Neutral Citation No: [2024] NIMaster 20 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **2024NIMaster 20** *ICOS No:* *Delivered:* **18/09/2024**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

Anthony McBride

Plaintiff;

and

John McGuigan

1St Defendant.

and

Gemma Webb

2nd Defendant

Mr Dunford KC and Mr Swift (instructed by Swift Solicitors) for the Plaintiff
Mr McGuckin (instructed by Faloon & Co) for the Defendants

Master Bell

Introduction

[1] The context of this dispute is that Mr McGuigan and Ms Webb sought to have a house built. They engaged a builder who started the project, laid the foundations, and built the house up to first floor level. The defendants then needed to obtain a mortgage and their bank insisted that they engage a contractor. The first contractor whom they approached quoted a price of £160,000 for the work. The defendants then

approached a second contractor, Mr McBride, to complete the project. He agreed to do so for a sum of between £140,000 and £150,000. Difficulties, however, arose between the parties as regards payments, and Mr McBride left the site and served a writ for breach of contract.

[2] On 10 July 2020, in the light of Mr McGuigan and Ms Webb's failure to enter an appearance to the writ, Mr McBride obtained default judgment against them. The case was then listed for an assessment of damages. Although the court was shown an email which referred to the terms of a contract having been agreed in a Whatsapp exchange between the parties, it appeared that neither party had a copy of those Whatsapp texts. The assessment of damages proceeded on a quantum meruit basis, seeking the unpaid value of the works which had been carried out by the plaintiff.

[3] I am grateful to counsel for their oral and written submissions.

Expert Evidence

[4] The evidence in the case began with expert evidence offered on behalf of each party. Expert opinion evidence is a necessary mainstay of the litigation process. Many cases could not be tried without it. Expert opinions are admissible to furnish courts with information which is likely to be outside their experience and knowledge. The evidence of experts has proliferated in modern litigation and is often determinative of one or more central issues in a case. Expert evidence can be of immense value to the court. However, we do not have trial by experts. Where experts disagree, the proper legal approach has been identified by the court in a number of cases. In *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, Henry LJ said:

> "Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where, as here, there is disputed expert evidence"

This approach was affirmed in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605. Lord Phillips MR stated at paragraph 19 of that decision:

> "This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the

> judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process."

[5] On behalf of the plaintiff, Mr McWilliams, a quantity surveyor, had been retained and gave oral evidence to the court. Mr McWilliams has been a chartered quantity surveyor for 26 years and has run his own business for 15 years. He has given expert evidence on one previous occasion. On behalf of the defendants, Mr Lynch, another quantity surveyor, had been retained on behalf of the defendants and also gave oral evidence. He has worked as a chartered quantity surveyor for 40 years.

[6] The evidence of both experts was "hot-tubbed". Instead of the parties' experts giving evidence and being cross-examined on it individually, the experts were sworn in at the same time and gave their evidence on a particular issue one after another before counsel moved on to another issue. This option for expert witnesses, to give their evidence concurrently was introduced in England by CPR PD 35, para 11 under the April 2013 Jackson Reforms. In Northern Ireland there is no statutory provision allowing such a practice and it is adopted under the inherent jurisdiction of the court to regulate its own procedure. The adoption of this practice both saves time and is particularly useful because it allows counsel and the court to hear the experts' answers to the same questions shortly after one another rather than perhaps days or weeks apart.

[7] Both experts initially produced written reports. Prior to the hearing there was a meeting of the experts and they produced a Scott Schedule setting out the various items of work which the plaintiff was claiming for, the value being claimed for that work, whether the defendants' expert agreed or disagreed and why, and the valuation which the defendants' expert argued for.

