Neutral Citation Number: [2007] IEHC 435

THE HIGH COURT

[2006 No. 1711S]

BETWEEN

KATHLEEN MOOHAN
AND
JOHN BRADLEY TRADING AS BRADLEY CONSTRUCTION

PLAINTIFFS

AND
S. & R. MOTORS (DONEGAL) LIMITED

DEFENDANTS

Judgment of Mr. Justice Clarke delivered the 14th December, 2007

1. Introduction

1.1 The defendants (S.& R. Motors) employed the plaintiffs ("Bradley Construction") to build a Volkswagen car show room at Drumlonagher in Donegal town. The parties entered into a written building construction contract ("the agreement") on 24th June, 2004. The agreement used the Royal Institute of Architects of Ireland ("RIAI"), 2002 template contract as its basis.

1.2 The disputes which have now arisen between the parties concern on the one hand, an allegation on the part of Bradley Construction of non-payment and, on the other hand, an allegation on the part of S.& R. Motors of faulty workmanship. Bradley Construction have issued summary summons proceedings claiming sums due on foot of architects' certificates issued under the terms of the agreement. The issues which I have to decide concern whether Bradley Construction is entitled to judgment at this stage in those proceedings or whether the proceedings should be stayed pending a possible arbitration of the disputes which have arisen concerning workmanship. In order to properly set out the specific issues which have now arisen it is necessary to turn firstly to the procedural history of this case.

2. Procedural History

2.1 A summary summons claiming the amounts certified by the architect concerned in Certificates 11 and 12 (together with interest on those amounts in accordance with Clause 35(m) of the agreement and the retention monies held under the provisions of that agreement) totalling €233,098.34 was issued on 23rd November, 2006. The summons as originally issued claimed pounds sterling by error and also misdescribed the defendant company. By order of 11th May, 2007 the Master, on the application of Bradley Construction, amended the summons by substituting the euro sign "€" in lieu of the sterling pound sign "£" and also amended the name of the defendant to read "S. & R. Motors (Donegal) Limited". Thereafter Bradley Construction brought a motion for judgment which was initially returnable on 26th July, 2007 seeking the above sum together with continuing interest. That motion was adjourned on a number of occasions and finally until the 26th October, 2007. In the meantime, on 25th September, 2007, solicitors on behalf of S. & R. Motors requested, by letter, a stay on the proceedings to enable the issues between the parties to be referred to arbitration. Solicitors for Bradley Construction declined and on 9th October, 2007 a motion seeking such a stay was issued before this court which was made returnable for the 19th November, 2007. However, in the meantime, on 26th October, 2007, the motion for judgment came on before the Master who declined to adjourn same to enable the stay application to be first considered by this court.

2.2 The stated basis put forward on behalf of S. & R. Motors for seeking an adjournment on the 26th October, 2007 was that, in order for S & R Motors to be entitled to successfully pursue an application for a stay pending arbitration, it was necessary, in accordance with the *jurisprudence* of the courts in the area, that no step be taken in the proceedings by S & R Motors prior to the stay application. In those circumstances it was said that S. & R. Motors were unable to file a replying affidavit setting out their substantive defence to the motion for judgment because so to do would amount to a step in the proceedings and would, thus, lose S & R Motors any entitlement which they might have, to have the case stayed pending arbitration. Notwithstanding that application the Master declined to further adjourn the motion for judgment and, in the absence of any effective opposition evidence, proceeded to give judgment in favour of Bradley Construction.

2.3 S. & R. Motors has appealed against that decision of the Master. That appeal together with the application for a stay came on for hearing at the same time before me and this judgment is directed towards both issues.

3. The legal consequence of the sequence of events

3.1 The first procedural issue which arises concerns the sequence of events which I have just outlined. I am satisfied that the Master was not correct in going ahead with the motion for judgment in circumstances where there was already pending before the court, an application for a stay pending arbitration. It seems to me that S. & R. Motors were placed in an invidious position. S & R Motors correctly argued that, had they contested the motion for judgment by filing replying affidavits, a step would have been deemed to have been taken by them in the proceedings and they would, thus, have lost any entitlement which they might have to arbitration. The situation might have been otherwise if S. & R. Motors had not already pending before this court a motion in which such a stay was sought. In those circumstances it would have been open to the Master to take the view that a party wishing to seek such a stay had lost any such entitlement by virtue of a failure to initiate the appropriate application prior to the motion for judgment coming on for hearing. However, that was not the case here. S. & R. Motors had initiated an application for a stay. Unfortunately S & R Motors could not be accommodated with a hearing date for that application in this court until the 19th November, 2007 notwithstanding that the motion for judgment was due for hearing on 26th October, 2007. The timing of court listings of that type should not affect the substantive rights of parties. In those circumstances it seems to me that it would have been appropriate for the Master to adjourn the motion for judgment until such time as the stay application had been considered. Be that as it may, both matters are now before this court and it is possible to deal with both of them at the same time.

