THE HIGH COURT

COMMERCIAL

[2024] IEHC 188

[2020 329 S]

BETWEEN

GEMBIRA LIMITED

PLAINTIFF

AND

AMTRUST EUROPE LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Michael Quinn delivered on the 5th day of April 2024

1. The plaintiff has applied for summary judgment in an amount of €1,360,735. The claim is made pursuant to a Performance Bond issued on 5th October 2017 by which the defendant agreed that, on certain terms and conditions and subject to a limit of €1.5m, it would pay to the plaintiff the amount of any liability of a contractor MDY Construction Limited ("MDY" or "the contractor") in the event of termination of the Plaintiff's contract with MDY pursuant to clause 33 of the contract.

2. On 17 July 2017, the plaintiff and MDY entered into a contract for the construction of 176 units and associated siteworks being Phase 2 of a residential development at Hollywoodrath, Hollystown, Dublin 15. The contract was initially for a fixed sum of €31,026,161, excluding VAT.

3. The works commenced and progressed. They were not completed when, on 20 September 2018, an interim examiner was appointed to the contractor.

4. On 5 October 2017, the contractor, the plaintiff and the defendant entered into the Performance Bond. The bond provided that, if the contractor's obligation to complete the works was terminated under clause 33 of the contract, the defendant would, subject to the terms of the bond, pay the employer any amount for which the contractor was liable under clause 33(c)(iv) of the contract. The initial cap on the bond was €1.5 million. It was reduced during the course of the works and is agreed by the parties to now stand at a maximum amount of €1,360,735.

5. Clause 33(b) of the contract provided that, if an examiner was appointed to the contractor, the plaintiff was entitled to terminate the employment of the contractor. Clause 33 further provided that, in that event, the Plaintiff may employ and pay another contractor to complete the works. No further payment would be made under the contract until after completion of the works. After completion, the contract architect is required to certify the amount of the expenses properly incurred by the employer to completion. Clause 33(c)(iv) provided that if that amount, added to the money paid to the contractor before termination of the contract, exceeded the amount which would have been payable on due completion of the contract by the contractor, the difference is a debt payable to the employer by the contractor. If that total amount transpired to be less than the contract price, the difference would be a debt payable by the employer to the contractor.

6. On the appointment of the interim examiner the plaintiff exercised the right to terminate the contract pursuant to clause 33 and appointed a new contractor Gem Construction Limited to complete the works. There is a dispute as to whether the contract was validly terminated by the Plaintiff or unlawfully repudiated, to which I shall return later.

7. On 1 August 2020, the works were completed.

8. On 9 September 2020, the contract architect issued what the plaintiff describes as a certificate to the effect that the *"sum of €35,948,975 (exclusive of VAT) represented the*

amount of expenses properly incurred by the plaintiff in completing the works subject to finalisation of snags and defects and this considerably exceeds the value remaining on the bond of €1,360,735".

9. In the summary summons, the plaintiff claims that the expenses incurred by it, added to the money paid to the contractor prior to the termination of the contract exceeded the total amount which would have been payable on due completion of the original contract.

10. Asserting that the excess of expenditure over the contract amount exceeded the amount of the bond, the Plaintiff claims the capped amount of €1,360,735.

11. The defendant claims that it has a *bona fide* defence to the claim and seeks leave to defend the proceedings. The defendant goes further and submits that, in accordance with the jurisdiction conferred by O. 37, r. 7, the court should dismiss the action.

12. Order 37, rule 7 provides as follows:-

> *"Upon the hearing of any such motion by the Court* [a motion for summary judgment]*, the Court may give judgment for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate…"*

13. The principal grounds on which the defendant asserts that it has a *bona fide* defence are as follows:-

(1) That its obligations under the Performance Bond are conditional on the plaintiff establishing the liability of the contractor, which it says has not been done;

(2) That the bond is not an unconditional *"on demand"* bond such as would give rise to liability without the plaintiff establishing the debt due to it by the contractor;

(3) That the certificate of the architect relied on to prove the expenses incurred by the plaintiff is not a certificate which is binding and effective for the purpose of clause 33 of the contract. It is no more than a statement of the *"estimated value of the completed works"* at best, and the plaintiff has not proved the amount of expenses incurred by it to demonstrate the excess over the contract amount as required by clause 33;

(4) That the contract was not validly terminated in accordance with clause 33;

(5) That the plaintiff failed to comply with Section 549 of the Companies Act 2014. That section provides that where a creditor of a company to which an examiner is appointed proposes to enforce an obligation of a third person in respect of a liability of the company he must serve a notice on the third person offering to transfer to it the rights to vote in respect of the examiner's proposals for a scheme of arrangement. The section stipulates time limits within which such an offer notice must be served.

14. Before turning to the evidence and the sequence of events, I shall consider the three centrally important documents in this case, namely the Contract, the Performance Bond and the Certificate of the Architect.

The contract: Articles of Agreement, 17 July 2017

15. The contract is described as a *"Building Contract (without quantities) for residential development at Phase 2 of Hollywoodrath"*.

16. The works are defined to mean the construction and completion of a residential development consisting of 176 units and associated site works. The contract sum is stated to be a fixed price of €31,026,161, later said to be varied to an amount of €32,970,940.

17. The contract adopts the Standard Conditions, 2012 edition, of the Royal Institute of Architects Ireland ("Blue Form"), with extensive amendments.

18. The term Certificate of Practical Completion is defined to mean *"a certificate issued by the architect in accordance with clause 31 of this contract certifying that the works have reached practical completion in accordance with the provisions of this contract, which certificate shall be conclusive and binding on the parties, save in the case of manifest error or fraud"*.

