

1982 No. 9739P

THE HIGH COURT

BETWEEN:

O'DWYER STEEL COMPANY LIMITED

Plaintiff

and

NOEL TEMPLETON

Defendant

Judgment of Mr. Justice Gannon delivered the 28th day of March, 1985.

This is a claim for damages for the breach by non performance of an alleged contract made on the 22nd of January, 1982. The plaintiff company are steel stockholders and fabricators, and the defendant is the owner of a site at Rathedmond, Sligo, which he intended to develop by the erection thereon of 11 units for warehousing for which he then had obtained planning permission from the Corporation of Sligo. At the time he had on the site a number of lorries in store in connection with his business of buying and selling lorries, and also a mobile office for the use of the security service necessary to protect the stored vehicles. All his previous business experience was in the buying and selling of mechanically propelled vehicles and the running of service garages for mechanical propelled vehicles. The business of the plaintiffs was the supply and sale of structural steel items to the building trade and included the design, manufacture, assembly, delivery and erection of prefabricated structural steel units to meet special requirements.

The circumstances which brought the contracting parties together originated with an application by the defendant's son-in-law, Mr. Gerry Duggan, to Messrs. Brouder Coleman & Sons, Rathangan, Co. Kildare, for a quotation for the supply of components and

erection of 11 steel industrial units in accordance with Mr. Duggan's plans. This application was sent in a letter dated the 5th of January, 1982 on notepaper headed:-

"D-Plans & Developments

Tonaphubble Sligo

G.B. Duggan T. Eng. Dip. Water Eng. (I.E.I.

(071) 61946

(041) 3261 (office hours)."

This letter is as follows:-

"We are at present undertaking the installation of the services for the proposed 11 industrial units (see drawings enclosed). Initially we had intended to erect with precast concrete portal frame but have since opted for steel work. We are interested in a quotation for structural steel, roofing, side cladding, i.e. the supply of all components and erection (please find specification enclosed).

If you are interested in quoting for the contract please let me know as soon as possible as we hope to commence operations within the next 2 to 3 weeks.

Yours sincerely,

Gerry Duggan

The project is in centre of Sligo city."

Messrs. Brouder Coleman & Sons to whom the letter was addressed were sub-contractors for the plaintiffs but were not steel stockholders or fabricators as were the plaintiffs to whom they passed on this letter with its enclosures.

On the 21st January, 1982 Mr. Seamus O'Dwyer, the sales

estimator of the plaintiff company, visited the site in Sligo and that afternoon met for the first and only time the defendant and Mr. Gerry Duggan. With him Mr. O'Dwyer brought a typed written quotation dated 21st January, 1982 and addressed as follows:-

"Attention Mr. Gerry Duggan,  
D-Plans & Developments,  
Tonaphubble,  
Sligo.

Re: Proposed Warehouse Units for Mr. Noel Templeton."

This two page document contains printed conditions on the back of the first page to which attention is drawn on the foot of the first page and again in the typewritten letter signed by Seamus O'Dwyer. These conditions are expressed in terms more appropriate to work being undertaken by the plaintiffs as sub-contractors for a main contractor engaged on a larger building contract than to work under a contract made directly with the building work employer.

In the course of his evidence Mr. O' Dwyer said that before preparing the estimate he had got in touch with Mr. Duggan by 'phone and discussed the drawings and offered to submit a tender and in that discussion he was told that Mr. Duggan was acting for Mr. Templeton. Mr. Duggan in evidence said that he had had no contact whatsoever with Mr. O'Dwyer previous to meeting him in Sligo upon receiving a 'phone call from Mr. Templeton on the afternoon of the 21st of January, 1982. The plaintiff's record of 'phone calls disclosed a call made on the 7th of January, 1982 by Seamus O'Dwyer to Gerry Duggan but Mr. Duggan denied receiving any such call. From a comparison of the quotation with the plans included with the letter of the 5th of January 1982 to Brouder Coleman & Sons it is evident

that some significant information additional to that furnished in the plans had been considered for the purpose of the quotation which had been prepared before Mr. O'Dwyer's arrival in Sligo on the 21st of January 1982. I accept the evidence of Mr. O'Dwyer as being correct.

