

THE HIGH COURT

1982/8762p

BETWEEN: -

SCAFFORM LIMITED

Plaintiffs

and

G & T CRAMPTON LIMITED

DefendantsJudgment of Mr. Justice McMahon delivered the 28th day of November 1984

The Defendants were the main contractors for the new hospital at Beaumont outside Dublin. They employed the Plaintiffs to supply the form work for the reinforced concrete at unit rates per linear yard or cubic yard. Galway Construction Limited had agreed with the Plaintiffs to fix the form work at agreed labour rates. The building was commenced in 1978. Progress was delayed by a number of factors outside the control of the parties. Both parties recognised that the delays were preventing the Plaintiffs earning an adequate return on the investment in their form work on the site which amounted to approximately £400,000. Meetings took place in the Summer of 1979 and an agreement was reached on a fairer way of remunerating the Plaintiffs. Letters dated the 27th June and the 3rd July, 1979, were exchanged between the parties to set out the terms of the agreement. I find the terms of the agreement were that the Plaintiffs would be paid for supplying and fixing the form work every two weeks by a payment made up

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of a labour component based on the schedule of rates originally quoted by Galway Construction Company Limited to the Plaintiffs and a materials component calculated on the hire of the material on site at the Plaintiffs standard rates of hire less 25% and 2½% special discount. The Defendants were to be responsible for any damage to, the maintenance of, and loss of the Plaintiffs' materials on site, fair wear and tear excepted and for return of materials on site to the Plaintiffs.

From this time until the 22nd June, 1981, the Plaintiffs received periodically from the Defendants two payments, one representing a payment for form work materials and the other the labour component for fixing the materials. The Plaintiffs passed on their own cheque for the latter sum to Galway Consturction Company Limited.

On the 22nd June, 1981, the Defendants ceased to make any payment to the Plaintiffs in respect of the use of Plaintiffs' materials. The Defendants continued to use the materials though on a reducing scale as that part of the work was tapering off and they continued to send to the Plaintiffs payments for the labour provided by Galway Construction Limited. The Plaintiffs did not welcome the ending of payments but they acquiesced in it and I find that both sides expected to make a final settlement between them at an early date under which the Defendants would purchase any form work material they wished to retain, return the remainder to the Plaintiffs and pay any sums outstanding for use of the material. The Plaintiffs ceased to invoice the Defendants for use of materials on site and the Defendants returned part of the material from time to time. The contemplated meetings did not take place and on the 31st March, 1982, the Plaintiffs invoiced the Defendants for the use of materials for the period 31st August, 1981, to 20th December, 1981, and 4th January, 1982 to

28th March, 1982 and notified the Defendants that hire continued since the 29th March, 1982, at £1,896 per week. The latter figure was based on the amount of the Plaintiffs' materials on the site according to their records.

Plaintiffs' claim for supply of form work

I find that all payments due to the 21st June, 1981, except the sum of £6,054 with V.A.T. £996 amounting to £7,050 were paid. At the meeting of the 30th July, 1981, between the parties the Defendants stated and the Plaintiffs accepted that the Defendants would make no further payments based on the amount of material on the site and the Plaintiffs were free to remove any of that material they wished to and any further use by the Defendants would be taken into account in the final settlement. I hold that in respect of the use of their material after the 30th July, 1981 the Plaintiffs were entitled to be remunerated on a quantum meruit basis for the material actually used. The evidence indicates that Galway Construction Company Limited continued to fix form work some which belonged to the Plaintiffs, some to Dockrells and some to the Defendants and payments for that labour continued to be made to the Plaintiffs. It was the duty of the Defendants in those circumstances to keep a proper record of the use made of the Plaintiffs' materials but they failed to do so. It is my view that in those circumstances the Court is entitled to award damages on the basis that only the Plaintiffs form work was used by analogy to the principle in cases of conversion of putting the highest value on goods which the Defendants refuse or are unable to produce. The only guide I have to the amount of form work used after the 30th July, 1981, are the amounts paid to Galway Construction Company Limited. I find this amount to be £90,000. I find that on average the amount paid for labour for fixing represented 70% of the total paid for supply and fixing form work. On this basis the total charge for plant

and labour would be £128,570 and the plant component is therefore £38,570.

I find the balance due to the Plaintiffs for the use of their plant on this contract should be calculated as follows:-

Retention money due 21st June, 1981	£ 6,054
V.A.T. on retention money	£ 996
Use of plant after 30th July, 1981	<u>£38,570</u>
	TOTAL
	£45,620
Less paid on account on 17/5/82	<u>£25,960</u>
	Nett
	£19,660

The Plaintiffs are entitled to interest at 11% from the 21st June, 1981, to the 17th May, 1982, on the sum of £45,620 and on the sum of £19,660 from the 17th May, 1982, to date.