19. The contract provides for the works to be authorised and progressed in sections and for the making of stage payments in respect of each section as and when certificates of practical completion are issued by the architect for each section.

20. Clause 33 contains the following important provisions:-

> *"33(b) If the contractor commits an act of bankruptcy or being a company enters into liquidation whether compulsory or voluntary (except liquidation for the purpose of reconstruction) or if a receiver, manager or examiner of the contractor's business or undertaking is appointed or possession taken by or on behalf of the holders of any debenture secured by a floating charge of any property comprised in or subject to a floating charge, the employer without prejudice to any other rights herein contained may send by registered post or have delivered to the contractor a written notice determining the employment of the contractor under this contract."*

21. Clause 33(c)(i), (ii) and (iii) empower the employer in such circumstances to employ and pay a contractor or other person to carry out and complete the works. Clause 33(c)(iv) provides as follows:-

> *"Until after completion of the work under this clause no payment shall be made to the contractor under this contract provided that upon completion as aforesaid and the verification within a reasonable time of the accounts therefore the Architect shall certify the amount of expenses properly incurred by the employer and if such amount added to the money paid to the contractor before such determination exceeds the total amount which would have been payable on due completion the difference shall be a debt payable to the employer by the contractor and if the said amount added to the said money be less than the said total amount the difference shall be a debt payable to the contractor by the employer."* (Emphasis added).

22. In essence, Clause 33(c)(iv) calls for two steps. Firstly, a straightforward calculation of adding the amount of the expenses incurred by the employer, and so certified by the Architect, in completing the contract to the amount already paid by the employer to the contractor before termination of the contract. Secondly, to establish the difference between that total and the total contract price. That difference is a debt owed to the employer if it is an excess over the contract price, or to the contractor if it is below the contract price.

23. Clause 35 contains standard provisions in respect of certificates and payments and includes a provision at 35(j) to the effect that a *"Final Certificate shall be conclusive in any proceedings arising out of this contract (whether by arbitration under clause 38 of these conditions or otherwise) that the works have been properly carried out and completed in accordance with the terms of this contract"*. This provision is stated to relate only to a Final Certificate issued for the purposes of completion and payment thereon in accordance with clause 35.

24. The definition of a Certificate of Practical Completion contained in Clause 1(a) of the contract, relevant for determining practical completion and the defects liability period contained in clause 31 of the contract, and the reference to a Final Certificate in Clause 35(j) which governs final certificates and payments each state that such Certificate shall be *"conclusive and binding on the parties, save in the case of manifest error or fraud"*. Nowhere does the contract confer a corresponding status on a Certificate issued by the architect in the context of the operation of clause 33.

25. Clause 49 provides for the provision of a performance bond, and that the plaintiff contribute towards to the cost of the bond up to an amount of €295,000. In this case, that premium of €295,000 was paid by the plaintiff.

Performance Bond 5 October 2017

26. The bond is stated to be made between the contractor, which is MDY, the surety, which is the defendant, and the employer, which is the plaintiff. It is entitled *"Performance Bond – Bond amount €1,500.000"*.

27. The bond recites that the plaintiff and the contractor have entered into the contract dated 17 July 2017 and that the contractor had agreed to furnish a performance bond. Terms defined in the contract have the same meaning in the bond. The following are the critical clauses in the operative part:-

> *"1* *If the Contractor's obligation to complete the works is terminated under clause 33 of the Conditions the Surety will, subject to this Bond, pay the Employer any amount for which the Contractor is liable under clause 33 (c)(iv) of the Conditions.*
>
> The claim in these proceedings is made under this clause.
>
> *2* *If the Contractor breaches the Contract the Surety will, subject to this Bond, pay the Employer any amount for which the Contractor is liable to the*

Employer as damages for breach of the Contract, as established under the Contract, taking into account all sums due to the Contractor under the Contract.

3 *The liability of the Surety under this Bond will not exceed €1,500,000.*

4 *It is hereby noted and agreed that this bond shall apply for the duration of the contract and that the sum bonded shall initially be 5% of the total contract amount being derived from the various phases of the project indicated in the attached Annex 1: Schedule of Phases. The initial bonded sum of €1.5m shall, on the issue of the Certificate of Practical Completion of first 3 phases of the works (representing approximately 50% of the total works) reduced by half of the value of these first three phases and thereafter reduced pro rata on issue of the Certificate of Practical Completion for each phase of the works as indicated in the Schedule of Phases Annex 1.*

5 *The Surety will be released incrementally from its liability under this Bond 15 months after the Certificate of Practical Completion of each phase of the Works has been issued, with the sum of the bond reducing by the remaining half of the value listed for each phase in the Schedule of Phases, except in relation to any breach by the Contractor or termination that has occurred before that date, written notice (including particulars of the breach or termination) of which has been given to the surety earlier than 4 weeks after this expiry date.*

6 *No alteration in the Contract or in the extent or nature of the works to be done under it, and no allowance of time under the Contract, and no forbearance or forgiveness concerning the Contract by the Employer, will in any way release the Surety from liability under this Bond.*

7 The Contractor undertakes to the Surety to perform its obligations under the Contract. This undertaking does not limit any rights or remedies of the Employer or the Surety.

8 The Employer may, but is not required to, provide to the Surety a copy of any notice that the employer gives to or receives from the Contractor under clause 33 of the Conditions.

9 The decision of a court or arbitrator in a dispute between the Employer and the Contractor will be binding on the Surety as to all matters concerning a breach of the contract, termination under the contract and the Contractor's liability."

