**Neutral Citation No. [2010] NICh 9** | *Ref:* **DEE7821**

*Judgment: approved by the Court for handing down* | *Delivered:* **25/05/10**
*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**CHANCERY DIVISION (Bankruptcy)**

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**2008 No. 121610**

**BETWEEN:**

**ANDREW ALLEN**

**Plaintiff;**

**v**

**BURKE CONSTRUCTION LIMITED**

**Defendant.**

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**DEENY J**

[1] On 9 October 2008 Messrs Napier & Sons issued a statutory demand in the sum of £104,482.32 on behalf of Burke Construction Limited against Mr Andrew Allen. Mr Allen through his solicitors, Messrs Hart & Company, then applied to the High Court to set aside the statutory demand with an initial hearing date of 8 December 2008. That was accompanied by an affidavit in which Mr Allen swore that he disputed the debt claimed "on the grounds that the amount is primarily made up of an invoice relating to works carried out to my premises by Burke Construction Limited at 10 Green Road, Belfast which are both unfinished and unsatisfactory as to their quality of workmanship and do not have the benefit of a building control completion certificate. This in effect makes the property unsaleable."

[2] The last sentence is a little curious as the address in question is the dwelling house where Mr Allen's former wife lived with their daughter. Burke Construction Limited had built an extension to that house and carried out extensive refurbishment works. Mr Allen had agreed to expend a sum of money on the house as part of his ancillary relief settlement with his then wife. At the hearing before me Miss Walkingshaw was present on behalf of the former wife but took no active part in the proceedings.

[3] Mr John Paul Burke, Director and shareholder in Burke Construction Limited replied by an affidavit received on 23 January 2009 denying that the works were defective and pointing out that no complaint of defective

workmanship had been made until after the presentation of the statutory demand. The matter went on for a hearing before the Master in Bankruptcy and she delivered a lengthy and careful judgment of 13 May 2009. She found in favour of Burke Construction Limited. Events subsequently moved on so that I consider it sufficient, without disrespect to her judgment, to say that the principal issue before her was the issue of defective workmanship linked to whether the builder was obliged to get building control approval and whether the absence of the same was something to be blamed on him. In the event the Master found that there was no genuine counter claim on Mr Allen's part and she gave the respondent liberty to present a bankruptcy petition against the application after the expiration of 28 days from the date of this order. The applicant/appellant then lodged his notice of appeal by 5 June 2009. Further affidavit evidence appeared and an inspection of the premises was arranged. The former wife, as notice party, was informed of the nature of the proceedings. The appeal was delayed to allow a hearing between Mr Allen and his former wife to be heard in the Family Division of the High Court. In the events that happened the parties then did ask for a hearing of the appeal which came on before me on 25 and 26 March 2010. Mr Keith Gibson appeared for Mr Allen and Mr John Coyle for Burke Construction Limited. Both furnished helpful skeleton arguments.

[4] The applicant/appellant relied on Rules 6.004 and 6.005 of the Insolvency Rules (NI) 1991 as amended. I set out the most relevant part of the Rules:-

> "Hearing of application to set aside
>
> 6.005 . . .
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> (3) On the hearing of the application, the court shall consider the evidence then available to it, and may either summarily determine the application or adjourn it, giving such directions as it thinks appropriate.
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> (4) The court may grant the application if –
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> (a) the debtor appears to have a counter claim, set off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or
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> (b) the debt is disputed on grounds which appear to the court to be substantial; or

> (c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule 6.1001 (6) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or
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> (d) the court is satisfied, on other grounds, that the demand ought to be set aside."

The Court of Appeal in England in Re a Debtor (Lancaster No 1 of 1987) [1989] 1 WLR 271 held that the category of "other grounds" as specified in (d) above must be of the same degree of substance as those set out in (a), (b) and (c).