3.2 In substance the real issue which I have to decide is as to whether S. & R. Motors must now make payment on foot of the architect's certificates which have issued. The contention of S & R Motors is that they should not be required to make payment because they have a bona fide cross claim which would, in principle, entitle them to defend these proceedings but, having regard to the fact that the cross claim ought, under the terms of the agreement, be referred to arbitration, entitles them, on the facts of this case, to a stay pending such arbitration. Against that background it is appropriate to turn first to the legal principles applicable.

4. The Law

4.1 The test to be applied in deciding whether a party should be given leave to defend a summary judgment application was most recently addressed by the Supreme Court in *Aer Rianta Cpt v. Ryanair Limited*, [2002] 1 ILRM 381. In that case the court indicated that the test is as to 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. As pointed out by Hardiman J., the test does not mean that the party must establish that he has a defence which will probably succeed; rather he must establish that it is probable that he has a

bona fide defence.

4.2 Where the nature of the defence put forward amounts to a form of cross claim slightly different considerations may apply. In those circumstances the court has a wider discretion. Where the defendant does not establish a *bona fide* defence to the claim as such, but maintains that he has a cross claim against the plaintiff, then the first question which needs to be determined is as to whether that cross claim would give rise to a defence in equity to the proceedings. It is clear from *Prendergast v. Biddle* (Unreported, Supreme Court, 21st July, 1957, Kingsmill Moore J.), that the test as to whether a cross claim gives rise to a defence in equity, depends on whether the cross claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set off is available so that the debt arising on the claim will be disallowed to the extent that the cross claim may be made out.

4.3 On the other hand if the cross claim arises from some independent set of circumstances then the claim (unless it can be defended on separate grounds) will have to be allowed, but the defendant may be able to establish a counter claim in due course, which may in whole or in part, be set against the claim. What the position is to be in the intervening period creates a difficulty as explained by Kingsmill Moore J., in *Prendergast v. Biddle* in the following terms:-

> "On the one hand it may be asked, why a plaintiff with approved 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 counter claim. On the other hand it may equally be asked why a defendant should be required to pay the plaintiffs demand when he asserts and may be able to prove that the plaintiff owes him a larger amount".

4.4 The courts discretion is to be exercised on the basis of the principles set out by Kingsmill Moore J. later in the course of the same judgment in the following terms:-

> "It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counter claim 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 counter claim had been heard, for the plaintiff having received payment by dues the monies to pay his debts or otherwise dissipated so the judgment on a counter claim would be fruitless. I mentioned earlier some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of this discretion".

4.5 It seems to me that it also follows that a court in determining whether a set off in equity may be available, so as to provide a defence to the claim itself, also has to have regard to the fact that the set off is equitable in nature and, it follows, a defendant seeking to assert such a set off must himself do equity.

4.6 On that basis the overall approach to a case such as this (involving, as it does, a cross claim) seems to me to be the following:-

> (a) It is firstly necessary to determine whether the defendant has established a defence as such to the plaintiffs claim. In order for the asserted cross claim to amount to a defence as such, it must arguably give rise to a set off in equity, and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendants case, it would not be inequitable to allow the asserted set off;
>
> (b) If, and to the extent that, a *prima facie* case for such a set off arises the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);
>
> (c) If the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in *Prendergast v. Biddle*.

5. Application to the facts of this case – Architects Certificates

5.1 The first issue which arises is as to whether it is open S & R Motors to raise a set off in equity as against architects certificates issued under a contract incorporating the RIA template. This topic has been the subject of a number of decisions of the courts in this jurisdiction over the last number of decades which, at a minimum, suggest at least a difference of emphasis if not a positive disagreement.

5.2 In John *Sisk & Sons Ltd v. Lawter Products B.V*. (Unreported, High Court, Finlay P., 15th of November, 1976) the then edition of the RIAI template was considered by Finlay P. in the following terms:-

> "Clause 31 provides for the arbitration of disputes and claims with a proviso that such references to arbitration shall not, apart from exceptions irrelevant to these issues, be opened until after the practical completion of the works. It gives however each party to the contract a clear right to refer disputes to arbitration.
>
> The issue of law which arises on these facts and on these terms in the contract shortly is as to whether the employer upon the due issue of an interim certificate is entitled to set-off against the sum so found due, claims against the contractor quantified but not yet proved arising in respect of alleged breaches by them of the contract …
>
> Clause 29 sub-sections (a) and (b) clearly give to the contractor a right to payment of the amount provided for in an interim certificate within fourteen days of its issue subject only to two clearly specified qualifications. The first is that arising under clause 15(c) in respect of previous default in his payments to nominated sub-contractors and the second is that arising by way of the right of the employer to retain and ascertain some.
>
> The amount so recoverable on the interim certificate furthermore is confined to the amount which in the judgment of the architect is the total value of the work duly executed and of the goods and materials specially prepared for the works.
>
> The architect therefore who is part under the terms of the building contract an agent of the employer and in part in a quasi judicial position must before using an interim certificate exercise a Value Judgment.