28. Clauses 10 to 14 cover cover such matters as the right of the surety to suggest a completion contractor to the employer, exclusion of liability for war, invasion and the like, provision for assignment of the bond by the employer, and a governing law and jurisdiction clause (Irish law and court).

29. Annex 1 is a *"Schedule of Phases"*. It identifies eight phases divided into varying numbers of units. In respect of each phase, it identifies a Planned Start Date, a Planned Finish Date, the Contract Value of the Phase, the Initial Bond Value of the Phase, the amount by which the Bond is to be reduced on Practical Completion of that Phase and expiry dates in respect of the bond for each Phase.

30. The total Contract Value is as stated to be €32,824,418.

31. The plaintiff submits that there is an important difference between paras. 1 and 2 of the Bond in the context of whether it is necessary to establish the liability of the contractor before making a valid demand.

32. Paragraph 1 states the Bond will *pay "any amount for which the Contractor is liable under Clause 33(c)(iv) of the Conditions"*. Paragraph 2, which is not invoked in this case,

states that the Bond will pay in respect of damages for breach of the contract *"as established under the contract"*. The absence in Paragraph 1 of the words "as established under the contract" does not mean that there is no obligation where clause 1 is invoked to establish the "amount for which the contractor is liable under clause 33(c)(iv)" by performing the calculation described at para 22 above.

33. Reliance is placed by the plaintiff on the fact that clause 33 describes the difference between the original contract price and the total amount expended by the employer as a *"debt payable to the employer"*. It submits that the use of this phrase, coupled with the use of the Architect's Certificate (considered below) means that the quantum did not require to be established by performing the calculation.

34. In submissions extensive references were made to the distinction between conditional and unconditional bonds. The plaintiff cited the *Law of Guarantees* (7th Ed., 2015) by *Andrews & Millett* describing a performance bond as follows:-

> *"A performance bond, also commonly called a 'performance guarantee', or (confusingly) a 'demand guarantee', is a binding contractual undertaking given by a person, usually a bank, insurer or similar commercial provider to pay a specified amount of money to a named beneficiary on the occurrence of a certain event, which is usually the non-fulfilment of a contractual obligation undertaken by the principal to the beneficiary.*
>
> *Performance bonds are not guarantees in the true sense, but are a particularly stringent form of contract of indemnity. They are often drafted in such a way that a liability to pay will arise on a mere demand by the beneficiary, even if there is reason to doubt that the primary obligation has been broken. The rights and duties of a party to a performance bond will depend on the terms of the contract which has been*

agreed between them, and are not subject to the usual equities which apply to ordinary contracts of guarantee or indemnity" (emphasis added).

35. The plaintiff quoted from further passages in *Andrews & Millett* to the effect that performance bonds are *"unconditional undertakings to pay a specified amount to a named beneficiary, usually on demand, and sometimes on the presentation of certain specified documents"*.

36. The plaintiff referred also the judgment of the Supreme Court in *Celtic International Insurance v Banque Nationale de Paris* [1995] IR 148 where O'Flaherty J. concluded that a performance bond may be regarded as analogous to a bill of exchange.

37. In *Celtic Insurance* the letter of undertaking, as it was properly described, relied on provided as follows:-

"We undertake to remit to you any sum up to a limit of IR£360,000 on your first written demand, provided that your claim for any such sum is accompanied by a certificate from the Southeastern Health Board that you have been obliged to pay a sum up to or in excess of the sum claimed from us in pursuance of the bond."

38. In that case the plaintiff presented to the defendant a letter from its solicitor formally certifying on behalf of his clients the liability in respect to which indemnity was now claimed. The claim was upheld on foot of that certificate.

39. *Celtic Insurance* illustrates the importance of such clear language as the reference to an undertaking to pay *"on your first written demand"*. No language of that kind or even resembling that of a 'demand guarantee' is contained in the bond in this case. The plain language of the Bond is that of a conditional instrument. This is apparent from the following.

40. Firstly, the bond is stated to be interdependent on the operational provisions of the contract itself. This is evidenced by the several references on the face of the bond to the

contract, the incorporation of defined terms from the contract by Recital C and the trigger for a claim under Clause 1 being liability under Clause 33(c)(iv) of the contract.

41. Secondly, Clauses 1 and 2 are both stated to operate *"if"* certain things occur by reference to the contract. In the case of Clause 1 the condition is that the obligation to complete the works is terminated under clause 33 of the contract, and the contractor is found to be liable for a debt under clause 33(c)(iv) by the required calculation.

42. Thirdly, clause 4 clearly establishes a direct connection and dependency between the amount of the defendant's obligations under the Bond by reference to the phased progression of the works and the incremental release of the bond over the course of the works by practical completion of each phase.

43. Fourthly, clause 9 incorporates the provisions of the contract to the effect that a decision of a court or arbitrator in a dispute between the parties will be binding on the surety.

44. In *Ziggurat (Claremont Place) LLP v HCC International Insurance Company plc* [2017] EWHC 328 a construction contract contained a provision governing termination by the employer on the occurrence of an insolvency of the contractor in terms very similar to those which apply in this case. In particular it contained a provision equivalent to clause 33(c)(iv) which called for certification by the architect of expenses incurred by the employer and a calculation of the difference between that amount and the contract amount, declaring that such difference *"shall be a debt payable by the contractor to the employer or, if that sum is less, by the employer to the contractor"*.

45. The bond in that case was in terms virtually identical to the bond relied on by the plaintiff. The court held that a bond in these terms was *"an instrument of secondary liability"* and that *"the surety cannot be in a worse position as against the employer than the contractor"*.