[8] Expert evidence is no different from any other evidence. The trial judge may accept it, reject it, or accept some of it and reject other parts of it. The role of the trial judge is to scrutinise the evidence thoroughly and ascribe to it such weight as he thinks it deserves. It must be as influential in the overall decision-making process as it deserves: no more, no less. There are many relevant judgements regarding expert witnesses and how their evidence should be approached, but it is widely acknowledged that one of the most important of these is a judgement by Sir Peter Cresswell in *National Justice Cia Naviera SA v. Prudential Assurance Co. Ltd (The Ikarian Reefer*) [1993] 2 Lloyd's Rep 68. When it comes to assessing expert evidence, there are a number of factors which courts will often use in reaching conclusions as to whether an expert view is worthy of being relied upon. Certain of the criteria are interrelated and overlap. No single criterion is determinative. Some of the criteria are particular to expert evidence alone; others are used to assess the weight of all witness testimony. Those factors may include:

i. The quality of the expert's investigation

ii. The correctness of the expert's factual premises and underlying assumptions

iii. The soundness of the expert's methodology

iv. The quality of the expert's reasoning

v. The scientific validity of the expert's conclusions

vi. The expert's qualifications and reputation

vii. The objectivity of the expert

viii. Any bias demonstrated by the expert

ix. The context of all the other evidence

x. The expert's performance under cross examination

xi. Any changes of opinion by the expert

xii. Whether the expert strays outside their field of expertise

xiii. The demeanour of the expert

I have considered the evidence of both experts within this framework of consideration.

[9] I shall begin by addressing the expert evidence in general terms. I was not impressed by the evidence of Mr McWilliams. His underlying assumptions were sometimes incorrect. For example, in relation to the roof slates, he told the court that he had assumed that the slates would be put on and therefore claimed an amount for their installation. He made that assumption because the plaintiff had told him that he was about to do it, However the plaintiff did not affix the slates. During cross-examination Mr Williams had to concede that he had therefore assessed and included in his valuation of what was owed to Mr McBride, work which Mr McBride merely said that he intended to do. In his report Mr McWilliams wrote on a number of occasions "Client states done by others." His opinion was therefore sometimes based not on what he himself witnessed but simply on what he had been told by the plaintiff. This undermined the weight that I can attach to his evidence. Another weakness in Mr McWilliams' evidence was that, in attempting to reach an assessment of what might be owed to the plaintiff, Mr McWilliams did not carry out an actual inventory of materials on site.

[10] An expert report is only as good as the assumptions on which it is based. Where the factual assumptions made by an expert witness are proved wrong, their opinion will be invalidated as a result (*David v. General Medical Council* [2004] EWHC 2977). In *Boulter v. Prior* (Court of Appeal (Civil Division), unreported, 12 May 1994)

the trial judge heard an expert witness whose report was based on some measurements that he took himself and on the version of events as given to him by the plaintiff. The trial judge did not find the expert to be of assistance. The Court of Appeal observed that the problem with this type of witness was that his evidence inevitably depended upon his accepting in a reconstruction of the accident much, if not all, of what he had been told by the plaintiff. Of course, if those factual assumptions proved to be inaccurate, then the whole calculation was thrown out.

[11] In deciding what weight to accord expert evidence, a trial judge must take into consideration whether the methodology which an expert has employed is flawed. Where one expert's methodology is more sound than another's, that expert's opinion may be accorded more weight. In this case there was a significant difference in the methodologies adopted by the experts. Mr McWilliams methodology left a very great deal to be desired. An example of this was in terms of his assessment of the amount of hardcore which had been provided by the plaintiff. His approach was to measure the section of ground on which there was hardcore and then simply to accept the word of Mr McBride that the hardcore had a particular depth. He did no sampling to check that what the plaintiff had told him was objectively true. Neither did Mr McWilliams look for proof of the purchase of a particular quantity hardcore, assuming that it may have been obtained in a cash sale.

