Neutral Citation No: [2023] NIMaster 10 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **2023NIMaster10** *ICOS No:* **22/106469** *Delivered:* **24/11/2023**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

Between

DAVISON & ASSOCIATES (NI) LIMITED

Plaintiff

-and

ADMIRAL CARE SERVICES (NI) LIMITED

First Named Defendant

-and-

RICHARD & DAWN SARGENT

Second Named Defendants

Mr Sinton BL (instructed by Fisher Law) for the Plaintiff.
Mr Fletcher BL (instructed by Tughans Solicitors) for the Defendants.

Master Harvey

Introduction

[1] This is a commercial action in which the plaintiff has applied for summary judgment under Order 14 of the Rules of Court of Judicature (NI) 1980 ("the Rules"). The plaintiff provides a claims management service. The defendants' premises were subject to a fire in 2020 which gave rise to an insurance claim of just under a million pounds. The defendants engaged the plaintiff to prepare, present and negotiate that claim with the defendants' insurers.

[2] On 22 August 2022 the plaintiff presented its invoice in respect of the services provided to the defendants in the sum of £74,372.93 inclusive of VAT. This was before the defendants received payment of the insurance claim, which is the main

bone of contention in this dispute. According to the invoice, payment was due on 21 September 2022. The basis of the calculation was 10% of the defendants' settlement with the insurer (£888,135.30) less an interim payment made by the defendants to the plaintiff of £14,444.60. On 8 December 2022, the plaintiff issued proceedings against the defendants due to their failure to pay this fee. Interest on the principal sum is also claimed, together with costs. The plaintiff then issued the current application for summary judgment on 10 February 2023.

[3] On 29 March 2023, the defendants received the balance of the insurance settlement of £642,951.48 and on 5 April 2023, the defendants paid the plaintiff the invoiced fee of £74,372.93.

[4] The issues between the parties have therefore been narrowed and I was informed that the plaintiff offered to have this matter removed to the Judge for determination of this issue and the substantive action, but the defendants opposed this course and the Judge directed the interlocutory application be dealt with first.

[5] Given that the capital sum has been paid, the application for summary judgement relates only to the claim for interest from 21 September 2022, calculated at 3% above the prevailing base rate in accordance with the plaintiff's terms of business or under section 33A of the Judicature Act (Northern Ireland) 1978 to the date of judgment or sooner payment, together with costs.

[6] I wish to express my gratitude to both counsel whose written and oral submissions were very helpful to the court and commendably focused.

Contractual terms between the parties

[7] The terms of the contract between the plaintiff and the defendants are to be found in the plaintiff's terms of business which were provided to the defendants on 25 May 2020. Under the sub-heading "Our Service", the following was provided:

> "We act on your behalf in providing claims management services to you, the policyholder, in the calculation, negotiation and settlement of your insurance claim and, where appropriate, in the recovery of uninsured losses (together or individually "the claim"). In instructing any third party in connection with your claim, we act as your agents only and we ae [sic] authorised to instruct such parties as is necessary for the proper preparation of your claim. You are liable for all costs incurred in connection with all work carried out by any third party we instruct on your behalf."

[8] Under the sub-heading, "What You Will Pay for our Services", the terms provided:

> "Our fees are based on a percentage (agreed between us separately) of the value of the claim plus VAT and are payable on all amounts received by you or anybody on your behalf under the policy or from a third party or from any other party through litigation, arbitration or other recovery or settlement process. Occasionally, we may agree to charge a specific fee for a specific service which will always be agreed in advance of any liability for you to pay. All invoices submitted by us must be settled by you promptly, and payment would normally be expected within seven working days of receiving our invoice. We will charge interest at 3% above the prevailing base rate in respect of all sums outstanding for over 28 days following receipt of invoice."

Defence submissions

[9] From the payment clause contained in the plaintiff's terms of business, it is patently clear that the plaintiff was entitled to a fee only once the defendants received their settlement sum. This is the only way to make sense of the term given that:

> (a) the fee is a fixed percentage of the settlement sum, and therefore, that sum can only be ascertained once the insurance company has confirmed what it will pay out; and
>
> (b) it explicitly refers to the fee being "payable on all amounts received by you". The contingent event for payment is therefore the receipt of settlement sums and nothing else.