Mr. O'Dwyer produced in evidence the handwritten notes made by him at the time he estimated his figures for the tender. All but 2 units were of regular rectangular shape 56' X 36' while those numbered 1 and 2 were 36' X 37'. ~~These~~ two and all save number 11 were in pairs having a common internal wall between each two and number 11 had four external walls. The price of a pair 56' X 72' was estimated at £18,460 but the price tendered for number 11 was £770, more than half the price of a pair. This price of £18,460 per pair when related to the overall floor area of the pair gave a charging rate of £4.58 per square foot which Mr. O'Dwyer says he told the defendant he was using for his quotation.

The site which was inspected on the 21st of January 1982 was found to be a strip of land 550' long by 80' wide to which access could be had by a single narrow road leading off the Sligo to Eniskillen road along the railway embankment. At this time Mr. Templeton was using the site as a storage place for lorries and parts in conjunction with his garage business in Sligo. It was his intention to finance the project by making advance sales of the units before their erection, and had engaged an auctioneer to find the purchasers. He had negotiated his first sale with Securicor for a double unit but had not obtained a deposit from them before the 22nd of January, 1982. After inspection of the site Mr. Templeton Mr. Duggan and Mr. O'Dwyer discussed the design and lay-out of the units and the work to be done on the site and delivery of materials

for erection of units. Mr. Templeton bargained for a reduction of the overall quoted price of £97,106 and this was rounded off to £95,000. After agreement was reached on the £95,000 Mr. O'Dwyer asked for a deposit of £8,000 as a first payment and further payments to be made at stages to be agreed of the work. The plaintiffs claim that the defendant agreed to this and that the defendant gave a firm order in accordance with the letter of the 22nd of January, 1982 accepting the tender as so varied to £95,000. The defendant denies having placed a firm order, and contends that it was a condition of any agreement that the defendant would not be liable for any payment until he had sold and received a deposit for the units to be constructed and erected. The dispute between the parties on this point is fundamental to the plaintiff's claim.

The letter of the 22nd of January 1982 from Mr. Duggan is as follows:-

"D-Plans & Developments

Tonaphubble Sligo  
(071) 61946

G.B. Duggan T.Eng. Dip. Water Eng. (I.E.I.)

O'Dwyer Steel Co. Ltd.,  
Dundrum,  
Co. Tipperary

22 Jan. '82

Re: Warehouse Units at Rathedmond, Sligo

Dear Seamus,

I am pleased to advise you that your quotation for the above complex has been accepted for the sum of £95,000 exclusive of V.A.T.

Please confirm the following:-

- (1) Your intention to commence operations within four to six

weeks.

(2) Your acceptance of stage payments as follows:-

- (a) Units 3 and 4 - £8,000 deposit prior to steel delivery.
- (b) £8,000 on delivery of asbestos and cladding on site.
- (c) £2,000 final payment.
- (d) Units 5 and 6 ditto.

(3) Outline drawings for foundation pads, steel details etc. with a signature for structural guarantee of the components you are using.

Hoping to hear from you at your earliest convenience.

Yours sincerely,

Gerry Duggan

P.S. Please excuse the informal letter Seamus but it takes two days to get anything typed around here."

Mr. O'Dwyer says that he was told that the defendant had already sold two units but was not told to whom, and that the defendant had auctioneers engaged to sell or lease the remaining units. He understood the two units already sold were required urgently and recalled that in his 'phone conversation with Mr. Duggan before preparing the quotation he had been told three units were sold. He said that the £8,000 he asked for as a deposit was approximately the value of the quantity of steel required for a double unit. He denied there was any condition or suggestion that the payment of

a deposit or the placing of the order were dependant upon the previous receipt by the defendant of money from a purchaser of any of the units. Mr. O'Dwyer's evidence was that at the end of the meeting on the 21st January 1982 he had secured a contract worth £95,000 under which the plaintiffs were to deliver and erect the first two units valued at £18,460 within four to six weeks and the defendant was to send a deposit of £8,000 as a first stage payment to be followed by two further stage payments of £8,000 and £2,460 and the like payments for subsequent units. No formal written document by way of contract was drawn up or prepared or executed but he says he drew the attention of the defendant to the condition on the back of the quotation. When asked by Mr. Templeton if he required a formal contract he said no that it was sufficient to write to him confirming the agreement.

