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

ICOS No: 2021/63873/01

Delivered: 08/11/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

GERARD MACKEY TRADING AS MDS CONTRACTS

Applicant/Plaintiff;

and

BRIAN HUGHES and ANN-MARIE HUGHES

Respondents/Defendants.

**Mr Dowd (instructed by Dickson & McNulty Solicitors) for the Applicant/Plaintiff
Mr Watt (instructed by Collins Solicitors) for the Respondents/Defendants**

McBRIDE J

Application

- [1] The plaintiff applies for the following interlocutory relief:
- (a) An injunction restraining the defendants from dissipating all monies obtained and/or due to be obtained by them from the Progressive Building Society in respect of an advance for the construction of a dwelling house at 134 Killycolpy Road, Stewartstown, County Tyrone.
 - (b) An order that the defendants permit the plaintiff to re-enter the site at 134 Killycolpy Road, Stewartstown to complete the construction of a dwelling house pursuant to a contract dated 7 October 2020 entered into between the plaintiff and the defendants.
 - (c) An order that the defendants pay to the plaintiff £50,000 already drawn down from the Progressive Building Society together with an order that the

defendants pay to the plaintiff all monies due from the Progressive Building Society and an order that the defendants pay to the plaintiff monies due for works done or due to be completed by the plaintiff.

Representation

[2] The plaintiff was represented by Mr Dowd of counsel and the defendants were represented by Mr Watt of counsel. I am grateful to all counsel for their detailed, concise and well researched oral and written submissions.

Background

[3] The factual background to the claim is set out in the affidavits of the plaintiff Mr Gerard Mackey sworn on 27 September 2021 and 20 October 2021 together with an affidavit of the first-named defendant sworn on 12 October 2021 and an affidavit of the second-named defendant sworn on 22 October 2021.

[4] As appears from the affidavit evidence there are a large number of factual disputes between the parties. For the purposes of the present proceedings the following factual matters are relevant:

(a) The plaintiff is a self-employed building contractor and trades under the name MDS Contracts.

(b) The defendants are husband and wife. They own a site at 134 Killycolpy Road, Stewartstown, County Tyrone. They wished to construct a new dwelling house on that site. On 24 September 2020 they obtained an offer of advance from the Progressive Building Society. One of the special conditions of the advance was that the advance was to be paid by way of staged payments. Each stage was subject to an inspection by the society's valuer and the society had to receive this report prior to the release of funds for that staged payment. There were five staged payments as follows:

Stage 1	-	Foundations complete	-	£22,500
Stage 2	-	Wall plate complete	-	£22,500
Stage 3	-	Property roofed in	-	£47,500
Stage 4	-	Property plastered interior and exterior	-	£50,000
Stage 5	-	Property complete	-	£45,000

(c) The defendants engaged the plaintiff to build the dwelling house. The exact terms of the contract are in dispute. The plaintiff asserts that the parties entered into a written contract dated 7 October 2020 and the terms of this contract governed their relationship. This is disputed by the defendants who state that the written contract is a forgery. They further dispute that they entered into a contractual relationship with the plaintiff on the terms set out in the written contract.

- (d) The plaintiff's case is that the relationship between the parties is governed by the written document entitled "Building Contract". This document was prepared by him and he asserts that it was signed by the second defendant on behalf of himself and the first defendant.
- (e) He relies on the terms of this contract as governing the relationship between the parties and in particular he relies on Clauses 4, 6, 7, 8, 9, 10, 11 and 12.
- (f) For the purposes of his claim in these proceedings the most relevant clauses of the written contract are Clauses 8, 9, and 11.

Clause 8 provides as follows:

"The contractor will charge the client a fee of £195,000 ... Staged payments will be drawn down by way of mortgage funds agreed by the client's lender in this case the Progressive Building Society. The contract makes reference to mortgage number...[ending in 4194]. Mortgage value is noted at £187,500 ... The five staged payments will be drawn by the clients' solicitors ... upon satisfactory inspection by MA McCloskey, Consulting Engineer, by Building Control and the clients' lender if required.

When the client receives their mortgage staged payment it will upon agreement be transferred directly to the contractor's account within 2 working days ... There should be no delay in this bank transfer ... as to the total contract cost is being funded by the contractor. Delay in this payment could stop works ..."

Clause 9 provides as follows:

"... It is agreed by the client the contractor will be entitled to draw down full mortgage monies to part fund the new build. Full mortgage monies will be transferred directly to the contractor's account upon drawn down of each and every staged payment."

Clause 10 provides:

"Client not permitted to gain access ... or take possession until ... outstanding monies are discharged in full".

Clause 11 provides:

“If the client should terminate the contract for any reason the contractor will be entitled to full contract payment of any outstanding balances including any additional payments without completing outstanding works ...”