[12] Another example of Mr McWilliams' flawed methodology was in relation to the external walls. Mr McWilliams told the court that he had made an assumption from the drawings that certain insulation work had been done (ie on the basis that it should have been done if Mr McBride had followed the plans with regard to the work he was supposed to do). The work, however, had not been done and Mr McWilliams did not check so as to verify for himself (and the court) that it had been done. His evidence at one point was that he had priced the job by the drawings and not by what he saw with his eyes. A further example of Mr McWillams' lack of diligence in methodological approach was in respect of the matter of whether cavities had been closed. Mr Lynch gave evidence that the closing of wall cavities had not been properly done and that the fire regulations in house building required that cavities be closed off by the use of a board. Mr McWilliams had to admit in his evidence that he had not inspected the cavities properly and had therefore to reduce his estimate of what was owed to Mr McBride by taking out the cost he had included for the closing of the cavities. Another consequence of Mr McWilliams simply working from the plans for much of his assessment was that he failed to observe that what should have been Quinn Lite Inner Block Leaf was not in fact the material used. Mr Lynch could tell this simply by observing the texture. Again, Mr McWilliams had to reduce what Mr McBride was claiming.

[13] Further, in some instances, Mr McWilliams' evidence appeared to be less of an expert conclusion and more a case of mere speculation. For example, in relation to the matter of insulation, the item in question was covered up and therefore difficult

to inspect. Mr McBride told him that insulation had been laid on top of the joists. Mr McWilliams observed a black line in a photograph and his evidence to the court was "I thought that might be it." On that basis he included a cost of £1,224.25 in his calculations for insulation.

[14] As a result of Mr McWilliams' approach to methodology I have no assurance that many of his conclusions are correct. By comparison, Mr Lynch approached matters in a much more formal way and looked for confirmatory documentary evidence where possible. For example, Mr Lynch sought documentary evidence from the plaintiff that a particular quantity of hardcore, said to have been obtained by the plaintiff, had in fact been purchased. He also gave evidence that, in his experience, the site would not have required the amount of hardcore which Mr McBride was claiming for.

[15] A significant evidential problem in the task of assessing the evidence of the parties, both expert and non-expert, was the inadequacy of the documentary evidence. Mr Lynch was critical of the lack of proper invoices provided by the plaintiff in respect of materials allegedly purchased by him. He noted, for example, that quarries normally provided invoices and that Mr McBride did not possess such invoices. The experts also differed significantly in their approach to the little documentary evidence which did exist. One of the invoices offered by the plaintiff was said to relate to the hire of a power washer. However there is nothing on the face of the invoice to indicate that it was for the hire of a power washer. Mr McWilliams, believing the word of his client, accepted it as genuinely having been for the hire of a power washer. Mr Lynch did not.

[16] The weakness in the plaintiff's claim was apparent from the very start of the expert evidence. The initial position of Mr McWilliams was that his client could legitimately charge £72,598 for the work done. Mr Lynch's position was that the value of the work and purchase of materials amounted to £37,096. After a meeting of the quantity surveyors, Mr McWilliams was obliged to shift his calculation downwards to £65,279. This was prior to the major flaws in Mr McWilliams' evidence being exposed by counsel.

[17] The defendants' counsel was predictably critical of Mr McWilliam's evidence, describing him in his final submissions as "demonstrably an incapable and incompetent witness", and arguing that his evidence was so poor that the court should reply solely on the evidence of Mr Lynch. I must agree with that view. In terms of an overall assessment of the expert witness evidence offered on behalf of the plaintiff, I have to be highly critical of the quality of Mr McWilliams' investigation, the correctness of his factual premises and underlying assumptions, and the soundness of his methodology. While on the face of matters he appeared to be a competent professional, he was exposed as not having been fit to have been put forward as an expert witness.

[18] Although Mr McWilliams signed an expert witness declaration at the end of his report, it is clearly that he did not abide by its terms. Paragraph 9 of the declaration states:

> "I have not, without forming an independent view, included or excluded anything which has been suggested to me by others, including my instructing lawyers."

Mr McWilliams' evidence was clear that he had accepted the word of Mr McBride as regards what work had been done without objectively checking whether that was the position.

[19] Essentially Mr McWilliams had only the vaguest idea of the role of an expert witness in court. He appeared to have had no training in the role of an expert witness. Such training is available from many sources including the Royal Institute of Chartered Surveyors. Indeed, the Royal Institute even publish on their website a practice statement and guidance document on the subject of surveyors acting as expert witnesses. The quality of this document can be anticipated by the fact that the fourth edition of the guidance has a foreword written by Lord Neuberger, the former President of the Supreme Court.

