Neutral Citation No. [2013] NIQB 66

Ref:	**STE8892**

Judgment: approved by the Court for handing down

Delivered:	**29/05/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL ACTION)

JOHN DONNELLY DEVELOPMENTS LIMITED

-v-

NIALL CURRAN and PATRICIA CURRAN

STEPHENS J

[1] In this action the plaintiff claims the balance of the contract sum allegedly due from the defendants on foot of a building contract. It is a commercial action. That is so quite irrespective of the contents of the defence and counterclaim in which the defendants allege defective building works. It is a commercial action because the action relates to a commercial transaction and specifically because it relates to a contract for works of building. It falls full square within Order 72 Rule 1(2) which provides

> "… "commercial actions" shall include any cause relating to business or commercial transactions and, without prejudice to the generality of the foregoing words, any cause relating to contracts for works of building or engineering construction, contracts of engagement of architects, engineers or quantity surveyors, the sale of goods, insurance, banking, the export or import of merchandise, shipping and other mercantile matters, agency, bailment, carriage of goods and such other causes as the Commercial Judge may think fit to enter in the Commercial List."

[2] The fact that the action is a commercial action meant that there was an obligation on the plaintiff's solicitor, prior to the defence and counterclaim being served and arising on the commencement of the proceedings, to request the registrar in charge of the commercial list to have the action entered in the commercial list. As soon as the writ was issued an application should have been, but was not, made to the commercial registrar to have the action listed in the commercial list. Rather the

plaintiff's legal advisors allowed the action to remain in the ordinary Queen's Bench list right up to and including the trial of the action. I have no doubt that this failure has led to the costs of this action increasing not least because in the event the trial has to be abandoned. In such circumstances the question arises as to whether an order for costs should be made against the plaintiff's solicitors under Order 62 rule 11 of the Rules of the Court of Judicature (Northern Ireland) 1980 in respect of the increase in costs brought about by the failure to transfer to the commercial list. In the event, it has not been necessary for me to decide that question as I have received an assurance that none of the wasted costs involved in what has proved to be an abortive trial will be borne by either of the litigants in this case. However it should be anticipated that if an application to have a commercial action entered in the commercial list is not made at the appropriate time, that is immediately upon commencement of the action, then that the legal advisers who fail to make that application will be responsible for any additional costs incurred under Order 62 rule 11.

[3] In this case there was not only an obligation on the plaintiff's solicitors to have the action entered into the commercial list but there was also an obligation on the defendants' solicitors. Any party to a commercial action may at any stage of the proceedings request the registrar to have the action entered in the commercial list. That is not only a power but it is also an obligation to both the court and to the client. To the court to efficiently use court time and to the client to ensure that the issues are defined and the opportunity is given at an early stage for the client to receive advice in relation to those issues. So an order under Order 62 rule 11 can also be made against a defendant's solicitor if the defendant does not request the registrar in charge of the commercial list to have the action entered in the commercial list.

[4] The reason for transferring an action to the commercial list is to bring definition to the issues between the parties. The whole purpose of Order 72 is to clarify the issues so that advice can be given and clients, the individuals or companies actually involved in the litigation can save costs, if they so wish by taking a view or concentrating on the important issues. The aim of assisting litigants by identifying issues is enhanced by the new Pre-action Protocol for Commercial Actions, the underlying and basic concept of which is the objective of fairness.

[5] I have given two decisions recently in relation to Pre-action Protocols. The first is Lunney and Danlor Utilities Limited v McGiven [2013] NIQB 49 and the second is Monaghan v The Very Reverend Graham sued on behalf of the Trustees of Milltown Cemetery [2013] NIQB 53. Both of those decisions emphasise the requirement, essentially of fairness, that litigants should be informed as to the issues at the earliest stage. For instance in Lunney v McGiven I said that the primary objective of the Protocol is to assist potential litigants and it should be operated in such a way as to achieve that objective. The potential litigant should be provided with an opportunity, ordinarily in practice with the benefit of legal advice, to minimise their exposure to costs. For instance a potential plaintiff or a potential

defendant can concede issues or concede liability or negotiate settlement or agree to mediation.

[6] The Pre-action Protocol did not apply to this action which was commenced some years ago. The parties relied on the pleadings to bring definition to the issues. The defence and counterclaim failed to do so and accordingly at the end of half a day's hearing the defendants applied to amend the defence and counterclaim. There are two broad proposed amendments. The first relates to plasterwork. The second relates to a whole series of other unrelated and relatively small allegations of defective workmanship.

[7] I will deal first with the proposed amendment in relation to the plasterwork as the outcome of that application will impact on my views in relation to the other amendments. Some allegations have already been made in relation to the plasterwork but not to the extent now being alleged by the defendants. The defendants were previously making the case that some areas of plasterwork would have to be stripped back and re-plastered but they now wish to allege that all the plasterwork is defective and will have to be replaced. The proposed amendment would result in a substantial increase in the amount of the counterclaim not only relating to the increased cost of re plastering but also relating for instance to the cost of moving out of the house while the work was done, re-painting and protecting wooden and other surfaces. The plaintiff was on notice of a significantly smaller claim in relation to defective plasterwork but not on notice of this increased claim. The plaintiff has had no opportunity to re-inspect the building. A counterclaim in relation to the plasterwork has always been a feature of this case and accordingly I am minded to grant leave to amend but as a result the action has to come out of the list. Neither the plaintiff individually nor the defendants individually are to pay any of the costs that are thrown away as a result.

[8] In relation to the other amendments if they stood alone I would not have granted leave to amend given the lack of opportunity for the defendants to investigate during an on-going trial. However the case has to come out of the list by virtue of the amendment of the defence and counterclaim relating to the plasterwork. The plaintiff will have an opportunity to investigate and prepare in relation to these other issues. Accordingly I am prepared to grant leave to make the other amendments so that all the issues between these individuals who are unfortunately caught up in litigation can be properly resolved. They will both have an opportunity to put forward whatever case they wish to make in relation to all the various items.

[9] I give a number of directions:

(1) By 12 noon tomorrow 30 May 2013 the plaintiff's solicitors should request the registrar in charge of the commercial list to have the action entered in the commercial list.

(2) By 12 noon on 30 May 2013 the plaintiff's solicitors should write to the commercial registrar passing on my request that the matter be reviewed before the Commercial Judge on Friday 21 June 2013.

(3) By 12 noon on 20 June 2013, that is the day before the review, both parties are to exchange written proposed directions and those are to be e-mailed to the Commercial Office so that the Commercial Judge has available to him what the parties are suggesting are the further steps that are necessary for the proper preparation of the issues in this case.

(4) I grant leave to the defendants to amend the defence and counterclaim. The amended defence and counterclaim is to be served by 12 noon on 30 May 2013, that is by 12 noon tomorrow. I give leave to the plaintiff to make consequential amendments to the reply and defence to counterclaim by 12 noon on 20 June 2013.

(5) The plaintiff's expert is to inspect a report by 12 noon on 13 June 2013, and provide a report. That report is to be disclosed by 12 noon on 13 June 2013.

(6) I direct a meeting of experts by 12 noon on 20 June 2013 and there is to be a signed minute of that expert's meeting.

Conclusion

[10] I give leave to amend and take the case out of the list on the basis of an assurance that the individual litigants will not have to bear any of the costs thrown away.