46. Coulson J. rejected a submission that the employer claimant needed firstly to either obtain a judgment against the contractor or secure the contractor's agreement of its liability for the debt before any claim could be made under the bond. In relation to the question of whether the architect's certificate relied on in that case could be regarded as conclusive he said the following:-

> *"Mr Oram said that the judgment in Paddington Churches also noted that, although a claim could be made in those circumstances, the surety could defend himself against the claim by advancing any of the arguments as to the quantum of the debt (a challenge to 'the accuracy of the employer's statement') which would have been available to County. He points to the fact that clause 8.7 does not say that the ascertainment and assertion of the debt was in some way conclusive and compares that with the provisions relating to for example the final certificate which do contain various conclusivity provisions.*
>
> *In my view Mr Oram is right on this topic. It is only necessary to consider what the position would have been under the building contract to see that, as a matter of principle, the debt figure can be challenged by the defendant. Let us assume that the debt was asserted by CAG and that County had then produced a twenty page critique of the accounting and quality surveying methodology that had been adopted, in order to demonstrate that only twenty percent of the sum asserted was actually due, County could not be shut out from advancing that defence. There was nothing in the contract to say that they could not challenge the figure and there are no provisions which indicate that, as soon as the figure was asserted, it was due and payable in the amount asserted, without any ability to challenge. And if County could have made that challenge, then so too can the defendant."*

47. I adopt the reasoning of Coulson J. In this case neither the bond or the contract even attempts to confer the status of conclusivity on the Architect's Certificate.

48. Although it is not incumbent on the plaintiff to first pursue, whether by arbitration or other proceedings, the contractor for the debt identified pursuant to Clause 33 and it may pursue the defendant directly under the bond, none of this means that the so-called *"debt"* does not have to be first established in accordance with the formula stipulated in Clause 33 of the contract.

The Architect's Certificate, 9 September 2020

49. I shall return later to the circumstances in which the Architect's Certificate was produced and its timing. However, it is necessary first to examine that document even within its own terms.

50. The Certificate is described as an *"Overarching Certificate of Practical Completion"*. It is stated to be for the project at Hollywoodrath, described as *"Project Hollywoodrath, Hollystown, Dublin 15 (Phase 1, 122 houses and Phase 2, 176 houses)"*. The bond has no relevance to the contract for Phase 1.

51. The certificate refers to the contract form, but not the date of the contract and describes the contractor as *"MDY Construction, Devoe Construction, Gem Construction"*. Devoe and Gem were the subsequent contractors engaged by the plaintiff in completion of the works.

52. The Certificate continues:-

> *"In accordance with the Articles of Agreement for the above building contract, we certify that, subject to the completion of any outstanding items, and/or making good of any defects, shrinkages and other faults which may appear during the defects liability period, the relevant parts of the works as described and indicated on the attached*

sketch (Attachment 1), Phase 1 and Phase 2, in our opinion (sic)*, practically complete as described in Clause Practical Completion Clause 31.*

Note/PC does not cover the list of outstanding Landscape and Civil items as per Doyle O'Troithigh Landscape Architect (D+OT Attachment 2) and Waterman Moylan Engineer (WM Attachment 3).

Estimated Value of the Relevant Part: excluding VAT

Phase 1: €19,828,357

Phase 2: €35,948,975

The balance of retention will be held until the end of the defects liability period for the relevant parts."

53. Before considering other commentary in relation to the Certificate, the following features of this document are noteworthy:-

(1) Firstly, it is called an *"Overarching Certificate of Practical Completion"*. There is no provision anywhere in the contract for such a document.

(2) It refers to the project as Phase 1 and Phase 2. The contract and the bond relate to Phase 2 only.

(3) It describes the contractor as "MDY Construction, Devoe Construction, Gem Construction" thereby including all three. The certificate is required to certify expenses properly incurred by the employer after termination of the MDY contract, which are then added to the amount previously paid to MDY. Clearly it should not certify amounts paid to MDY.

(4) It states that it is certifying that, *"subject to completion of any outstanding items, and/or making good of any defects, shrinkages, and other faults which may appear during the defects liability period the relevant parts of the works indicated on an attached sketch* (being Phase 1 and Phase 2) *are practically complete as described in Clause Practical Completion Clause 31*". Clause 31 is a different provision of the contract and relates to Certificates of Practical Completion and their importance for deeming practical completion to have taken place, and triggering commencement of the defects liability period. It has no place in the determination of a liability pursuant to Clause 33 of the contract.

(5) The certificate concludes by stating the *"Estimated Value of the Relevant Part"*. By no description could this be characterised as a certificate of expenses properly incurred in exercise of the powers conferred by Clause 33. There are other circumstances in which a Certificate of Practical Completion, properly so called, coupled with estimates of value may trigger interim or final payments. On its face this is not such a certificate.

Affidavits of professionals

54. On behalf of the plaintiff, an affidavit was sworn on 15 March 2021 by Mr. Ciaran Byrne of Macrossan O'Rourke Manning, the contract architects. Mr. Byrne refers to the Certificate as a *"Certificate of Practical Completion"*. He does not explain what is meant by the term "Overarching Certificate of Practical Completion" or how a certificate in such format has any place in the operation of clause 33 of the contract or clause 1 of the bond. He confirms, in para. 10, that the certificate is an *"estimated value"*. He says that this is substantiated by a Payment Recommendation Value Sheet prepared by the Quantity Surveyor and states that the certificate is an estimate in circumstances where, at the time of its issue,

certain matters remain outstanding. He then exhibits the *"Certificate Recommendation Values"*, which relate again to both Phases 1 and 2.

