Neutral Citation No.: [2008] NIQB 114 | *Ref:* **McCL7295**

Judgment: approved by the Court for handing down | *Delivered:* **22/10/08**
*(subject to editorial corrections)**

2007 No. 137330

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

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BETWEEN:

BALLINAMALLARD DEVELOPMENTS LIMITED

Plaintiff

-and-

ORMEAU GAS WORKS LIMITED

Defendant

_____

RULING ON COSTS

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McCLOSKEY J

[1] In the events which have occurred, the parties to this litigation having resolved their differences, which will be reflected in the making of a so-called "Tomlin" Order, the sole issue to be determined by the court is that of costs. In determining this issue, the court has been assisted by, and I take fully into account, the helpful chronologies and skeleton arguments submitted by the parties' respective counsel.

[2] The arguments advanced invite the court to examine critically the conduct of both parties both prior to the commencement of proceedings (by a specially indorsed Writ of Summons, issued on 18th September 2007) and during the course of the proceedings themselves. I have done so, taking into account particularly the fairly

extensive correspondence belonging to these two phases, together with the agreement for lease dated 24th November 2003. This is the instrument containing provisions relating to the establishment of an Escrow account in connection with the development of the Ormeau Gas Works site. The dispute between the parties giving rise to this litigation has its origins in Clause 7 of and the First Schedule to the Agreement. As these provisions make clear, the Escrow account was in the joint names of the Plaintiff's predecessor and the Defendant and, further, the letter of instructions to the manager of the Bank of Ireland stated:

> "*These instructions may not be varied without directions in writing from both of us and in the case of Ormeau to be signed or confirmed in writing by Douglas Elliott and in the case of Adpax to be signed or confirmed in writing by Michael McAllister*".

Thus the arrangements between the parties pertaining to the Escrow account included a clear and solemn mechanism to vary the instruction to the bank to make payments out of the account. Such payments were to be made to the building contractor only, in the absence of a consensual variation of instructions in accordance with the formal mechanism.

[3] The legal framework within which the issue of costs is to be resolved by the court is constituted by (a) Section 59 of the Judicature (Northern Ireland) Act 1978 (which invests the court with a discretion and contemplates that this will be subject to Rules of Court) and (b) RSC Order 62, Rule 3 (which establishes the general, but not inflexible, rule that costs should follow the event). I have also considered the decision of the Northern Ireland Court of Appeal in ***Re Kavanagh's Application*** [1997] NI 368, which, properly analysed, is an illustration of the operation of the general rule: see per Carswell LCJ, p. 382A – 383A.

[4] The decision in ***Kavanagh*** also serves as a reminder that the general rule is more difficult to apply in a case such as the present, where there is no judicially determined "*event*" viz no judgment giving rise to a clearly discernible winner. It is this consideration which prompts me to focus strongly on what the parties have achieved at the conclusion of the present action. It seems to me that this is properly analysed in the form of two separate, though inter-related, benefits. The benefit secured by the Plaintiff will be the transfer of the funds in question from the bank account to him. The benefit gained by the Defendant will be the execution of an extensively framed indemnity (appended to the letter dated 13th October 2008 from the Defendant's solicitors to the Plaintiff's solicitors).

[5] In essence, the approach adopted by both parties was to invite the court to review critically and meticulously the pre-litigation events and the course of the litigation to date. Frankly, I find it difficult to criticise either party unduly. With the benefit of hindsight, it might be said that both parties could, or should, have acted differently at certain times and should have been more proactive and flexible in their respective approaches to certain issues. However, the court must be realistic about

these matters, bearing in mind the commercial setting and the overall context. Moreover, in general, the correspondence bears witness to stances, positions and contentions on behalf of both parties which the court should be slow to condemn with the benefit of hindsight.

[6] I consider that I should review all the evidence highlighted before me and the outcome of the litigation broadly, rather than microscopically. I further consider that I should seek to resolve the costs issue on a fair and equitable basis. I conclude that it would be fair and equitable, in the exercise of my discretion, to order that the parties bear their own costs respectively. Accordingly, as far as costs are concerned, there is no winner or loser.