[5] These provisions were considered by Girvan J in James Moore Earthmoving v Commissioners of Inland Revenue [2001] NI Ch 15. He points out that the prevailing, although not undisputed, view is that if a debtor fails at this stage he may not raise the same arguments again in regard to the debt at the hearing of a petition. He concluded therefore that a debtor should not be in a worse position than a party seeking to set aside a judgment or a party seeking leave to defend a case and avoid summary judgment. I agree with that view. The language in the former situation is of a defendant showing that he has an arguable case. In the latter the court considers whether it is in the interests of justice for the defendant to be allowed to defend. Order 14 rule 4(1) provides that a "defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the court". Rule 1 allows an application for summary judgment to be brought –

> "On the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed . . ."

[6] Again analogy could be drawn with an application to stay a winding up petition. There the debtor company is required to show a substantial defence requiring investigation of the dispute. Mann v Goldstein [1968] 2 All ER 769; Spanboard Products Limited v Elias Altrincham Properties [2003] NI Ch 3.

[7] It may be thought that the words of the relevant Rule are clear i.e. in this case, is the debt "disputed on grounds which appear to the court to be substantial?" The court is not holding a full trial of the matter; it must only decide if the grounds appear to be substantial. They must be genuine. The grounds of dispute must not consist of some ingenious pretext invented to deprive a creditor of his just entitlement. It must not be a mere quibble. If there is a genuine dispute about part of a debt but not about another part, contained in the same statutory demand, the court has the power to grant the

application to set aside the statutory demand on condition that the debtor pays the genuinely owed debt within a reasonable period of time.

[8] Applying these principles to this case I find the following facts. Firstly, a building control certificate had been obtained in the interval and the applicant/appellant no longer relied on this ground or the linked ground of defective workmanship.

[9] Secondly, the contention by the appellant that on foot of valuations carried out by Durnian & Company, Quantity Surveyors, the amount sought by the respondent should properly be approximately £59,120.16 was shown to be without foundation. This estimate referred only to "the construction of a single storey extension to 10 Green Road Belfast" and did not take into account, as another opinion by Durnian did, the extensive refurbishment works. These refurbishment works, I find were carried out by the respondent and they are entitled to be paid for them. Their figure in fact is entirely borne out by the other Durnian estimate presented on behalf of the appellant.

[10] Thirdly, the hearing before the court really turned on a separate defence advanced by Mr Allen for the first time in these proceedings, and only briefly indicated even in the skeleton argument of 9 March 2010. I mention that not in criticism of counsel but as pointing to the lateness of this defence on the part of his client. His client's contention, on his sworn evidence before me, was that he had in fact paid for this work in full by some small cash payments but also by a series of cheques for substantial amounts which together covered the amount in the statutory demand. Ultimately the authenticity of these cheques was accepted by the respondent and he accepted that they had been paid to him.

[11] However, his explanation of this was that in parallel with the personal works for Mr Allen at Green Road, the respondent company was engaged in building works on behalf of Astondoa Limited at 9-11 Bangor Road, Holywood, Co Down. This involved the restoration of two substantial dwellings, described by Mr Burke as Victorian; in fact they date from the reign of King William IV and have been the subject of litigation before. It also involved the construction of four semi-detached dwellings in the gardens of numbers 9 and 11. I will turn to one other aspect of this in a moment but Mr Burke swore that the appellant was a director and he believed shareholder in Astondoa which was not disputed. His agreement with Mr Allen and his co-director and co-shareholder, Eamonn Marnell, was that he would be kept in funds throughout these building works. If cheques on the resources of Astondoa were not available he would receive the funds directly from Mr Marnell or Mr Allen.

[12] As I had listened, earlier, to the evidence of Mr Allen I had considerable difficulty in accepting it in several respects. He had not raised this defence of payments at the time that he received the invoice from Mr Marnell in

September 2008. He did not raise it when he received the statutory demand which brings this matter before the court. More strikingly, he did not raise it even when giving evidence before Master Kelly. He was repeatedly questioned about this by Mr Coyle of counsel but at no time gave a satisfactory explanation. He said that it was only over a period of time and since that hearing that he had been able to do reconciliation between Astondoa and his own affairs and arrive at the correct calculation. However that could not fully explain why he failed to say that he had made substantial payments already. His various excuses were as follows. He claimed that his partner Mr Marnell had told him that he had only had to show a genuine dispute to put aside the statutory demand and that is why he relied on the building control issue only. That of course implies that he did remember at that time that he had made payments. At one point he appeared to claim that he had told his solicitor that but he subsequently resiled from that contention. Secondly he said he had only had the belated opportunity to reconcile the various payments. Again that might explain why he could not give the detailed figure but fails to explain why he did not say on affidavit and in evidence earlier that he had made some substantial payments.