Furthermore there is an express remedy for such delay as is here complained of given to the employer in Clause 24.

Again it is envisaged in Clause 28 that a bare failure on the part of the employer to pay upon an interim certificate would justify the contractor in suspending the works.

Finally, clause 31, in my view, clearly envisages the arbitration of all disputes at the instance of either party but not before the practical completion of the works. If an employer were entitled, as the defendants here contend, to set-off or counter-claim for a disputed claim against the amount due on foot of an interim certificate he would thus effectively deprive the contractor of his right to refer such dispute to arbitration and thus effectively frustrate Clause 31.

Applying therefore the test which I consider to be the true legal test, namely whether the common law right of set-off and counter-claim is consistent with:

(a) A specific right of payment on an interim certificate subject only to specified deductions as is contained in Clause 29.

(b) A right of the contractor to suspend the works on mere non-payment on an interim certificate.

(c) A specific right of each party to refer disputes to arbitration not to be opened until after the practical completion of the works.

I find that it is inconsistent and that therefore the contract should be construed as by its terms excluding such a right.

I am therefore satisfied that the plaintiffs are entitled to enter Summary Judgment in the amount claimed."

5.3 That judgment was, at a minimum, distinguished by Murphy J., in *P.J. Hegarty & Sons Ltd v. Royal Liver Friendly Society* [1985] I.R. 524 in the following terms:-

"It seems to me that the main propositions to be gleaned from the decision of the House of Lords in *Modern Engineering v. Gilbert-Ash* [1974] A.C. 689 may be summarised 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.

I believe I am correct in saying that in John Sisk and Son Ltd. v. Lawter Products B.V. (Unreported, Finlay P., 13th November, 1976), the then President of the High Court accepted – though not in those terms – the foregoing propositions. However, though otherwise accepting the judgment of Lord Diplock and the implied criticism by him of Lord Denning, he declined to accept the views of Lord Diplock as to the weight of evidence required to rebut the presumption that each party intended to maintain the rights to which they were entitled at law. Lord Diplock had expressed his views on that topic (at p. 718) in the following terms:-

'To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract."

Having reviewed *John Sisk*, Murphy J. went on to say:-

"Whilst the value of precedent in the actual construction of documents as opposed to the principles by which they fall to be construed may be of relatively little value I would have been extremely slow to differ from the conclusion reached in *John Sisk and Son Ltd. v. Lawter Products B.V.*, (Unreported, Finlay P., 13th November, 1976) were it not for this important distinction. There is no doubt that the then President attached very considerable importance to the form of the arbitration clause in the agreement before him. In that he appears to have taken a somewhat different view from that expressed by Lord Salmon with regard to the terms of the arbitration clause under consideration in *Modern Engineering v. Gilbert-Ash* [1974] A.C. 689 (at page 762). Be that as it may, once the arbitration point is taken out of the reckoning, one is left in the present case with the basic provisions requiring that the interim certificate should be honoured by the employer within seven working days of presentation of same to him by the contractor (Clause 35) and the other provisions, to which the President had referred, providing that if the employer should not pay the contractor within the period for honouring the certificates, that the contractor should be entitled after seven days notice to the employer to suspend the works (Clause 34). It seems to me in effect that they are the only two clauses which bear on the issue and that they do not go very far beyond describing the interim certificate procedure and the manner in which that procedure would operate in any case, whether the right of set off was to be preserved, restricted or excluded.

In these circumstances I take the view that the terms of the contracts between the parties in the presence case are not inconsistent with the rights of set off and counterclaim and that accordingly the employer/defendant is entitled to set up its claim by way of defence to the liquidated demand of the builders/plaintiffs herein.

5.4 Thereafter Costello J., in *Rohan Construction Ltd v. Antigen Ltd* [1989] ILRM 783, described the previous two decisions to which I have referred as "an unfortunate difference of opinion" but found himself in agreement with Finlay P., on the construction of the contract.

5.5 Finally, and in more recent times, in *Powderly v. McDonagh* (Unreported, High Court, Kelly J., 31st of January, 2006), the conflicting authorities were considered again in slightly unusual circumstances where there was, in fact, no single written contract between the parties. It is, however, worthy of note that Kelly J., described the analysis conducted by Murphy J., in *P J Hegarty & Sons Ltd* as "perhaps the best analysis of the position". I agree.