[10] The defendants assured the plaintiff that they would pay its fee once the insurance monies were received and that the plaintiff had no contractual entitlement to a fee until the aforementioned monies were received. The plaintiff's claim was therefore issued when it had no cause of action. On this basis, the application for summary judgment should be dismissed.

[11] There is no commercial sense to an interpretation of the contract that allows for payment before the insurance monies are received by the client given that the services provided by the plaintiff had the object of securing payment from the insurance company. The payment of the interim invoice from the plaintiff was from initial monies paid by the insurer. The payment of the other professionals engaged by the plaintiff to assist with the claim was on the basis of their time spent, and not calculated as a percentage of the final claim nor was it charged as an invoice to the defendant but settled by the insurer.

[12] The defendants claims the plaintiff has pursued this litigation in a needlessly aggressive manner and has been paid in accordance with its own terms of business, therefore, it cannot have any complaint against the defendants who made payment promptly whenever the plaintiff's right to a fee arose, not because of the correctness of these proceedings.

[13] The arguments advanced by the plaintiff in relation to estoppel were not addressed in its grounding affidavit nor in the statement of claim in the action. The defendant did not have a chance to deal with these points in advance of the hearing of this interlocutory application as it was raised for the first time in plaintiff counsel's skeleton argument. In any event, the defendant has established it has an arguable case in relation to the interest claim and therefore the application should fail.

Plaintiff's submissions

[14] The plaintiff's position is that it has clearly "won" these proceedings as the defendants have paid. They claim the defendants are now using this application as an opportunity to argue the plaintiff would not have won at trial thus the plaintiff has to deal with the points raised by the defendants. The plaintiff's primary contention is that such an inquiry is unnecessary and submits that this is a very straightforward matter in which costs should follow the event in the usual course as well as interest on the principal sum.

[15] The defendants are estopped from advancing a defence that that the sum claimed by the plaintiff was not due at the time the writ was issued and only fell due when the defendants were paid by their insurer. The plaintiff served a pre-action protocol letter on the defendants dated 23 September 2022. The defendants' solicitors replied to this letter on 7 October 2022. This response only addresses issues of quantum of the fees claimed and fails to make any reference to the suggestion now raised that the plaintiff's fee was not yet due for payment. The first time it was ever referred to was on 13 January 2023, after issue of the writ.

[16] It is clear that, notwithstanding the wording of the terms & conditions issued by the plaintiff, that is not what the parties in this instance actually understood. The defendants are now relying upon such wording in relation to the time for payment, when the parties have never previously done so, and it is unjust and unconscionable for the defendants to do so.

[17] Throughout the parties' clear and unequivocal previous dealings, both parties assumed that if the plaintiff presented an invoice, the defendants would pay this. The defendants paid an interim invoice for £14,440.60 on 22 September 2021. Had

either party considered that the clause in issue applied, then the Plaintiff would not have presented a bill at that time, nor would the defendants have paid it.

[18] This clearly influenced the plaintiff, as it proceeded to issue the further invoice now in dispute. The plaintiff did so believing that the invoice would be paid in the same fashion as the first, because of the parties' assumption that this was how they were doing business. The facts of this matter therefore give rise to a promissory estoppel against the defendants as regards the clause raised. Moreover, there was no duress or misrepresentation by the plaintiff.

Legal principles

[19] Order 14 of the Rules provides:

> "*Application by plaintiff for summary judgment*
>
> 1. – (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action. the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.
>
> …
>
> *Judgment for plaintiff*
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> 3. – (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.
>
> …
>
> *Leave to defend*
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> 4. – (1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.
>
> (2) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms

as to giving security or time or mode of trial (in cases which under the Act may be tried without a jury) or otherwise as it thinks fit."

[20] In an application for summary judgment, the defendant need only raise a reasonable doubt about the plaintiff's entitlement to judgment; assuming all facts in his favour: Wylie *Irish Judicature Acts* (1905 ed.) p.264.