- (g) In the events which happened the plaintiff completed stages 1, 2 and 3 and was paid the three staged payments totalling £91,530. The plaintiff states that he completed stage 4 and the works at stage 4 were certified by the engineer. In accordance with the Progressive Building Society advanced payment special conditions the stage 4 payment amounted to £50,000. The plaintiff says that this money was drawn down but was not paid to him. The plaintiff further states that he commenced some of the stage 5 works.
- (h) On 7 June 2021 the defendants purported to terminate the contract and put the plaintiff off the site. Solicitor’s correspondence from the defendants state that the contract was terminated due to “obstructive and aggressive behaviour by the plaintiff causing a breakdown in relationship” and due to defective workmanship.
- (i) In her affidavit sworn on 12 October 2021 the second-named defendant at paragraph 9 states that she and the first defendant “proposed to use the funds made available by our lender for the purpose of paying other contractors to perform work left undone by the plaintiff.”

Relevant legal principles in relation to the grant of interim injunctive/specific performance relief

[5] The court is empowered by Section 91 of the Judicature (Northern Ireland) Act 1978 to grant an injunction “in any case where it appears to the court to be just and convenient to do so.”

[6] The discretion to grant an interim injunction is governed by guidelines set out in **American Cyanamid v Ethicon** [1975] AC 396 but it is important to note that these are guidelines which must be applied flexibly so that the overriding objective of justice between the parties is achieved.

[7] The **American Cyanamid** guidelines set out a number of sequential questions the court should ask, namely:

- (a) Is there a serious issue to be tried?
- (b) If so are damages an adequate remedy and is the defendant in a position to pay them? If yes no interlocutory injunction should normally be granted.

- (c) If there is a doubt as to the availability of damages, the court must then consider the question of the balance of convenience.

[8] In cases where the plaintiff's fear is that he will be left with an unenforceable judgment the court has power to grant a Mareva injunction. Before granting a Mareva injunction the plaintiff must show the following:

- (a) A good arguable case; and
- (b) A real risk that assets will be dissipated by the defendant.

[9] The phrase "good arguable case" has been variously defined in the jurisprudence. I consider however that there is no reason to apply a different definition to the phrase good arguable case to the test set out in **American Cyanamid** namely "a serious issue to be tried". I consider that each phrase places upon the plaintiff the burden of showing that his case has "substance and reality".

[10] At the interim stage it is not the function of the court to resolve factual conflicts although by way of exception the court may be able to resolve straightforward legal disputes.

Consideration

[11] During the course of the hearing the plaintiff's counsel indicated that his client was seeking essentially the following relief:-

- (a) An order that he be permitted to return to the site to complete the works of construction.
- (b) An order that all monies already drawn down from the Progressive Building Society together with all monies due to be paid by the Progressive Building Society ("the fund") be paid to the plaintiff.
- (c) An order that the sum of £50,000 drawn down from the Progressive Building Society be frozen.

Order to re-enter the site

[12] The plaintiff wishes to return to the site to complete construction of the dwelling house and seeks an injunction restraining the defendants obstructing re-entry and/or an order permitting him to return to the site.

[13] To obtain such interlocutory relief the plaintiff must first establish that there is a serious issue to be tried.

[14] The affidavit evidence shows that there are a large number of factual conflicts between the parties regarding whether the alleged contract is a forgery and in the event that it is not a forgery how it ought to be construed.

[15] At this stage I consider the court is not able to resolve these factual disputes. Nonetheless I consider the plaintiff has on the basis of the evidence before the court established an arguable case. The parties were clearly in a contractual relationship and this is not denied by the defendants. Secondly, there is prima facie evidence of a written contract and this has been exhibited in evidence and it purports to bear the signature of one of the defendants. Thirdly, under the terms of the contract, on one possible construction the plaintiff is afforded the right to remain on the site until the dwelling is complete. Ultimately, whether this term is enforceable or not is a matter for another court.

[16] Given that the plaintiff has established that there is a serious issue to be tried the court must then consider whether damages would be an adequate remedy.

[17] I am satisfied that the plaintiff's interest in returning to the site is simply to obtain payment for completing works of construction. His interest is therefore a monetary one. He has no proprietary interest in the dwelling house and accordingly I consider that damages are an adequate remedy to compensate him for any loss he may sustain if he is not allowed to return to complete the works of construction.

[18] Given that damages are an adequate remedy the court then has to consider whether the defendants are in a position to pay damages. If so, no interlocutory relief should be granted.

[19] The plaintiff in his affidavit evidence points to impecuniosity on the part of the defendants. He states that they were unable to find a suitable contractor because they could not afford to pay "upfront" for building the dwelling. He also indicates that apparently they had difficulty in securing funds.

[20] The plaintiff's counsel argued that this was an unusual case because his client paid the costs upfront for the building works.