Mr. Templeton's evidence as to the meeting on the 21st of January, 1982 in Sligo is that he did not know that Mr. Duggan had sought quotations from anyone other than from a Sligo firm, and that when Mr. O'Dwyer called to his garage on the 21st of January, he 'phoned Mr. Duggan and they drove out to the site and came back to a premises near Ballymote for discussions. He said he was only interested in the price, and that when they had agreed the price Mr. O'Dwyer wanted a definite order. He said Mr. O'Dwyer wanted a deposit of £8,000 as a first payment and more payments at different stages. His evidence was:-

"I said we wouldn't pay any money until we got our first deposit from a client. It was made very clear we wouldn't. It didn't get down to anything definite of when we would pay a deposit. We had to get a commitment from clients. All these things were presumed. He was told when I would get

a deposit he would get a deposit. He was satisfied. I asked did he want a contract. He said no."

In the course of cross-examination Mr. Templeton said he had advertised extensively before he met Mr. O'Dwyer but could not say what information was given in the advertisements nor if the number of units was mentioned, and he did not think the advertisements mentioned when the units would be available. He had no bill from the auctioneers. He said he told Mr. O'Dwyer he had clients interested - "four clients on the agenda for buying, one definite, one reasonably definite, and the auctioneer not at a definite point with another". He said he did not see the letter Mr. Duggan wrote the next day.

Mr. Duggan's account of the events of the 21st of January, 1982 was that he had had no contact with Mr. O'Dwyer until he got the 'phone call from Mr. Templeton on the 21st of January and then went out and met Mr. O'Dwyer. The three of them, he said, discussed every aspect of the project of 11 units and hoped to be underway in four to six weeks. He went through the entire design of the units and agreed Mr. Templeton would be responsible for the concrete foundation pads and site works. They also discussed what the plaintiffs would be doing. Before the price was agreed they discussed what was involved in their work by the defendant and analysed the quotation figure to get it down and round it off. After that the price was fixed at £95,000 when Mr. O'Dwyer rounded off all the figures he had quoted. He said:

"We told him (Mr. O'Dwyer) we were going to get £10,000 from Securicor for each of two units within 14 days. The project would be ready for development by four or five weeks and we would take four weeks to get the site ready. We told him we could not proceed with the work until we



got deposits from Securicor. That was towards the latter stages of conversation. I don't recall who told him. I cannot say what he said. The contract was the last thing mentioned. As we got up Mr. Templeton said did he need a contract signed. Mr. O'Dwyer said no, it was sufficient to write. Nothing whatsoever was said as to when O'Dwyer Steel would do their work, that is arriving and putting the steel into the concrete. We told Mr. O'Dwyer that business would be subject to our signing a contract with Securicor within two weeks. We told him we would pay his deposit in approximately two weeks from that date but couldn't be exactly sure of the date because we were told the auctioneer hoped to have the contracts signed by Securicor, that was for £10,000. Apart from the letter I drafted the next day nothing more was said about anything to be done by either party, nor was either to get in touch with the other."

To resolve the conflict between the distinctly irreconcilable accounts in relation to the making of the alleged contract I have considered the terms of the documents, about which there is no dispute, and the subsequent conduct of the parties, about which there is no significant conflict of evidence. Following receipt of the letter of the 22nd of January, 1982 Mr. O'Dwyer got in touch with the various departments of the plaintiff company's business and set about ordering materials and having them prepared for delivery. Mr. Cahill the plaintiff's Technical Manager examined the drawings and 'phoned Mr. Duggan about technical details of dimensions not shown in the drawings. The drawings were completed by the 3rd of February, 1982 and the cutting of steel commenced about the 10th of February, 1982. Mr. O'Dwyer wrote to Mr. Duggan on the 5th of February confirming the terms of the letter of the 22nd of January. On the