[21] In *National Westminster* v *Daniel* [1993] 1 WLR 1453 (applied in *First National Commercial Bank* v *Anglin* [1996] 1 IR 75 and *Bell v Causeway H & SS Trust* [2003] 4 BNIL 93, [2002] NIQB (Coghlin J), the Court of Appeal has laid down the test for unconditional leave to defend: is the evidence to which the defendant deposes credible and on the facts raised thereby, is there a fair or reasonable probability of him having a real or *bona fide* defence in law?

[22] In *Winemark (The Wine Merchants Ltd) v Kilmona Property Ltd [2019] NIQB 23* the parties were in a dispute over covenants in lease. The plaintiff was renting a unit in a shopping centre owned by the defendant, the latter was seeking to redevelop the centre and issued a notice to terminate the lease. The plaintiff applied for injunctive relief for breach of covenants. The defendant undertook to carry out works identified by experts, therefore, the parties agreed adjudication was not required by the court following that undertaking, however, they were unable to agree costs. At paragraphs 23 and 24, McBride J stated:

> "[23] I consider that this is a case in which the relief obtained by the plaintiff constituted a final order as all the breaches set out in the interim injunction application were finally resolved by the defendant carrying out certain works. I note that a number of other issues set out in the Writ remain to be adjudicated upon. I further note that there are pending Lands Tribunal proceedings. The matters to be resolved in respect of the Writ and the Lands Tribunal proceedings however, relate to completely different issues. Accordingly, I consider that the undertakings given by the defendant in this case and the carrying out of the works to remedy the breaches in respect of health and safety, amounted to a final resolution of the matters set out in the interim injunction application.
>
> [24] the plaintiff was entitled to issue proceedings in this case; … the plaintiff won the case and the resolution of the dispute amounted to a final determination of the interim injunction."

Conclusion

[23] The current action is distinguishable from the *Winemark* case. In this case, payment of the principal sum was not the final resolution of the dispute as the parties have not agreed on the interest claim. The interest claim is not a "completely different" issue, moreover the plaintiff is pursuing an application for summary judgment which requires determination.

[24] The plaintiff is of the view that this court has unfettered discretion and can adjudicate upon the interest claim, the costs of the overall action as well as the costs of the interlocutory application, as the plaintiff has "won". The defendant does not accept this and asserts that the costs of the final action are different from the costs of the application.

[25] I agree with the latter proposition as the substantive proceedings have not actually fully settled given the interest claim remains in play and this court is required to deal with the interlocutory application before it. Of the possible outcomes in this application, one is that if the court finds in favour of the plaintiff, damages, interest and costs inevitably follow. However, if the court concludes that there exists an arguable defence to the claim and leave is granted for the defendant to defend what remains in the action, summary judgment will not be granted. Thereafter the trial Judge will have to consider any further evidence adduced and hear from the parties' respective witnesses, ultimately determining the issue of interest and costs in the substantive claim. Contrary to submissions from the plaintiff, these are not matters that can be dealt with at this interlocutory stage in the context of an Order 14 application where the evidence has not been tested through the hearing of oral evidence and cross examination of witnesses.

[26] When one stands back from all this, the question for this court is a simple one, does the plaintiff have grounds for the relief sought under Order 14 of the Rules? The test in accordance with the authorities is straightforward; is the evidence to which the defendant deposes credible and, on the facts raised thereby, is there a fair or reasonable probability of them having a real or *bona fide* defence in law?

[27] In addition to the above test, one can add from the authorities that a defence is not incredible simply because the judge is not inclined to believe the defendant: *Irish Bank Resolution Corporation v McCaughey* [2014] 1 IR 749.

[28] In short, if the defendant can show a bona fide, arguable case, the application should not be granted and the matter will proceed to a hearing before the judge, albeit such a hearing will now only deal with the interest claim and costs. The former figure is relatively modest in the sum of £2,498.63. The parties could not advise me of the likely costs and I caution the parties that figure will clearly not reduce the longer this dispute is prolonged.

[30] On balance, when one considers the clear wording of the payment terms, taking a commercial and common-sense approach to the meaning of those words in relation to the timing of payment of the plaintiff's fees, it is more in keeping with the defendant's interpretation. This was a significant insurance claim of just under a million pounds. A large fee such as in this case could only reasonably be expected to be settled after receiving payment of the claim and that is what the terms provided, regardless of what appears to be the premature issuing of the invoice and the prompt expected date of payment contained therein.