[20] By comparison, Mr Lynch's methodology was far superior to Mr McWilliams'. He did not simply go by the drawings but rigorously inspected the build on site and sought documentary evidence where possible.

Evidence of the Parties

[21] After the expert evidence, I heard oral evidence from the plaintiff and the first defendant.

[22] Mr McBride stated that he started off in his early 20s as a builder and had worked as a builder for 25 years. He is a sole trader and he sub-contracts to people who work for him. He and his son Christoper were the business' employees. He is not currently registered for VAT although he had previously been registered for VAT when he was operating through a company. He explained that £80,000 of turnover was the threshold for VAT and that he usually did zero-rated VAT work. He stated that the record keeping in this case was "pretty good". This was a bizarre assertion in the light of the evidence which was to follow.

[23] This was a case in which invoices for materials were strangely absent. When it came to documentary evidence, and Mr McBride was asked whether he had invoices, he mainly conceded that he did not. He told the court that he had kept notes which he could no longer find. When it came to the tiles, for example, he did not have an invoice for them because they had been delivered by Quinns but the tiles had been "organised" through the roofer who Mr McBride had subcontracted.

[24] One of the major issues in Mr McGuckin's cross-examination of Mr McBride focused on Mr McBride's cash transactions. Most of Mr McBride's transactions

appeared to be by means of cash. In respect of the purchase of hardcore, for example, Mr McBride stated that the reason he did not have an invoice was that he paid for the hardcore on the day. He then went into a meandering account where he explained that hardcore had been ordered by telephone from Barrack Hill Quarries who delivered the hardcore along with a delivery note (but not an invoice). However, Mr McBride said he did not retain these delivery notes because he did not think he would need them. After the litigation commenced, he then went to Barrack Hill Quarries to obtain what he described as "duplicate" delivery notes for the purpose of the litigation. Mr McBride essentially had no response to Mr McGuckin when it was put to him that there was nothing in the whole case which was not paid for in cash. He told the court that, when he received £23,000 in cash from Mr McGuigan, it went into his books although he stated that he could not say whether or not it then featured in his bank account records. Mr McBride had no explanation as to why he did not simply arrange for a bank transfer from Mr McGuigan's account to his own account once one of the stages of work had been completed. The position of payments of persons employed was similar. In respect of the task of clearing out the cavities, Mr McBride told the court that he had employed "a foreign lad" called Andrew to help him and that Andrew had been paid in cash. I came to the conclusion that Mr McBride clearly wanted to deal solely in cash for reasons of not leaving a paper trail. Mr McGuckin in his cross-examination painted a very vivid picture of Mr McBride being a man who was, at best, allergic to paperwork and, at worst, engaged in evading the Revenue. Once I had heard all the evidence I was eventually persuaded, on the balance of probabilities, that both were true.

[25] Mr McBride did not, in my view, have a credible response to Mr McGuckin's questions regarding Mr McWilliams. Mr McBride said that at the site he had shown Mr McWilliams what he had and had not done. He acknowledged that Mr McWilliams had claimed for the fitting of the roof tiles when this had not been done. Yet he said that Mr McWilliams had nevertheless simply "worked from the drawings" "because that's what QS's do." He stated that he had not seen the report prepared by Mr McWilliams before it was admitted in evidence and so had not been in a position to correct Mr McWilliams' errors in relation to the issues of what work had been done and what work had not been done. His evidence was that his solicitor had told him about the total figure which Mr McWilliams had arrived at in terms of the value of the work done, but Mr McBride did not think of asking to see the report. He also gave evidence that he had not seen the Scott Schedule submitted to the court. After being pressed by counsel, Mr McBride then started using phrases such as "I never touched the report" and eventually gave evidence that the report had been read to him by his solicitor who had the report on his computer. I regarded some of Mr McBride's earlier answers to counsel's questions as being disingenuous and economical with the truth.

[26] Somewhat unusually, Mr McBride disparaged the evidence of his own expert witness. Commenting on the evidence of Mr McWilliams and Mr Lynch, Mr McBride stated, "Both quantity surveyors were pathetic." Mr McBride particularly

blamed Mr McWilliams for errors in his report. In my view, however, the plaintiff has to take responsibility for what his witness has put forward.

