

Neutral Citation no. [2003] NIQB 43

Ref: **HIGC3949**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **20/06/2003**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION

**CHRISTOPHER FLANAGAN T/A C F CONSTRUCTION ADVISORY
SERVICES BUILDING DEPARTMENT**

Plaintiff

and

PAULINE MAGUIRE

Defendant

HIGGINS J

[1] This is an appeal from a decision of Master Corry whereby he refused the defendant's summons to stay the present proceedings as an abuse of process pursuant to the inherent jurisdiction of the High Court.

[2] On 29 May 1997 the defendant in these proceedings (hereinafter referred to as the defendant, irrespective of the proceedings referred to) entered into an agreement with the plaintiff in the proceedings (hereinafter referred to as the defendant, irrespective of the proceedings referred to) whereby the plaintiff agreed to construct a dwelling house at Rosstown, County Donegal, in the Republic of Ireland. At the time the defendant was domiciled in County Fermanagh and the plaintiff has business addresses in Northern Ireland and the Republic of Ireland. The dwelling was to be constructed in accordance with plans and specifications prepared by C F Design and Construction Advisory Services under the supervision of Christopher Flanagan. The contractor agreed "to execute and complete the works" for the contract sum of £70,000 with an advance of £10,000 to facilitate the construction which commenced in or about August 1997. The plaintiff engaged Oisín McGlinchey, a builder (hereafter referred to as the builder, irrespective of the proceedings referred to), of Waveney, Ballybofey, County Donegal to construct the dwelling house. In February 1998 the plaintiff wrote to the builder terminating his contract allegedly on the ground that the builder was taking too long to construct the dwelling. On 21 July 1991 the builder issued Civil Bill proceedings in the Circuit Court, Donegal, against the

plaintiff and the defendant for breach of contract and for £26,708.00 being the balance of monies due and owing and for property had and received. The Civil Bill alleged that the defendant entered into a contract with the builder on 20 June 1997. The defendant entered an appearance on 2 November 1999 and served a Notice of Particulars on 10 January 2000. The Replies to the Notice for Particulars dated 10 April 2000 alleged that the defendant entered into an agreement with the builder whereby the builder would construct the dwelling house to specifications prepared by C F Design Services and Construction Advisory Services and under the supervision of Christopher Flanagan. The replies alleged further that Christopher Flanagan acted as agent for the defendant pursuant to Articles of Agreement dated 20 June 1997. The defence of the Civil Bill filed on behalf of the defendant on 8 May 2000 denied that the Defendant was the employer of the builder under any contract for the construction of the dwelling and further denied that the defendant was an agent for the plaintiff. On the same date the defendant issued a Notice seeking indemnity and/or contribution from the plaintiff on the grounds of breach of duty and breach of contract by the plaintiff "in and about the matters of which complaint is made in the particulars set out in the Indorsement of Claim of the ordinary Civil Bill herein". On 11 February 2002 an amended defence was filed by the defendant which included a counterclaim alleging negligence and breach of contract by the builder and the plaintiff in and about the conduct of construction works by them or either or both of them on the defendant's property at Rossnowlagh. It appears that an amended Notice of Indemnity and/or contributory was filed, though this is undated. It is in similar terms to the earlier Notice of Indemnity. There is in the papers a letter dated 24 February 2000 from the plaintiff's solicitors in County Donegal to the defendant's solicitors in County Donegal confirming that the plaintiff would indemnify the defendant in the Circuit Court proceedings. The amended defence alleges that the Donegal Circuit Court has power to hear and determine the defendant's defence to the plaintiff builder's claim and the defendant's counterclaim against the plaintiff and the builder by virtue of the provisions of the Convention on Jurisdiction and Enforcement of Judgments in civil and commercial matters. No third party proceedings appear to have been issued between the defendant and the plaintiff in the proceedings in the Circuit Court in which both are defendants.