[13] However there were five further points which upon reflection gave me cause for concern about rejecting this appeal. Firstly I heard from the appellant that he had been under treatment for several conditions for the past few years. One medication which was named is a member of the diazepam family of drugs. I am satisfied that a side effect of that drug is a loss of memory on occasions. Secondly, while I have rejected Mr Allen's contention that all the monies he gave Mr Burke were in respect of the work at his wife's house rather than at the property at Old Bangor Road, Holywood I am left uncertain as to whether the reverse of that is true. How can I be satisfied that Mr Burke is entitled to attribute all of these payments to Old Bangor Road and none of them to Green Road? His justification for doing so is to say that he was told to do so by Mr Marnell and Mr Allen. But there is no documentation supporting this and no contemporary reconciliation. If all these payments were to go to Old Bangor Road it is a little surprising that Mr Burke was not making any request for interim payments from Mr Allen for the work at Green Road. There is no invoice from Mr Allen for this work until September 2008. That is a pointer towards Mr Burke taking the view that he was receiving payments from Mr Allen some of which were for Holywood and some for Green Road. Thirdly it is also right to take into account that Mr Allen in an early e-mail about this matter did assert that he had made payments for Green Road, although he seems to have forgotten this subsequently. Furthermore, although cross-examined about this by counsel for the respondent it was not put to him that he and Mr Marnell had told Mr Burke that all payments from Mr Allen were to be attributed to Old Bangor Road rather than Green Road. I also note that when Mr Allen was challenged about a claim that he had half a million pounds he was able to produce an e-mail of 26 March 2010 from the Ulster Bank Limited confirming that he had a balance maturing on 30 July (2010) of

£511,240.91. This was pledged in some way to the development by Astondoa and not readily available to him but it is a factor which I cannot wholly dismiss. Astondoa would appear to be the owner of these properties at Old Bangor Road which are currently for sale; if sold some benefit would come to Mr Allen.

[14] Taking all these factors into account it seems to me that the proper approach would be to conclude that there is an arguable case that some of these payments should be attributed to Green Road rather than to Old Bangor Road. I propose to adjourn the matter with the direction that the appeal will be allowed if Mr Allen pays the sum of £50,000 to the solicitors for the respondent for their client within six weeks of this judgment. I am satisfied that that is an amount which on the evidence clearly can be attributed to Old Bangor Road. I will leave Burke Construction Limited to its remedies at law against Mr Allen and against Astondoa Limited for the remaining amounts which may be owing from one or other and may be forthcoming if sales now occur.

[15] One matter remains outstanding. In the course of cross-examination by Mr Keith Gibson of counsel Mr Burke said that he had been told by Mr Allen and Mr Marnell to put all invoices, whether for Green Road or Bangor Road, in under the heading of Bangor Road. The reason for that was that the Bangor Road new houses were zero rated for VAT and so they would not have to pay VAT on those amounts. They would save 17½% therefore. He admitted this was VAT evasion. He admitted to Mr Gibson or agreed with him that so far as Her Majesty's Revenue and Customs were concerned no work would have taken place at Green Road at all. He admitted that he was involved in this. But he then immediately went on to describe this as VAT avoidance rather than evasion although he may not have appreciated the distinction. He said there was no gain to him. He said it was a nightmare for him as he had registered for VAT on commencing building work on his account in 2007. He had received invoices in respect of Green Road where the supplier was seeking VAT. He was panicking. He was only trying to keep his client (ie Allen and Marnell) happy.

[16] This evidence raised in my mind a concern that his claim therefore was tainted by illegality and on foot of the maxim ex turpi causa non oritur actio he might not be entitled to have it enforced by the court. However in light of the authorities and of the important fact that his invoice of September 2008 to Mr Allen did properly seek the payment of VAT I have reached the conclusion that this is not a bar to the respondent's claim here.