20th of February Mr. Duggan wrote asking for a change of colour of cladding and for design information for the purposes of preparing the foundation pads. The holding down bolts required by the defendant for this purpose were dispatched by C.I.E. from Connolly Station on the 17th of February for collection by Mr. Templeton at Sligo, and they were collected at Sligo on behalf of Mr. Templeton on the 25th of February, 1982. By the end of February 1982 the first 2 units required were completed and loaded ready for delivery. The information as to base loads for foundations was sent by Mr. Cahill to Mr. Duggan by letter of the 22nd of February, but no mention was made in that letter of the dispatch of three cartons of holding down bolts. On the 8th of March, 1982, Mr. Duggan wrote to Mr. O'Dwyer the following letter:-

"D-Plans & Developments

Tonaphubble Sligo  
(071) 61946

G.B. Duggan T. Eng. Dip. Water Eng. (I.E.I.)

8th March, '82

Seamus,

Please find enclosed revised plans for your attention. Please note the following.

We are now proposing to build 10 initially with more car parking space between units - we find it suits our clients better.

Can you now forward me a new quotation based on the first, taking into account the revisions on the lay-out plan i.e. larger unit - number 1 and 2.

2 No. detached units as opposed to one.

We propose to widen front roll up door from 13' 0" to 15' 0". I understand this is not possible for the first two units.

Yours sincerely,

Gerry Duggan  
for Noel Templeton."

Following receipt of this letter Mr. O'Dwyer 'phoned and gave revised figures calculated on the basis of £4.58 per square foot according to the revised areas. According to Mr. Duggan the alteration of plans was to facilitate Securicor but this was not mentioned in the letter. No further letters were written, all further communications being conducted by 'phone. The substance of the 'phone conversations is not agreed. According to Mr. O'Dwyer, he 'phoned both Mr. Duggan and Mr. Templeton in March enquiring when they would be ready to take delivery, and requesting payment of the deposit, and informing them the materials were loaded on a trailer ready for delivery. He says he was told the foundations were not yet ready, and that the deposit would be sent and that they wanted to get on with it. He says he was never told that Securicor had an interest in the plans or that the defendant was awaiting a payment from Securicor before proceeding with the contract. Mr. Mahony, the plaintiff company's General Manager 'phoned Mr. Templeton on the 13th of April, 1982 enquiring about when payment would be made and saying he had 2 units completed. According to him Mr. Templeton's reply was that he would take delivery shortly and would get in touch. Mr. Mahony said that as he heard no more he 'phoned two or three times in the month of May and was told by Mr. Templeton that he had trouble with his auctioneer and had changed him. In the final 'phone call Mr. Mahony said they had a row and Mr. Templeton said to him "you're not going to pressurise me to take until I'm ready". According to Mr. Mahony Mr. Templeton never said to him that he could not proceed until he got a firm order from a client, nor that he could not pay a deposit until he had a client, nor that he could not take delivery until he had sold. After the last 'phone call in May Mr. Mahony concluded that

the deal was off. Mr. Templeton's version of these phone calls is that all conversations with Mr. Mahony were heated. In the first call in April he says Mr. Mahony asked him if he was going ahead and he said he was but could not pay a deposit until he got a deposit as he had not any money. Mr. Templeton agrees that at some stage Mr. Mahony told him the steel was cut and ready to deliver and on a trailer. In the final conversation, according to Mr. Templeton, Mr. Mahony said to him that if he did not go ahead with the job he would go to law. Mr. Templeton says he told Mr. Mahony he was still going ahead and was still trying to sell but could not sell and that he then hung up on Mr. Mahony.