[21] I do not consider that this is an unusual case. It is clear from the evidence that the defendants secured a mortgage payment to build the house by way of staged payments. This occurred before they entered into any contractual relationship with the plaintiff. Further the plaintiff agreed to do the work and to be paid after each stage had been completed. This is very common and it would indeed be unusual for someone in the defendants' position to pay or be in a position to pay upfront the entire costs of the dwelling. Essentially the plaintiff was only paying for the first stage upfront and thereafter he was paid by way of stage payments after each stage was completed. I am further satisfied that the defendants would be in a position to pay damages given that they own the site on which the house is being built and

further are using any monies due to be paid to them by the Progressive Building Society to complete the dwelling house which is the property in which they will live.

[22] If I am wrong about this I would nonetheless refuse to grant an order restraining the defendants from preventing the plaintiff returning to the site to complete the works. Injunctive relief is an equitable remedy and the court will not grant such an order where it would be oppressive to do so. I consider that it would be oppressive to make the order in this case as granting this relief to the plaintiff would mean foisting personal services upon an unwilling party. It is clear that the relationship between the parties has broken down and in these circumstances I do not consider that equitable relief would do justice to all the parties. I therefore refuse to grant this relief.

Order to pay the entire Progressive Building Society fund to the plaintiff

[23] The plaintiff submits that the £50,000 already drawn down from the Progressive Building Society and the further staged payment of £45,000 due to be paid by the Progressive Building Society hereinafter called "the fund" was assigned to him in equity. He asserts that this equitable assignment is one of the contractual terms set out in the written contract entered into between the parties.

[24] The burden is on the plaintiff to show that the fund was assigned to him in equity. Equitable assignment in this case is a factually and legally complex issue. I have been given very detailed submissions by both counsel and in these submissions there is reference to complex jurisprudence. This is not therefore an issue I consider can be resolved at this interlocutory stage. The threshold the plaintiff has to reach at this stage is to show that there is a 'serious issue' or 'arguable case' to be made that the fund was assigned to him in equity. I note the terms of the written contract and on one construction there is an arguable case that the fund was assigned to the plaintiff in equity.

[25] Notwithstanding the fact the court is satisfied there was an equitable assignment of the fund, the property in the fund consists of money and I therefore consider that it does not require the protection of an injunction as damages would clearly be an adequate remedy.

[26] Consequently, the next question the court has to consider is whether the defendants are in a position to pay damages. The purpose of the fund was to pay for the construction of a dwelling house. The defendants in their affidavit at paragraph 9 confirm that they are going to use the fund for that purpose. Indeed I am satisfied that the fund will be used for that purpose because this is where the defendants intend to live.

[27] I consider that, as the fund is being used to complete the dwelling house, the fund is essentially being converted from money into equity in a property and

therefore the defendants as owners of the house would be in a position to pay damages.

An order that £50,000 be frozen

[28] The third relief sought by the plaintiff is an injunction to freeze £50,000 already paid by the Progressive Building Society in respect of the stage 4 works. The plaintiff seeks this injunction as he is concerned the defendants will dissipate these monies and any judgment he would obtain for carrying out these works, the stage 4 works valued at £50,000, the expenditure of this part of the fund by the plaintiffs represents dissipation of assets. He has further expressed in his affidavit evidence concerns that the defendants may re-mortgage the property.

[29] I consider the plaintiff meets the threshold of a good arguable case as the stage 4 works were signed off by the engineer and the Progressive Building Society paid the Stage 4 payment. The Progressive Building Society must have done so on the basis the conditions in the special conditions were met namely the Building Society was satisfied the stage 4 works were completed. In such circumstances notwithstanding there is a dispute as to the quality of the works carried out I consider the plaintiff has made out an arguable case that he is entitled to payment on the basis he completed these works.

[30] To obtain a Mareva Injunction the burden then rests upon the plaintiff to show that there is a real risk of dissipation. To get over this hurdle the plaintiff must produce solid evidence of dissipation. Dissipation involves spending money in a manner designed to “cheat the plaintiff out of the proceeds of their action” – *PCW v Dixon* [1983] 2 All ER 158. Consequently spending money in the ordinary course namely for living or business purposes does not constitute dissipation.

[31] In the present case the defendants indicate they are going to use the £50,000 and any other monies obtained from the Progressive Building Society to complete the construction of their home so it can become habitable. They indicate that they wish to pay contractors to remedy any defects in the works already carried out.

[34] I consider that such payments are being paid in good faith for ordinary purposes and as a result do not constitute dissipation of funds. Further, I consider there is sufficient equity in the property to meet any claim by the plaintiff especially as the defendants are living in the house and are unlikely to sell it. The plaintiff has produced no evidence that the defendants are going to sell or re-mortgage the house and in the absence of solid evidence about this I consider there is no sufficient evidence to support dissipation.

[35] Finally, I consider the granting of an injunction in the present circumstances would be oppressive as it would have the effect of preventing the defendants completing the construction of their dwelling thereby consigning them to live in a mobile home during the winter months.

[37] I therefore refuse the application and reserve costs.