55. The Quantity Surveyor, Mr. Peter Reilly of Kerrigan Sheanon Newman, also swore an affidavit on 15 March 2021 exhibiting the same Recommendation Value Sheet.

56. Importantly in relation to this Certificate of Recommended Value, it is recorded that, in respect of the amounts attributed to Gem Construction and Devoe Construction, these are, in each case, the total amounts agreed with Gem/Devoe for the final account on phase 2. Therefore, the Certificate is based, not on verified expenses but, on amounts agreed with the successor contractors.

57. An affidavit was sworn on 31 March 2021 by Joan O'Connor, architect. Ms. O'Connor was retained by the defendant in her capacity as an independent expert and she makes the usual averment required of such an expert to the effect that she understands that her duty is to assist the court on matters within her field of expertise and that this duty overrides any obligation to the party instructing her.

58. Ms. O'Connor says that the Certificate is an attempt to certify in one place the completion of works performed under three separate contracts, namely the contract between the Plaintiff and MDY, the contract between the Plaintiff and Gem Construction Limited and the contract between the Plaintiff and Devoe Construction. She sees no proper basis for a single certificate to be issued by an architect in respect of all of these contracts. In her opinion, *"the Overarching Certificate of Practical Completion has no standing for the purpose of an architect's administration of the contract, <u>whether as a Certificate of Practical Completion or otherwise</u>"*.

59. Ms. O'Connor states that the role of the architect under clause 33(c)(iv) of the contract is to verify the accounts after the works are complete. Instead, the Certificate in this

case presents only an estimate of the total expenditure on Phase 2, without any attempt to verify expenses incurred by the plaintiff after termination of the contract.

60. Finally, Ms. O'Connor concludes that, when account is taken also the evidence of Mr. Reilly and Mr. Byrne, the quantity surveyor and architect respectively, the figure of €35,948,975 is no more than an estimate of the plaintiff's overall spend, in some cases based on amounts agreed with Gem and Devoe.

The requirement for a Certificate and form thereof

61. Clause 33 does not prescribe any form of the certificate of expenses incurred. It merely states that *"The architect shall certify the amount of expenses properly incurred"*.

62. In *Keating on Construction Contracts* (11th Ed., 2021), the authors say:-

> *"The formal requirements of an architect's certificate depend on the terms of the contract, but construction contracts seldom stipulate precise formalities. In any event minor immaterial errors will not invalidate the certificate if no one is misled. It must however clearly and unambiguously appear that the document relied upon is the physical expression of a certifying process and regard should be had to its 'form', 'substance' and 'intent'. A certificate is subject to the usual rules of construction taking account of the surrounding factual matrix."*

63. The authors continue:-

> *"It is important that any certificate should be clear and unambiguous so that the parties know where they are and should not be left in any doubt or dispute as to their consequent mutual rights and liabilities. An ambiguity may be resolved by having recourse to any documents which can properly be regarded as being issued as part of the certificate. The use of the word 'certify' is not, in most contracts mandatory, but the architect will be well advised to use the word and to follow as closely as they can the language of the clause from which their power to certify derives."*

64. In this case, the Certificate makes no reference to Clause 33 of the contract and does not purport to follow the language of the clause.

65. In *Token Construction v Charlton Estates* (1973) 1 BLR 48, Roskill L.J. put the matter thus:-

> *"Though neither condition 2(e) nor condition 16, so far as relevant to the second condition of which I have spoken, prescribes any form in which the architect is to grant any extension or to certify his opinion, it is in my judgment essential that while the architect is left free to adopt what form of expression he likes for the grant or certificate, as the case may require, he must do so clearly so that the intent and substance of what he does is clear. The court should not be astute to criticise documents issued by an architect merely because he may not use the precise language which a lawyer might have selected in order to express a like determination, but whilst this amount of latitude is permissible, it cannot extend to the courts treating as due compliance with contractual requirements documents which, however liberally interpreted, do not plainly show that they were intended to comply with, and fairly understood, do comply with those contractual requirements."*

66. In this case, the architect has given an estimate of the expenses of both Phase 1 and 2 of the project. The plaintiff submits that it emerges from the evidence of the architect and of the quantity surveyor that the amount stated in the Certificate as an estimate represents, at a minimum, a *"floor"* on the expense incurred by the plaintiff. It is submitted that the effect of the qualification in the certificate by reference to "outstanding items, defects and shrinkages" is that the gap between the contract price on the one hand and the final amount of expenses properly incurred by the plaintiff can only increase from the amount stated to be an estimate.

67. The function of a certificate for Clause 33(c)(iv) is to verify the amount of expenses incurred by the employer, such that the next step in the process, namely the calculation

required by Clause 33(c)(iv) can be performed. I cannot accept the submission that an estimate, even if it shows that the total will or is likely to exceed the original contract price, serves the purpose of verifying the expenses incurred as required by clause 33(c)(iv) of the contract and clause 1 of the bond.

Conclusion as regards reliance on the Architect's Certificate

68. In the special endorsement of claim on the summary summons, the plaintiff relies on the Certificate of 9 September 2020. As appears from the analysis above, that Certificate is not a Certificate effective for the purpose of establishing a debt within the meaning of clause 33. It is an estimate and para. 17 of the special endorsement relies on it, simply asserting that the amount "considerably exceeds the value remaining on the bond of €1,360,735". This "headroom" claim, based on an estimate, cannot be taken as conclusive evidence of a debt.