[27] Mr McBride also gave evidence that he was not asked by Mr McGuigan to step away from the project. He regarded this as a lie by Mr McGuigan when the latter gave his evidence.

[28] Mr McGuckin, in his summary of the plaintiff's performance, submitted that Mr McBride was "evasive, inconsistent and demonstrated fundamental dishonesty in his evidence." I agree with counsel's assessment. In my view Mr McBride was a highly unsatisfactory witness. I concluded that I could not rely on any of his evidence unless it was agreed to by the defendants or corroborated by independent evidence.

[29] The Court then heard evidence from Mr McGuigan. He explained that the second defendant, Gemma Webb, was his wife. They had married in 2002. They have instructed the same solicitor. She had not come to court because she was caring for their two children. Mr McGuigan stated that a second reason she had not come to court was that she was afraid of Mr McBride. He had served the writ personally on Ms Webb at her workplace and he had threatened to knock the house down if he was not paid what he said he was owed.

[30] Mr McGuigan outlined the background to this litigation which I have summarised in the opening paragraph of this judgment. Mr McBride arrived at the site in November 2019 and Mr McGuigan explained that he wanted the house completed to a turnkey finish. While Mr McBride gave him a price of somewhere between £140,000 to £150,000, he never put that price in writing, even though Mr McGuigan asked him several times to do so. Mr McGuigan said that he was nervous when Mr McBride started the project before a definite figure was agreed between them.

[31] Mr McGuigan told the court that a significant problem then arose between the parties in relation to payments. Mr McBride wanted cash for materials. Mr McGuigan complied, despite the fact that Ms Webb was unhappy with this arrangement. The couple got as much cash as they were able to obtain. However the bank kept asking them why they wanted so much paid out to them in cash. There was only so much that the bank would provide. The first amount, supplied to Mr McBride in January 2020, was £10,000. In February 2020 Mr McBride wanted more cash and Mr McGuigan gave him additional amounts of £7,500 and £5,500. At one point, Mr McBride told Mr McGuigan that a bank transfer "was no good to him". The conflict between Mr McGuigan and Mr McBride escalated at the end of February 2020 when Mr McBride wanted Mr McGuigan to draw more cash out of the bank and give it to him. Tensions reached a peak when Mr McGuigan again asked for a written bill and Mr McBride would not give him one. Mr McGuigan and Ms Webb became highly concerned at this point.

[32] At the end of February 2020 Mr McBride essentially stopped talking to the defendants. He told Ms Webb that they were asking too many questions. This led Mr McGuigan to tell Mr McBride to leave the site and they would pay him what he was owed. Mr McBride's response, instead of providing them with a bill, was to serve them with a writ. Mr McGuigan then paid a further £14,000 to Mr McBride after the issue of these proceedings. He then arranged for someone else to complete the house project which took until the end of 2021.

[33] Mr McGuigan said that during the litigation Mr McWilliams' report had been served on them. He initially thought it was a joke because it was obvious to him that Mr McBride was claiming for things that had not been done. He found it sickening.

Conclusion

[34] On an assessment of damages such as this, the plaintiff has to be in a position to prove what he is owed. The burden of proof lies on him to show that he is owed for work which has not been paid for.

[35] McGregor on Damages (22nd Edition) explains the general position on the burden of proof at para 53-001 in this fashion:

> "The claimant has the burden of proving both the fact and the amount of damage before they can recover substantial damages. This follows from the general rule that the burden of proving a fact is upon the person who alleges it and not upon the person who denies it, so that where a given allegation forms an essential part of a person's case the proof of such allegation falls on them. Even if the defendant fails to deny the allegations of damage or suffers default, the claimant must still prove their loss."

