

FANNING

THE HIGH COURT

145 ✓

EASTERN CIRCUIT

COUNTY OF WICKLOW

BETWEEN

PATRICK FANNING AND JOSEPH FANNING
t/a FANNING BROTHERS

Plaintiffs
(Respondents)

-and-

WICKLOW COUNTY COUNCIL

Defendants
(Appellants)

Judgement delivered by O'Hanlon J., the 30th day of
April, 1984.

The Plaintiffs brought proceedings in the High Court against the Defendants for a balance which they claimed was due to them on foot of an agreement to build a number of houses for Wicklow Co. Council. The action was heard by Butler J. in the High Court, and it appears that he required a valuation to be carried out by a Quantity Surveyor of the works which had been carried out by the Plaintiffs on behalf of the Defendant, but unfortunately the learned High Court Judge died before the matter could come back to him again to resume the hearing.

The action was subsequently remitted for hearing de novo in the Circuit Court and resulted in an award being made on the 13th May, 1983, for a sum of £15,000 with interest thereon as referred to in the Order of that date.

The action is an unusual one, in that there is no allegation of defective workmanship against the Plaintiffs. The County Council accept that the sixteen houses were built and were completed, and were satisfactory, but a dispute arises as to what was the contract price which they were bound to pay for the completion of these building works.

Tenders were invited for the building of the houses in question. The Plaintiffs submitted a tender which was accepted, and led to the drawing up and execution of a written contract between the parties. So far so good - it is difficult to understand why a dispute should now arise as to the contract price. The tender submitted by the Plaintiffs, which was prepared with the assistance of a Quantity Surveyor, was a three-page document. Had it been completed in the manner sought by the County Council the gross figure for construction of the sixteen houses

would have appeared on page 1, but instead, a figure of £5,057.19 was given, which obviously referred to the cost of construction of a single house, and a break-down of this figure was given on page 2 of the document. On page 3 the only words and figures which appeared were as follows:-
"Roundwood - Site Development - Total: £11,843.29".

The Plaintiffs say that the amount of their tender was sixteen times £5,057.19, plus £11,843.29 for site development, making in all a sum of £92,758.33 or thereabouts, to which had to be added VAT at 3%, bringing the gross figure up to a sum in excess of £95,000.

The County Council officials interpreted the tender in a different way, however, and took it that the figure of £5,057.19 per house was an inclusive figure, and they proceeded to draw up Articles of Agreement setting out quite clearly that the sum of £83,366.60 (inclusive of VAT) would be the gross figure payable to the contractors for the execution of the works.

To avoid any possibility of misunderstanding the figures were discussed with the Plaintiffs, before the Articles of Agreement were signed, and the County Council

officials claim to have been assured by them that the figure referred to in the tender for site development works was included in the figure of £83,366.60 mentioned in the Articles of Agreement which the Plaintiffs were about to sign.

I am satisfied that both parties acted honestly and that neither attempted to deceive or take advantage of the other, but I am also of opinion that both parties were at fault in relation to the misunderstanding which arose between them.

Had the County Council officials done a simple mathematical calculation based on the figures in the tender, coupled with the break-down of those figures given on page 2 of the tender, it should have been apparent to them that the costs of the site development works were not incorporated in the figure of £5,057.18 per house which appeared on page 1 of the tender. They knew that the Plaintiffs were being advised by a Quantity Surveyor in the preparation of the tender, and having regard to the Plaintiffs' inability to grapple in any meaningful way with the figures involved in the

transaction, as appeared quite clearly in the course of the evidence given by them in Court, it would have been a wise precaution by the County Council officials to have asked for the attendance of the Quantity Surveyor at the discussion about the figures which took place before the Articles of Agreement were signed.

The Plaintiffs must also bear their share of the blame, and in my opinion they were the more blameworthy of the two parties. They put forward a tender which did not at all conform with the requirements of the County Council. Instead of insisting that the document be completed in proper form before the tender could be made the subject of an agreement, the County Council unfortunately took a short-cut and let the matter proceed on the basis of a tender which was ambiguous and incomplete. However, they did do their utmost to alert the Plaintiffs to the true significance of the Articles of Agreement they were signing, and if this contract were to be enforced to the letter, the Plaintiffs would have no further claim for payment over and above the amounts they have already received.

I have formed the view that there was an absence of consensus ad idem between the parties. The Plaintiffs thought they were being offered a price of £5,057.18 per house together with a sum of £11,843.29 for site development works, and VAT. They were very negligent in so believing, having regard to the express terms of the document they were signing. The County Council thought the Plaintiffs were agreeing to complete the entire contract works for a figure of £83,366.60, inclusive of VAT. They should, in my opinion, have taken even greater precautions than they did take, to ensure that there was no misunderstanding between themselves and the Plaintiffs in relation to the figures.

Absence of consensus ad idem may, in appropriate circumstances, entitle a party to an apparently valid contract to apply to have it set aside. But in the present case the work has been carried out and completed by the Plaintiffs at the request of and with the consent of the County Council. What is lacking is agreement as to the price which should be paid for the work. It does not appear to me that the Plaintiffs have made out a

case for compelling the Council to pay the full amount sought by the Plaintiffs, as though the Council had agreed to pay on the basis of figures which are wholly incompatible with those which were written into the Articles of Agreement.

Having regard to the findings of fault made against both parties, it appears to me that the Plaintiffs' present entitlement is to receive payment on the basis of a quantum meruit claim, and I have no doubt that this is what the late Mr. Justice Butler had in mind when he directed that the value of the work done by the Plaintiffs should be re-assessed by a Quantity Surveyor. However, I do not find it necessary to take this course, as the evidence adduced during the hearing of the appeal included particulars of the other tenders which were received by the County Council, and these give a good guide to the value which can reasonably be placed on the work which was actually carried out. I leave out of consideration the Plaintiffs' own figures as the proper figure attributable to their tender is in dispute. I also leave out of consideration the two highest figures

in the list of tenders, since they are well out of line with four other tenders which were received at the same time. Taking the four remaining tenders, the figures range from £85,000 up to £96,000, and would give an average in round figures of £88,400. I propose to take this figure or one close to it as representing a reasonable valuation of the works carried out by the Plaintiffs on a quantum meruit basis. The Plaintiffs have already received payment of £83,366.60, the sum mentioned in the Articles of Agreement. By this means I reach the conclusion that the Plaintiffs should have a decree for a sum in the region of £5,000 against the Defendants, to which I would add interest at 11% per annum from the 25th May, 1982. As this represents almost exactly two years' interest at this rate there will be judgement for the Plaintiffs' for a figure inclusive of interest to date, of £6,100, in substitution for the figure awarded by the learned Circuit Court Judge.

R. J. O'Hanlon

R. J. O'Hanlon.

30th April, 1984.