69. Notwithstanding my conclusion that the certificate of 9th September 2020 is not a Certificate which has binding effects for the purpose of Clause 33 of the Contract and Clause 1 of the Bond, for ease of reference, in this judgment I refer to it as the "Certificate".

70. My conclusions by reference to the key documents may be summarised as follows:

1. Clause 33(c)(iv) of the contract requires a calculation to be made, of which the verified amount of expenses incurred after termination of the contract forms part. It contains no provision conferring binding and conclusive status on an architect's certificate in any form.
2. The bond is a conditional bond, and does not relieve the plaintiff from establishing the amount of a debt due under Clause 33 of the Contract.
3. The 'Overarching Certificate of Practical Completion' is an estimate and not a verification as required by Clause 33.

71. The court can only grant summary judgment if it is clear that the defendant's case is not credible and that the defendant has "no fair or reasonable probability of having a real or

bona fide defence" (per Laffoy J. in *Aer Rianta v* Ryanair [2001] 4 IR 607 and [2002] ILRM 381). In so far as the Plaintiff relies on the Certificate, it seems to me that the considerations identified above sustain the defendant's argument that it has a real and a *bona fide* defence and ought to be granted leave to defend.

72. I do not go so far as to accede to the Defendant's submission that the action should be dismissed. Further evidence and submissions were made which the plaintiff ought to be permitted to advance at a plenary hearing. I consider these matters below, but my conclusions regarding the Contract, the Bond and the Architect's Certificate, are sufficient to meet the requirement that the defendant has demonstrated grounds of a bona fide defence which it should be granted leave to advance at trial.

Termination Notice, dated 18 September 2018

73. The Interim Examiner was appointed on 20 September 2018. It appears that, in a short period preceding that appointment, the plaintiff was concerned at progress on the site. The plaintiff had reason to believe that an application would be made for the appointment of an interim examiner on 18 September 2018. It therefore caused to be prepared letters by its solicitor Messrs Eversheds Sutherland, dated 18 September 2018. These letters were signed, and they purport to give notice to the contractor of termination of the contract pursuant to Clause 33(b) (insolvency events) and notifying the contractor that it reserved all its rights and remedies to recover losses, expenses and costs. On the same day, a letter was prepared and signed addressed to the defendant giving notice that the plaintiff had terminated the contract and calling on the defendant to pay the plaintiff's losses following such termination under clause 33(b) of the contract.

74. The defendant submitted that the service of a notice of termination relying as it did on the appointment of an examiner, where no such appointment had by then been made, was invalid. It further submitted that the service of such a letter was a repudiatory breach of the

contract. The defendant submitted that the effect of this repudiatory breach was not only to bring the contract to an end, but also to discharge it as surety from liability under the Bond.

75. In a replying affidavit, sworn on the defendant's behalf, Mr. Ronan Conboy stated that he was advised that, following the service of the termination notice on 18 November, the contractor did not return to the site.

76. Affidavits were exchanged on this subject and the plaintiff's evidence is that no letters were delivered to the contractor on 18 September 2018. Its evidence was that, although letters were prepared and signed, when no application was made for the appointment of an interim examiner, the letters were not delivered. Letters in identical terms were delivered on 21 September 2018, the day after the appointment of the Interim Examiner.

77. The plaintiff's explanation for the existence of these signed letters on its file was that, when it made a comprehensive file of correspondence and material available to the defendant's agent by a "Dropbox" from its own files, these included the signed copies of these letters, and that this may have caused confusion.

78. For the purpose of the hearing of the application for summary judgment, the defendant accepted that it was unable to gainsay the affidavit of the plaintiff's agent, who was a serving member of An Garda Síochána. He had been on standby to deliver the letters of 18th December 2018, but says that they were never delivered. The defendant nonetheless reserved its position as to the effect that such letters would have. If the matter were remitted to plenary hearing, the events surrounding the preparation and signing of these letters could be properly tested and interrogated.

79. An unsatisfactory aspect of the matter from the plaintiff's perspective is that much of its correspondence, including the formal call on the Performance Bond made much later, cites, not the "second" termination letter of 21 September 2018 but, the letters apparently

signed on 18 September 2018. Therefore, I should not preclude the defendant from invoking this ground of defence.

The examinership of the contractor

80. On 20 September 2018, the court appointed an Interim Examiner to the contractor. On 21 September 2018, two important letters were issued by the plaintiff's solicitors, Eversheds Sutherland. The first is a letter addressed to the contractor informing it that it is on notice of the appointment of an examiner and giving notice of termination of the contract in accordance with Clause 33(b).

81. The second is a letter to the defendant referring to and enclosing the Performance Bond, and giving notice that the plaintiff has delivered a notice of termination to the contractor. It concludes *"Please take this letter as Gembira's formal call on Amtrust Europe Limited, as surety under the Performance Bond, to pay Gembira's losses following such termination under clause 33(b)"*.

82. Also on 21 September 2018, Messrs Eversheds Sutherland notified the appointed Interim Examiner, Mr. Hughes, that it had exercised its right to determine the contract.

83. On 22 October 2018, the appointment of the Examiner was confirmed by the court.

84. Unusually, the statutory meetings of members and creditors to consider and vote on the examiner's proposals for a scheme of arrangement had been convened by him as interim examiner and were held on the next day, 23 October 2018. The results of those meetings were presented to the court on 24 October 2018.

85. Following a contested hearing, on 15 November 2018, the court made an order confirming the scheme of arrangement, effective that day, and the Examiner was discharged.

86. On 1 November 2018, Eversheds Sutherland wrote to the Examiner, pointing out that they had received no communication from him in relation to the proposed scheme of arrangement or statutory meetings. They requested a copy of the scheme of arrangement.