[3] On 10 October 2000 the plaintiff issued a Writ of Summons against the defendant out of the High Court in Northern Ireland claiming £18,500.98 being the unpaid balance due on foot of or in breach of the agreement dated 29 May 1997 and for works done and goods supplied by the plaintiff on foot of the agreement or variations thereto. The Statement of Claim issued on 10 October 2000 asserts that the dwelling was completed by the plaintiff in or about August 1998 and that the defendant has paid in total £66,500 (including the £10,000 advance). The claim for £18,500.98 is made up of the balance of the original contract price of £70,000 less what has been paid (£66,500) and £15,000.98 for additional work carried out allegedly at the defendant's

request. By her defence dated 3 May 2001, the defendant denies the agreement and any variations thereto. An amended defence was served on 31 December 2001 which repeats the earlier defence and includes a counterclaim based on the May 1997 agreement. The counterclaim alleges that the plaintiff did construct a dwelling for the defendant at Rosstown, but failed to do so in a proper workmanlike fashion and left defects in the dwelling. The defendant claims £11,419.54 for the cost of rectifying the defects and £6,500 being an overpayment on the original contract, making a total counterclaim of £17,919.54.

[4] In his affidavit, filed in support of the summons, the defendant's solicitor averred that the plaintiff and the defendant are resident in Donegal and that the issues in respect of the dwelling in Donegal can be more properly heard and determined in the proceedings already issued there. The issues are identified as non payment by the defendant of monies arising out of the building agreement and defective building work carried out by the plaintiff. The affidavit in response averred that the plaintiff's claim for monies owed by the defendant to the plaintiff, forms no part of the Circuit Court proceedings in Donegal.

[5] The Brussels Convention on Jurisdiction and Enforcement of Judgments 1968 (the Brussels Convention) was brought into effect within the United Kingdom by the Civil Jurisdiction and Judgments Act 1982. Article 2 of the Brussels Convention provides that, subject to the provisions of the Convention, persons domiciled in a contracting state shall, whatever their nationality, be sued in the court of that state. If the defendant is domiciled in the Republic of Ireland then, generally speaking, he should be sued in the courts of the Republic of Ireland. Article 3 provides that persons domiciled in a contracting state may be sued in another contracting state only in accordance with the rules set out in Sections 2 - 6 of the Brussels Convention. Where proceedings are commenced in two contracting states then Article 21 and 22 apply. They provide as follows -

Article 21

"Where proceedings involving the same cause of action and between the same parties are brought in the courts of different contracting states, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the first seized is established."

[6] Thus where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.

Article 22

“Where related actions are brought in the courts of different contracting states, any court other than the court first seized may, while the actions are pending at first instance, stay its proceedings.

A court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seized has jurisdiction over both actions.

For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of judgments resulting from separate proceedings.”

[7] These Articles appear in Section 8 of the Convention, which Section is intended to prevent parallel proceedings in courts of different contracting states and to avoid conflicts between decisions which might thereby result – see Gubuish Maschinenfabrik v Palumbo 1987 ECR 4861.

[8] The parties are agreed that, by the defendant’s summons, the court has to consider whether Article 21 applies. According to its wording Article 21 applies where two actions are between the same parties and involve the same cause of action or subject matter. The subject matter of the dispute for the purpose of Article 21 means the end the action has in view - see The Tetry 1994 ECR I 5439. The first point to consider is whether there are proceedings involving the same parties. In the Circuit Court proceedings the plaintiff is the builder and the present plaintiff and defendant are defendants. In the High Court proceedings the second defendant in the Circuit Court proceedings is the plaintiff and the first defendant in the Circuit Court proceedings is the defendant. The plaintiff in the Circuit Court proceedings is not a party to the High Court proceedings. Thus on the face of it the parties are not the same. However in the Circuit Court proceedings the defendant has issued a Notice of Contribution and/or Indemnity against the plaintiff and by her amended defence a counterclaim which is against the builder and the present plaintiff. It would appear that the claim by the defendant against the plaintiff in the Circuit Court proceedings, in which both are defendants, is not properly constituted. A counterclaim is, by definition, against the original claimant, namely the builder. Nonetheless the pleadings do make a claim against the plaintiff.

[9] In Ganter Electronic GmbH v Basch Exploitatie Maatschappij BV (judgment delivered 8 May 2003, as yet unreported) a reference was made to the European Court on the interpretation of Article 21. Those questions were placed before the court, the first two of which are relevant –

1. Does the concept of the same cause of action in Article 21 of the Brussels Convention extend also to the defence of the defendant that he has extinguished a part of the claim sued for by extra judicial set-off, where the part of this counterclaim that is allegedly not extinguished is the subject matter of a legal dispute between the same parties on the basis of an action that has already been brought early in another contracting state.