5.6 It seems to me, therefore, that the overall test is as to whether, as a matter of construction of the contract taken as whole, it can properly be said that the parties have agreed that there can be no set off.

5.7 The default position is that a party is entitled to a set off in equity in relation to any cross claim arising out of the same contract. Thus if a builder is owed money on foot of a construction contract, the employer is *prima facie* entitled to a set off in equity, in principle, in respect of any defective works. The question which arises is as to whether that *prima facie* position has been displaced by the terms of the contract. There is no doubt but that the parties are free to agree that there will be no set off. The question is whether they have in fact done so. I am not satisfied that the balance of the authorities favours the view that the current standard form RIAI template does give rise to an agreement to exclude a set off, at least, and this is the only issue relevant in this case, in circumstances where the contract is completed to the stage of a certificate of practical completion having been issued by the architect and where, therefore, any entitlement to arbitration on the part of the employer is immediate. It is, of course, the case that Finlay P, in *John Sisk* had significant regard to the fact that, in the case then under consideration, there was no immediate right to arbitration as the contract was ongoing.

5.8 In those circumstances I am satisfied that, as a matter of construction of the contract in this case, S & R Motors are *prima facie* entitled to a set off in respect of any cross claim which they can maintain. However, that set off arises in equity and is, as I have previously noted, subject to S & R Motors themselves having done equity.

6. An Assessment of the Cross Claim

6.1 The most striking feature of the cross claim now put forward by S & R Motors is the extent to which it has only been formulated with any precision in very recent times indeed. It was only on the filing of an affidavit of the 29th of November, 2007 (just a few days before the motions came on for hearing) that any attempt to establish that the cross claim might be such as would extinguish the claim was attempted. The architects certificates concerned date from the 1st of June, 2005 and the 26th of April, 2006 respectively.

6.2 The underlying basis of the counter claim is an allegation that the floor of the car showrooms concerned is uneven and defective. While that fact was raised at an early stage, I am not satisfied on the affidavit evidence that any meaningful attempt to quantify a claim arising therefrom, or have same properly referred to arbitration, has been established by S & R Motors until very recent times indeed. There is reference in the affidavit of evidence of attempts made to engage in dispute resolution. While parties are to be commended for attempting to engage in dispute resolution which does not require the intervention of the court, a point is, nonetheless, reached where a party who is not satisfied with the direction in which such dispute resolution attempts are going has an obligation to bring such attempts to a conclusion or embark on whatever action might be required for enforcement in the absence of agreement. Such a party cannot just sit on its hands and then reactivate its complaints when it suits.

6.3 It has often been said that delay defeats equity and that he who seeks equity must do equity. Having regard to the very belated attempt to quantify, in any significant way, a claim arising out of the defective floor, I am not satisfied that S & R Motors has done equity. For reasons which I have already addressed I accept that S & R Motors had a real difficulty in putting its defence on affidavit until recent times. If its cross claim had been set out in any reasonable detail in correspondence prior to the proceedings having been issued, then the absence of affidavit evidence until very recent times would not, in my view, on the facts of this case, be material.

However, on the evidence I am not satisfied that S & R Motors made any reasonable attempt to quantify or pursue their cross claim by arbitration in a timely manner.

6.4 In those circumstances I am not satisfied that S & R Motors have established a prima facie defence as such to these proceedings. S & R Motors has, however, established a prima facie cross claim and it seems to me that I must apply the principles set out by Kingsmill Moore J., in *Prendergast v. Biddle*, in assessing what, in those circumstance, should occur.

7. Conclusion

7.1 It follows that the claim must be allowed and judgment entered for the sum claimed. The question is as to whether execution on that judgment should be stayed pending an arbitration of the issues which S & R Motors wish to raise concerning the defective floor. It seems to me that, in equity, I must have regard to the fact that the claim, at least in general terms, has been asserted from the beginning. It is only in recent times, however, that there has been any attempt to put forward a basis upon which it might be asserted that the claim would be of an order of magnitude which could meet and extinguish the claim made by Bradley Construction. It is clear from the passage from the judgment of Kingsmill Moore J., in *Prendergast v. Biddle*, to which I have referred, that delay is a factor to be properly taken into account. I equally take into account the fact that no basis has been put forward for suggesting that Bradley Construction would not be in a position to meet any award which an arbitrator might make in favour of S & R Motors arising out of the defective floor claim.

7.2. Taking all of those factors into account I would propose entering judgment in the sum claimed but placing a stay on the execution of any sum in excess of €100,000.00 until the determination of an arbitration in respect of the claims made by S & R Motors relating to defective construction or further order. I would also propose giving liberty to apply in that I would be minded to remove that stay unless S & R Motors expedite (insofar as that it is within their power) the maintenance of the appropriate arbitration proceedings.