Further correspondence was exchanged between Eversheds Sutherland and the Examiner and a modification was made to the scheme that nothing contained in the scheme would preclude creditors holding insurance or performance bonds from pursuing the full extent of such claims.

87. The defendant says that the plaintiff failed to comply with the provisions of S. 549 of the Companies Act 2014. That section provides that, where a creditor intends to enforce a guarantee, it must serve a notice in writing on the guarantor within the time prescribed in the section offering to transfer to the guarantor any rights which the creditor has in respect of the guaranteed obligation to vote at the meeting of creditors. The obligation is triggered when the creditor receives notice of the meeting of creditors.

88. The defendant asserts that no such notice was given by the plaintiff to it as required by s. 549.

89. The plaintiff's evidence is that it never received notice of the meetings convened by the examiner and, accordingly, that the obligation imposed by s. 549 did not arise.

90. This dispute cannot be resolved on affidavit. The defendant fairly conceded that it was in no position on the summary application to contradict the sworn evidence of the plaintiff that it did not receive such notice. However, it is an issue which the defendant is entitled to plead in the action. Whether it does so, in light of the sworn evidence of the plaintiff that it never received the examiner's notice, is a separate matter, but I shall not by this judgment preclude the defendant from pleading such a point.

Call on the Bond – 17 December 2019

91. Eversheds Sutherland wrote to the defendant on 17 December 2019, formally calling on it under the bond to pay. The contents of this letter and its attachment are important. Eversheds Sutherland refer to their letter of 18 September 2018, which is the letter the plaintiff denies ever delivering, and continues:-

"Our letter formally called on you as surety under the Performance Bond to pay our client's losses following termination of the contract. At the time of delivery of our letter all of the losses had not yet been established and ascertained.

Full details of the losses have now been ascertained and are set out in Appendix 1 hereto. The full value of the Performance Bond is €1.5 million and the total losses are approximately €5 million.

In circumstances where MDY has been placed in Examinership and the scheme of arrangement provided a carve out for any claims on the Performance Bond, we now hereby call on you to release full payment under the Performance Bond to our client.

If required we have all the relevant backup documentation and if you wish to arrange delivery of same to you please contact Dermot McEvoy or Aidan Kirrane of this office.

Our client is anxious to secure payment against the losses incurred and should we fail to receive confirmation by 6 January 2020 that you will pay the full sum due under the Performance Bond, we are instructed to advise our client of all of the options available to it including the issue of proceedings. We trust this will not be necessary."

92. The first noteworthy feature of this letter is the assertion that all of the losses *"have now been ascertained"*. The letter contains no reference to the express provisions of Clause 33, let alone to any certification of the expenses incurred. This is understandable where the Certificate of the architect now relied on by the plaintiff did not issue until 9 September 2020

but it begs a question as to how it could then have been asserted that all the losses "have now been ascertained".

93. In his second affidavit sworn on 5 February 2021, Mr. Cullen on behalf of the plaintiff acknowledges that, insofar as the letter of 17 December 2019 *"purported to quantify the losses incurred by the plaintiff for the purpose of making a claim on the bond, the said letter was premature in the following circumstances"*. He then refers to the provisions of Clause 33 of the contract and the requirement to perform the calculation provided for in that clause.

94. Attached to the letter from Eversheds dated 17 December 2019 is an *"Appendix 1"*. This is a three-page calculation citing the original contract sum and what is described as a "summary of Costs Sustained by Client" in an amount of €37,439,510.90, supporting a claim for a total amount of €5,071,821.16.

95. Elsewhere it is asserted that the works were completed on 1 August 2020. Yet, by this document, the plaintiff was asserting amounts *"to complete contract, including amounts of a 'contract sum' for Gem and for Devoe'"*.

96. In his affidavit of 5 February 2021, Mr. Cullen makes it clear that he understands that the quantum of the claim must be determined in a prescribed manner, namely the performance of the calculation provided for by clause 33. He says that the claim advanced in these proceedings is not premised on the contents of the Appendix to the letter of 17 December 2019, or by reference to the *"Bond Narrative"* document which was submitted to the defendant in correspondence. He says that that document had been prepared only in an attempt to advance a negotiated resolution of the matter and not by way of proof of the claim. That being the case, the plaintiff places its reliance on the Certificate of 9 September 2020.

97. In para. 75 of this affidavit, Mr. Cullen refers to the provision of clause 33(c)(iv) of the contract which provides that the architect *"shall certify the amount of expenses properly incurred by the employer"*. He correctly points out that the precise manner in which the

architect would *"certify"* is not specified, by contrast with the very precise provisions contained in clause 35 of the contract which governs certificates and payments.

98. On 14 January 2020, Eversheds Sutherland wrote a further letter to the defendant's agent, calling for confirmation and, in particular, for a *"reasonable on the record proposal on how to move forward on issues of quantum alone"*.

99. On 30 July 2020, the defendant's English solicitor, Messrs Gately Legal, wrote to Eversheds Sutherland stating that it did not currently have enough information to substantiate the claim made on the bond. Messrs Gately stated that they were confident that on receipt of information and documents, they would be in a position to carry out a forensic assessment of the losses incurred and resolve the matter without the need for legal proceedings. They then identified a number of issues concerning the nature of the bond, the maximum amount, the quantum of the claim, and further documents and material which they said were required.