Plaintiffs' claim for damage to form work

The Plaintiffs sent separate invoices for damage to form work to the Defendants on the 20th November, 1979, the 14th March, 1980, and the 9th April, 1980, amounting to £13,316 (including £1,952 V.A.T.). After the statement of claim was delivered a further damage invoice was sent to the Defendants amounting to £357 (including £75 V.A.T.). I accept the evidence of Mr. John Francois and the Plaintiffs' records as to the quantity of form work damaged, the cost of repairing the repairable items and the value of the unrepairable items.

I therefore find the Plaintiffs are entitled to recover under this head £13,316 with interest at 11% from the 12th May, 1981, to date and £357 with interest at 11% from the 23rd March, 1983, to date.

Claim for value of equipment not returned

The Plaintiffs' letter of the 27th June, 1979, referring to a meeting that day between Mr. John Butler of the Plaintiffs and Mr. Michael Cassidy of the Defendants stated:

"(c) G & T Crampton Limited further assume full responsibility for the return of materials on the site to Scafform Limited".

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The Defendants reply of the 3rd July, 1979, confirmed that they agreed with the points made in the Plaintiff's letter and went on to state more accurately the basis of future payments but did not dissent on the question of liability for return of materials. According to the Plaintiffs' records and the evidence as to value of Mr. Francois which I accept material to the value of £53,000 has not been returned to the Defendants. The Defendants say they returned all materials and the discrepancy must be due to errors in the Plaintiffs' records, because unauthorised removal was prevented by a security barrier and examination of all lorries leaving the site by security personnel. The Defendants accept that the amount claimed by the Plaintiffs is in accordance with invoices sent to the Defendants for delivery of material to the site and receipts sent to the Defendants for the return of materials from the site. On such a large contract there are many ways in which form work material could go astray notwithstanding the security measures in operation. I am satisfied that form work to the value of £53,000 (including V.A.T.) was not returned to the Plaintiffs and they are entitled to recover this amount together with interest at 11% from the 3rd January, 1983, to date.

Counterclaim

The Defendants claim a sum of £244,000 which they allege was overpaid to the Plaintiffs in mistake of fact on foot of demands by the Plaintiffs for payment of moneys for equipment and work not in fact supplied or done. The Defendants say that during the currency of the agreement the Plaintiffs consistently demanded payment in respect of equipment which was not in fact supplied. The only grounds put forward by the Defendants in support of this claim are that the Defendants carried out stocktakings of the Plaintiffs' equipment on the site on the 21st May, 1979, and the 17th May, 1981, and the first

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of these they allege showed 5% deficiency relating to the amount of material claimed by the Plaintiffs to be on site and the second a deficiency of 10%. The Defendants admit that they did not do a comprehensive stocktaking but confined it to all the more valuable items and accept that their check could be subject to a 5% margin for error. The purpose of the 1979 stocktaking was to ascertain the amount of equipment on site at the commencement of the new method of payment agreed to in June/July, 1979, and the purpose of the stocktaking in 1981 was to give the Defendants a basis for negotiating a final settlement with the Plaintiffs under the contract.

The Defendants gave the Plaintiffs receipts for all materials delivered on site after the 21st May, 1979, and obtained receipts from the Plaintiffs for all materials returned by the Defendants from the site. The sums invoiced by the Plaintiffs to the Defendants for the use of materials are in accord with these receipts. During the two years involved the Defendants never claimed that the sums invoiced for the use of materials were overstated. The Plaintiffs kept meticulous records and the Defendants never made this claim until they needed negotiating grounds in settling the Plaintiffs' final claim. The onus is on the Defendants to show that they were overcharged and in the circumstances it is a heavy onus. I am satisfied that it has not been discharged and I dismiss the counterclaim.

ADDENDUM

In dealing with the Plaintiffs' claim for damages to form work earlier in this Judgment when I stated that I accepted the evidence of Mr. John Francois and the Plaintiffs' records as to the quantity of form work damaged, the cost of repairing the repairable items and the value of the unrepairable items I overlooked the following invoices for damages to form work which the Plaintiffs had sent to the Defendants:

5/4/1982	£59,155.54
14/10/1982	<u>£ 2,922.61</u>
Total	£62,078.15

I therefore find the Plaintiffs are entitled to recover the following additional sums under this heading:

- £59,155.54 with interest at 11% from the 5th April, 1982
- £ 2,922.61 with interest at 11% from the 14th October, 1982.

Assured
Jm Mahon
 5/12/85