2. In the examination of the question whether the same cause of action has been brought, are exclusively the pleadings of the plaintiff in the proceedings initiated by a later action decisive and the defence and submissions of the defendant therefore irrelevant, in particular also the defence of the procedural objection of set-off concerning a claim that is the subject matter of a legal dispute between the same parties on the basis of an action that has already been brought earlier in another contracting state.

Ganter supplied Basch with goods for resale in the Netherlands. By June 1999 Basch according to Ganter had not paid for goods delivered so they terminated commercial relations which had lasted 40 years. On 7 September 1999 Basch brought an action in the court in the Netherlands seeking damages for termination of the commercial relations without the requisite notice. From the sum sought for damages they deducted a sum which corresponded with what was owed to Ganter thereby effecting a set-off. On 22 September 1999 Ganter brought an action for the price of the goods delivered and which remained unpaid. Basch agreed that the claim by Ganter should be stayed because, if it was upheld, it would be set against by the balance of its own claim for damages. The court held that account should be taken only of the claims of the respective applicants and not of submissions relating to set-off. No counterclaims were filed.

[10] The court stated –

“26. It thus appears from the wording of Article 21 of the Convention that it refers only to the applicants’ respective claims in each of the sets of

proceedings and not to the defence which may be raised by a defendant.

31. It follows that, in order to determine whether there is *lis pendens* in relation to two disputes, account cannot be taken of the defence submissions, whatever their nature, and in particular of defence submissions alleging set-off, on which a defendant might subsequently rely when the court is definitively seized in accordance with its national law.”

[11] In the Circuit Court proceedings there is a counterclaim against the builder the plaintiff, as well as against a co-defendant, but without third party proceedings. No evidence was addressed as to whether the counterclaim against the co-defendant is properly constituted in the law of the Republic of Ireland. I assume the procedure is the same as that which pertains in this jurisdiction. At best an attempt at third party proceedings has been made against the plaintiff in those proceedings in which the parties are the same. Strictly speaking as it is by way of counterclaim, it is not a claim against the plaintiff. If it is a claim against the plaintiff, does it relate to the same subject matter in the sense that is to be understood? Both sets of proceedings relate to the construction of the dwelling in Rosstown. In the High Court proceedings the plaintiff seeks money due and owing on the original agreement together with additional matters arising from variation of that agreement. In the Circuit Court proceedings the defendant seeks damages for breach of contract and negligence in the construction of the dwelling.

[12] The English version of Article 21 refers to the same ‘cause of action’. The French version (and other versions) speaks of “*le même objet et la même cause*” which comprises two concepts. In *Gubrick* supra the two concepts were identified as “subject-matter” (*objet*) and ‘cause of action’ (*cause*). In *Haja-Ioannou v Frangos* 1999 2 Lloyds Reports 337 the Court of Appeal in England and Wales confirmed that two concepts are involved. It was stated that actions have the “same cause” if they have the same facts and rule of law as their basis and actions have the “same *objet*” if they have the same end in view.

[13] There are strong indications that the same facts and law are involved relating to the construction of the dwelling. Whether they have the same ‘*objet*’ is less clear. In the Circuit Court proceedings the defendant is seeking damages for negligent construction. In the High Court proceedings the plaintiff is seeking money alleged to be due on foot of a contract and variations of that contract. Yet at the heart of each will be an examination of the construction of the dwelling and what sums, if any, remain to be paid in respect of it.

[14] What concerns me more is the constitution of the defendant's proceedings in the Circuit Court which arose in an amended defence and counterclaim on 11 February 2002 long after proceedings were commenced in this jurisdiction. It seems clear that the High Court in Northern Ireland was seized first of the issues between the plaintiff and the defendant. Article 21 requires a court other than the court first seized to stay the proceedings. Article 22 is in similar terms. The High Court is not for the purposes of these Articles 'any court other than the court first seized' but is the court first seized of the issues between the plaintiff and the defendant. Therefore I decline to stay the proceedings in the High Court.