[36] The correctness of this general approach is demonstrated in the decision in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21 which concerned the recoverability of damages against negligent solicitors in circumstances where they had assumed limited responsibility in relation to a transaction. In that decision Lord Sumption held that the burden of proving facts which established that the claimant had suffered loss lay upon the claimant:

> "The legal burden of proving any averment of fact lies upon the person who is required to assert it as part of his case. In the ordinary course, this means that the claimant has the burden of pleading and proving his loss, whereas the defendant has the burden of proving facts (such as failure to mitigate) going to avoid or abate the consequent liability in damages."

[37] Despite all the considerable skills of Mr Dunford KC, nothing could be done to salvage these proceedings given the evidence which had been provided to the court by the witnesses for the plaintiff. As a result of that evidence, the plaintiff has not discharged his burden of proof by adducing reliable evidence to satisfy me on the balance of probabilities that money is outstanding for work completed which is in excess of what has already been paid to the plaintiff by the defendants. The defendants, however, having rigorously examined each element of Mr McBride's claim, have conceded that the small amount of £3,911.56 may be regarded as being owed to Mr McBride. I therefore make an order that the amount of damages to be awarded to the plaintiff is in the amount of £3,911.56.

Costs

[38] I must now decide what to order in respect of the costs of these proceedings.

[39] Order 63 Rule 3(3) of the Rules of the Court of Judicature sets out the general rule in respect of costs in High Court litigation:

> "If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

[40] One issue which requires clarification is that of which event it is which costs must follow. Undoubtedly the plaintiff might wish to argue that the relevant event is the default judgment entered against the defendants for their failure to enter an appearance. On the other hand, the defendants might wish to argue that the relevant event is the non-award of damages at the assessment of damages hearing. In my opinion it is the latter view which is correct. The entering of a default judgment is an administrative action carried out by court staff and not a judicial decision. Valentine's Annotated Rules of the Court of Judicature points out:

> 'The event' is not necessarily the judgment for one party. For instance, if the plaintiff recovers a judgment but does not exceed the amount lodged in court under Order 22, the event is, in respect of costs after the date of lodgement, in favour of the defendant."

[41] That this view is correct is supported by two Court of Appeal decisions from England and Wales. Firstly, there is the decision in *Alltrans Express Ltd. v CVA Holdings Ltd*. [1984] 1 WLR 394. Master Lubbock had made an order giving the plaintiffs leave to enter judgment for damages to be assessed and the action to be transferred to official referees' business for assessment of damages. Judge Hayman then assessed the plaintiffs' damages at £2 and ordered judgment to be entered in that amount. He further ordered that the defendants should pay the plaintiffs their costs of the assessment. He gave the defendants leave to appeal against the order for costs. In the Court of Appeal Stephenson LJ held that the event of an award of £2 was not the event at which the plaintiffs were aiming. They were aiming at £82,500,

and the mere fact that they ultimately got something — token or nominal damages — did not enable him to regard them as remaining successful plaintiffs. Secondly, a similar approach to costs was adopted more recently by the Court of Appeal in *Medway Primary Care Trust and another v Marcus* [2011] EWCA Civ 750.

[42] The issue therefore in the consideration of costs is whether Mr McGuigan and his wife deserve to have a costs order made against them for Mr McBride's costs in respect of an application which I have found merits little more than a token award. It will be remembered that Mr McBride alleged the value of work done and materials purchased was £72,598. Mr Lynch had put a value of £37,096 on this. Mr McGuigan and Ms Webb had already paid £37,000. Essentially therefore Mr McBride was making a claim for £35,598 which he said he was owed. I have however awarded him a mere £3,911.56 based solely on the defendants' concession.

[43] The general rule that costs follow the event has an important function to encourage parties in a sensible approach to increasingly expensive litigation. This general rule promotes discipline within the litigation system, compelling the parties to assess carefully for themselves the strength of any claim, and ensures that the assets of the successful party are not depleted by reason of having to go to court. This is desirable in both public law cases and in private law cases (*R* v *Lord Chancellor ex p CPAG* [1999] 1 WLR 347 (Dyson J); *Re Moore [Costs]* [2007] NIQB 23 [2007] 4 BNIL 130).

[44] In the light of all the circumstances of this case I consider that it is appropriate to order that the plaintiff shall pay the defendants' costs of this application.