100. On 17 September 2020, Eversheds Sutherland replied to Gately enclosing the following:-

(1) The *"Certificate of Practical Completion"* as issued by the architects on 9 September 2020. This is the "Overarching Certificate" described earlier in this judgment;

(2) A *"Bond Narrative"* which, it is stated, contained all relevant events and details in respect of the bond. Eversheds Sutherland pointed out that this had been provided in the course of intervening correspondence with the defendant's agents. This is the Bond Narrative which Mr Cullen swore is not the basis of the claim for summary judgment.

(3) A schedule identifying extensive correspondence which had passed, between January and July 2020, between Eversheds Sutherland and a claims consultant *"70 Five"* engaged by the defendant.

101. In its letter of 17 September 2020, Messrs Eversheds expressed their disappointment that Messrs Gately were stating that they did not have enough information to substantiate the claim. They referred them to the Bond Narrative and the Dropbox folder which was stated to include all of the documentation required to substantiate the claim. They informed Messrs Gately that, although their client remained open to reaching a resolution, proceedings had been drafted by counsel and that they intended to issue them.

102. On 9 October 2020, the summary summons was issued. Correspondence between Eversheds Sutherland and the defendant's solicitors, Mason Hayes and Curran continued after the issue and service of the Summons. In this correspondence Eversheds Sutherland provided extensive further documentation, much of which it said it had previously provided. This included such documents as Authorisations to Proceed, Certificates of Practical Completion, Possession Certificates, Letters of Intention to issue Certificates of Practical Completion, Payment Applications, Payment Recommendations, Architect's Certificates, invoices and further correspondence between the parties.

103. The Certificate was issued on 9th September 2020 and delivered on 17th September 2020 under cover of the Eversheds Sutherland letter of that day, in the midst of the ongoing contentious correspondence in which the plaintiff was insisting that it had already provided sufficient substantiation of the claim to enable the defendant to verify it and respond on the Bond. Even after the Certificate, the plaintiff was delivering extensive materials, albeit asserting that it had done so already. I am not persuaded that the unilateral act of producing such a Certificate can have the effect of closing down the question of liability in the manner contended for and to supplant the need for the plaintiff to establish the liability of the contractor in accordance with the formula provided for in Clause 33 of the contract.

The contractor's claim against the plaintiff

104. The affidavits refer to outstanding claims made by the contractor against the plaintiff pursuant to the contract.

105. Mr. Conboy on behalf of the defendant, in his affidavit of 15 January 2021, refers to a draft final account which was submitted to the architect on 28 November 2018, after the contractor had emerged from examinership. This is a reference to a letter of 28 November 2018 from the contractor to the architect enclosing a *"draft final account application for the project"* in a total amount of €2,065,042, excluding VAT. This is stated to comprise valuations in respect of each phase of the work performed up to that time, together with a claim for variations and for materials on site.

106. Mr. Conboy states that, in light of this claim, there are substantial amounts which remain due and owing by the plaintiff to the contractor and which he says would have a material impact on the contract calculations for Clause 33. He says also that liquidated principal amounts of (1) €849,549.13 for unpaid monies due to prior certificates, and (2) €1,429,271.49 were due in respect of variations, remain outstanding, together with a claim in respect of materials on site and that this claim was notified to the plaintiff's solicitors on 15 January 2021.

107. Mr. Cullen, in his second affidavit, states that no such amounts are due and that, in any event, the process for pursuing such claims is governed by express provisions of Clause 38 of the contract, which governs dispute resolution. Mr. Cullen continues that, even if one was to accept such a claim for the sum of €2.2 million deducted from the balance which, in his affidavit of 5 February 2021, he says is €4,922,814, there would remain due to the plaintiff a sum in excess of the amount of the bond.

108. Whether any valid set off in respect of any such amounts could be asserted even in the course of establishing the liability pursuant to clause 33 is a separate question which was not the subject of any detailed submissions to this Court. Nonetheless, it is clear that where a

plaintiff makes the case simply that a settled liability will exceed the amount of the bond by definition that proposition illustrates the existence of a genuine controversy. In '*Ziggurat*' (op cit), Coulson J. made it clear that a surety should not be precluded from defending the claim on its merits.

109. Finally, the affidavits reveal a dispute concerning an amount of €332,734 which the plaintiff says it paid directly to the contractor's creditors for work done and goods supplied. The plaintiff's Mr Cullen states that following a meeting on 18 August 2018 the contractor asked the plaintiff "to facilitate such payments". He exhibits one email of 22 August 2018 identifying "subcontractors/suppliers who could disrupt the handover of [certain] units". The defendant submits that there is no contractual or lawful basis for such direct payments. This issue is integral to a determination of the status of the account between the plaintiff and the contractor, which goes to the claim on the bond. As to whether the parties varied the contract to provide for such payments the affidavits, although limited on this point, establish a genuine dispute, both of law and fact, which should properly be determined at plenary hearing.

Conclusion

110. Extensive evidence was exchanged and submissions made concerning the status of the contract, previous applications for payments, and previous Certificates of Practical Completion in respect of certain phases. Yet reliance for summary judgment was placed on the Certificate of the Architect. I have earlier analysed the Contract, the Bond and the Certificate and the case law governing the form and status of such certificates and concluded that, taken together with the further issues arising from the examinership of the contractor and the contested claims regarding payments and disputes as to the underlying liability of the contractor the defendant has demonstrated a credible and *bona fide* defence to these proceedings.

111. Under the terms of the Bond there is no requirement for the Plaintiff to first pursue the contractor for its claim. Therefore, I shall not close the plaintiff out from establishing the liability of the contractor pursuant to clause 33 and accordingly the claim on the Bond. I shall refuse the application for summary judgment and grant leave to defend the proceedings.