avers that she relied completely on the engineer in these matters as she was "personally inexperienced in matters of finance."

6. The plaintiff company presented a tender for the house and fittings in the sum of €491,710. There was also an estimate for external works in the sum of €112,592, but Ms. Murray-Roberts contends that she advised the engineer to defer the question of any external works until the house was actually constructed. She further avers as to the extent to which she relied on the advice and expertise of the engineer in this regard and she contends that she relied on him when she executed the building contract.

7. As it happens, however, the price actually specified in the contract was €604,302. Ms. Murray-Roberts maintains that the engineer never advised her of the difference between the tender price and contract price or that she had never realised that the contract price included the sum for external works. She also states that at the time she was so pre-occupied with her husband's plight and was so reliant on the engineer that she simply followed the engineer's advice.

8. I pause here to observe that I was informed at the hearing that the defendant is suing the engineer for professional negligence in separate proceedings. Since I have but imperfect knowledge of those proceedings and more particularly because the engineer has not had any opportunity of putting his case, I refrain from any further comment in relation to this matter and nothing in this judgment should be taken as any expressing any view whatsoever in relation to those proceedings. It is nevertheless necessary to set out these matters because it is relevant both to the sequence of events and the defendant's defence to these proceedings.

9. In October, 2008 the plaintiff submitted an invoice to the engineer for certification in the manner envisaged in the building contract. The engineer apparently certified this sum as being a fair and true value of the work done to date and this was paid by the defendant.

10. By this stage, however, the economic stormclouds had battered the Irish economy. The defendant's interior design business more or less collapsed and she claims that it was difficult to secure payment from clients. Worse again, her husband's health - which was already fragile - deteriorated further and her time was solely taken up with caring for his welfare.

11. In November, 2008 the engineer certified that a second stage payment in the sum of just €139,000 was due. At this point the defendant says that she realised that the house was too expensive and that she did not have the means to afford it. In January 2009, shortly before travelling to the US with her husband for medical treatment for him, she says that she directed the engineer to inform the plaintiff to cease work on the project.

12. There is some dispute as to when exactly the plaintiff received this request, but at all events it seems that work ceased in or around February, 2009. Judged by the photographs supplied to me, it would seem that this is an elegant (if compact) dwelling, the external finishes of which have been substantially completed. While the block work is in place, perhaps 30% to 40% of the external

finishing stone work remains to be completed. On 19th February, 2009 the engineer certified that a third payment of €80,816 was due.

13. Ms. Murray-Roberts contends that she was grossly overcharged in the circumstances. Despite the significant sums expended, she maintains that further significant sums will be required to complete the house and that a cost of over €600,000 for a one bed-roomed (if high specification) dwelling in rural Connemara is manifestly excessive. Tragically, her husband's condition has declined further. He has had to go into residential care and their mutual dream of idyllic country life will never be realised.

14. The real question, of course, is whether the plaintiff is entitled to summary judgment. Given that the contract provided for payments in tranches based on certification by the defendant's own engineer and in view of the fact that there is no doubt but that the engineer duly certified for these sums in the manner envisaged by the contract, the plaintiff is prima facie entitled to payment for the sums. The first invoice was, of course, promptly discharged.

15. It has been urged on behalf of the defendant that the fact she is suing the engineer is a factor which would justify me adjourning the present claim for plenary hearing. I cannot agree. The plaintiff is suing the defendant on foot of a contract which binds the parties. The fact that the defendant may (or may not) have a remedy against her own agent who was not a party to the contract cannot be material so far as the plaintiff is concerned. The plaintiff never contracted that its entitlement to payment should await the resolution of a dispute between the defendant and a third party.

16. There is, of course, a factual dispute between the parties as to when the defendant instructed the plaintiff to cease work on the house and when those instructions were actually acted upon. Although this is only relevant so far as the third invoice is concerned, it is indisputable that the plaintiff must be entitled to a significant portion of that sum of €80,816 which I propose to measure at €40,000. I will adjourn the balance of the claim to plenary hearing, since Ms. Murray-Roberts may be in a position to show that the additional sum was the result of the plaintiff company's failure to adhere to her instructions.

17. It is impossible not to be moved by the sad plight of Ms. Murray-Roberts and her husband. I have no doubt at all but that her actions were motivated entirely by a desire to do the very best for her husband. It would also not be surprising if were to transpire that she did rely completely on the engineer, given that she must have been beset with the strains of caring for a seriously ill husband. Given that the courts operate under a Constitution whose Preamble commits the State to the noble virtues of "justice, prudence and charity", a judge cannot be deaf to arguments based on compassion: there must always be room in appropriate cases for judicial sympathy and humanitarian concern. But in the end it must be recalled that the courts are courts of law and not courts of compassion. This means that they must uphold the rule of law and they cannot allow arguments based on compassion to override the rights of the parties to a contract. For the reasons I have endeavoured to set out, the plaintiff company has a right to have its contract enforced and it would be grossly unfair to allow considerations of sympathy for the tragic circumstances of the Murray-Roberts to influence my decision-making in that regard.

18. In these circumstances, I will give judgment in favour of the plaintiff in the sum of €178,996.17 and together with contractual interest in the sum of €24,335.03. As already indicated, I propose to stay the enforcement of this judgment for five months with effect from 15th November, 2010.