[31] The wording in the terms and conditions was that the plaintiff's fee was (my emphasis added) "payable on all amounts *received* by you." I did raise with defence counsel as to why the defendants, upon receiving a bill for payment of a final fee to the plaintiff for tens of thousands of pounds (when they assumed payment would be made at the end), they did not immediately pick up the phone or send an email to the plaintiff expressing incredulity as to the timing of their sending of this large invoice. It is not clear to me why they chose not to do so. This would have brought the matter to the attention of the plaintiff and perhaps avoided all that ensued.

[32] What followed was a series of correspondence between the lawyers, the purported termination of the plaintiff's retainer, and the issuing of legal proceedings. The various communications are in dispute, and I do not propose to rehearse them here, however, the defendants primary defence remains essentially "we paid when we were supposed to" and did so within six days of receiving the insurance settlement in April 2023. While their conduct leaves questions to be answered, on balance in all the circumstances of this case, I do not conclude their defence is unarguable.

[33] The defendant's payment of the plaintiff's interim fee and the circumstances surrounding that payment are in dispute, with the defendant's counsel indicating it was paid from a large initial sum received from the insurance company. Clearly further affidavits are required, or evidence needs to be heard on this point. Nevertheless, I do not conclude that payment thereof constituted an acceptance by the defendant that they would pay the full amount for a considerably larger sum as soon as they were invoiced and before receiving the insurance monies.

[34] Similarly, I do not accept that early payment of the other professionals engaged by the plaintiff including surveyors, architects and engineers amounted to evidence which contradicts the defendant's purported interpretation of when payment of the plaintiff's own final invoice fell due. I was advised that the payment of these professionals was released by the defendant's insurers and not paid directly by the defendants. The position with the plaintiff's invoice was manifestly different.

They expected the defendants to pay up within a few weeks, not via the insurers but out of their own pocket well in advance of the settlement of an insurance claim for hundreds of thousands of pounds.

[35] Immediately prior to the issuing of proceedings, the defendant's solicitor wrote to his counterpart for the plaintiff stating that legal proceedings were "unnecessary" and that "your clients cannot expect to be paid in full for their work before they have completed what they were appointed to do." That is the crux of the defendant's case and is at the very least an arguable defence meaning there is an issue or question in dispute which ought to be tried, in accordance with Order 14 Rule 3 (1) of the Rules. It is not for this court, in the context of an interlocutory application, to determine if that is a strong or weak defence or ultimately decide upon the merits of the plaintiff's claim, not having heard from witnesses or having the evidence tested at trial.

[36] The plaintiff raises legal issues regarding estoppel on the basis of the parties' previous dealings, the respective understanding of their business relationship and the conduct of the defendant. The defendant indicates it was unable to deal with this point in its replying affidavit or skeleton argument as the issue was not raised in the plaintiff's affidavit evidence or the pleadings and first emerged just a few days prior to this hearing in plaintiff counsel's skeleton argument. Ultimately, this will have to be dealt with at any trial, if the case reaches that far, as it is apparent the defendant has a real defence in law and therefore, I must refuse the application for summary judgment under Order 14. With regard to costs, there is disagreement between the parties as to whether the plaintiff needed to issue the substantive proceedings or this application. Given the plaintiff's interest claim requires determination by the Judge and that all these issues are intertwined, I reserve the issue of the costs of this application to the trial judge and direct the matter now be referred to the judge for the hearing of what remains of the substantive action.

[37] Finally, it is apparent that a lot of acrimony and bad blood has developed between the parties. It is unfortunate they have not been able to resolve their differences in this case via negotiations through their respective legal teams, rather than coming to the court with a contested interlocutory application and a seemingly inevitable further hearing before the commercial judge and the consequent escalating costs. This jurisdiction has a long history of parties for the most part adopting a common sense and pragmatic approach to civil claims with a degree of flexibility and compromise on both sides, leading to the resolution of hitherto seemingly intractable disputes. I urge the parties in this case to strive to seek an amicable resolution to this matter at the earliest opportunity which will save further time and money on both sides.