I have no doubt that Mr. Templeton's plans for the development of the site were thought out and prepared on the basis that he would be able to fund the project out of advance sales. I accept that he was not in a position to finance the project in any other way. But I have not been given any evidence other than the mere fact that Mr. Templeton engaged the services of an auctioneer indicative of genuine efforts to raise finance in this way. But even assuming evidence of the nature and terms of negotiations and names of persons with whom carried on could have been adduced such evidence would have been inconclusive on the fundamental question of whether or not the securing of an advance sale was a condition for agreement between the parties to this £95,000 contract. To me it seems entirely improbable that if the substantial contract negotiated on the 21st of January 1982 was subject to the advance sale condition, for which the defendant contends, no reference to it would have been made in the letter of the 22nd of January written by Mr. Dugan. Even if the omission to make such a reference was an inadvertent oversight it seems to me to be most improbable that when further opportunities

presented in further correspondence or 'phone conversations no reference to such a condition would be made. In none of the conversations as described by Mr. Duggan or Mr. Templeton making reference to selling units was it suggested by them that the obtaining of money by deposit from or by a sale to any third party was a pre-condition to the agreement made with O'Dwyer Steel Company Limited. I find the evidence of Mr. O'Dwyer and Mr. Mahony more convincing than that of Mr. Duggan or Mr. Templeton as to the conversations recalled. From the absence of any reference to Securicor in the letter of the 8th of March, written by Mr. Duggan, I feel confirmed in my belief that Mr. Duggan is mistaken in his recollection of telling Mr. O'Dwyer about Securicor which Mr. O'Dwyer denies. It is a necessary inference from the evidence taken as a whole, and I find as proved, that the plaintiff company proceeded expeditiously with performance on their part of the terms of the defendant's letter of the 22nd of January, 1982 confirmed by letter of 5th February 1982 and did so with the knowledge of the defendant. I am convinced that the defendant for his part did not require either the conclusion of an agreement or its performance to be dependent upon his previous receipt of payments from any other party in respect of any of the units the subject of his contract with the plaintiff company. There is no evidence upon which I could hold that the defendant did anything indicative of an intention to perform the contract on his part and I think the plaintiffs were entitled to treat the contract as wrongfully repudiated by the defendant from the expiry of the week's notice given in the plaintiffs' solicitor's letter of the 9th of July, 1982.

In my judgment the plaintiff company is entitled to recover damages for the breach of the contract at the revised overall price

of £90,124. The loss comprises the profit which would have been made on the contract, namely 10% of such sum as with such 10% would make up the total of £90,124 and that I calculate at £8,193. I am satisfied that having regard to the nature of the plaintiff's business and the necessity of protecting their business reputation they took reasonable and proper steps to sell the completed units. In respect of the unit not sold they are entitled to the cost only of manufacture, the element of profit being already taken into account in the total contract price. My note of the evidence of the value so ascertained is £7,438. In respect of the unit sold in Cork, they are entitled to the cost of adapting it for sale and the difference between the price realised and the price provided for in the contract with the defendant. My note of the evidence on this is that it amounts to £9,741. I calculate the total of these three amounts at £25,372. The plaintiff company is entitled to judgment for this amount upon their claim.

S.J.  
27/3/85

## THE HIGH COURT

BETWEEN

EAMONN O'FIACHAIN

PLAINTIFF

AND

DERMOT P. KIERNAN, PETER ANTHONY KIERNAN AND  
MERCANTILE CREDIT COMPANY OF IRELAND LIMITEDDEFENDANTSJUDGMENT delivered the 11th January, 1985 by Mr. Justice Keane.

The issue which has to be determined at this stage in these proceedings is whether a motor-car was being driven by the first-named defendant as the servant of the third named defendants within the meaning of section 118 of the Road Traffic Act 1961 on the occasion of the accident which gave rise to the proceedings. Most of the material facts which are relevant to the determination of that issue are not in dispute.

The third named defendants (whom I shall call "the Finance Company") were the owners of the car which was leased by them together with others to a company called O'Neill and McHenry (Donegal) Limited under the terms of a written leasing agreement dated the 15th July, 1976. On the 13th December 1976 that company informed the Finance Company that it had disposed of its interest in the business for which the cars were being used to a business in Dublin which was trading under the name of "Associated Trade Agencies". This business was not incorporated at the relevant times as a legal entity of any sort. The second-named