2005 IEHC 239

THE HIGH COURT

[2003 No.12511P]

BETWEEN

ANGLO IRISH BANKING CORPORATION

PLAINTIFF

AND

TOLKA STRUCTURAL ENGINEERING & DAVID KEANE

DEFENDANT

Judgment of Mr.Justice Gilligan delivered on the 8th day of July, 2005.

1. The plaintiff brings these proceedings seeking a declaration that the appointment of the second named defendant as arbitrator in a dispute between the first named defendant as claimant and the plaintiff as respondent is void and of no effect there being no arbitration agreement between the plaintiff and the first named defendant.

2. In addition the plaintiff seeks various ancillary reliefs as set out in the statement of claim.

3. The background circumstances are that the defendant was a domestic sub-contractor to Matthew Wallace Limited in respect of certain building works taking place at the Clarence Hotel in the City of Dublin in the mid 1990s.Matthew Wallace went into receivership and the defendant company maintains that it has not been paid for certain works carried out and goods supplied against the background where in respect of the buildings works to be carried out the plaintiff in these proceedings was the employer and Matthew Wallace Limited the main contractor.

4. By way of a letter dated 24th October, 1994 from Matthew Wallace Limited to the defendant company it was agreed *inter alia* that the defendant would accept various terms as set out in the said letter and that the main form of contract would replace the conditions of the defendants tender.

5. The main form of contract was never signed but notwithstanding this fact it is accepted on the plaintiff's behalf that Matthew Wallace Limited and the defendants did agree that their agreement be bound by the main form of contract.The contract contains a clause at 11(f) which states:-

> If the sub-contractor shall feel aggrieved by the amount certified by the Architect/Engineer or by his failure to certify or failure by the Employer to honour his certificate in whole or in part within the time period stipulated in the main contract document, then, subject to the Sub-Contractor giving to the Contract such indemnity and security as the Contractor shall reasonably require, the Contractor shall allow the Sub-Contractor to use the Contractor's name and if necessary will join the Sub-Contractor as claimant in any legal proceedings by the Sub-Contractor in respect of the said matters complained of by the Sub-Contractor.(See NOTE).
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> NOTE:- Arbitration under this Sub-Clause would be governed by the provisions with regard to arbitration contained in the Main Contract.The Sub-Clause should be struck out when the Sub-Contractor is not nominated or selected by the Architect under the Main Contract.

6. The factual situation is that the defendant company was a domestic sub-contractor and the issue that arises is as to whether or not it was the intention of the parties that clause 11(f) was agreed to.The parties accept that if clause 11(f) was agreed to then the defendant is entitled pursuant to the terms of 11(f) to step into the shoes of the main contractor and to have the existing dispute referred to arbitration.The parties equally accept that if clause 11(f) was not part of the agreement as entered into that the plaintiff is not entitled to an order in respect of the relief as claimed.

7. Mr.Ó hOisín on the plaintiffs behalf argues that the court should presume the intention of the parties as taken against the ordinary and everyday meaning of clause 11(f) and the note attached thereto on the basis that the defendant as a domestic sub-contractor would not be entitled to the benefit of the clause.

8. He further submits that the note is not being used in the particular circumstances of this case to contradict in any way the meaning of any clause.He says that the parties were free to contract as they saw fit and while they can vary the form of contract the defendant's position as a domestic sub-contractor was entirely different to a nominated sub-contractor who enjoys more extensive rights and no reference was made in the letter of 24th October, 1994 to clause 11(f) being retained and agreed upon against the background of what was the normal situation as described by the note that clause 11(f) would be automatically struck out if the sub-contractor was domestic as opposed to nominated or selected by the architect under the main contract.He urges upon the court that it is obvious as the defendant was not a nominated sub-contractor that clause 11(f) was not agreed upon.With reference to clause 21 of the contract he submits it is clear that the particular section is of no assistance to the court because of the norm that the content of the clause does not assist a domestic sub-contractor.

9. He further submits that in respect of the recitals at the commencement of the contract the parties should be ad idem if a change is going to be made to the contract and the particular circumstances arising would require there to be some form of a clear agreement that clause 11(f) was to remain in against a background where the defendant was a domestic sub-contractor.

10. Mr.Stimpson on the defendants behalf refers to clause 11(f) as providing an area of redress for an aggrieved sub-contractor who has not been paid.He submits that while it maybe that the clause may or may not be struck out it beholds the main contractor to indicate clearly what the position is to be and accordingly clause 11(f) is contained in the agreement and if it was the intention of the main contractor to have struck out clause 11(f) he should have said so in the letter of 24th October, 1994 to the defendant.

11. Mr.Stimpson relies on a letter as written by Arthur Cox and Company Solicitors on behalf of Rory O'Ferrall Receiver and Manager of Matthew Wallace Limited as dated 20th February, 2001 which confirmed their client was willing to consent to the defendants adoption of the name borrowing procedure in the sub-contract and in addition confirmed that insofar as any award made by the arbitrator related purely to the entitlement of the defendant they would not be making any claim against such an award.Mr.Stimpson argues that this puts the matter beyond any doubt and is a clear admission on behalf of Matthew Wallace Limited that the sub-contract agreement and clause 11(f) was agreed and was applicable.

12. He further submits that the headings and notes are not of equal value to the content of the actual clause and the note referred to would not override the body of the contract.

13. Mr.Stimpson relies o the decision of the High Court of England in National Farmers Union Mutual Insurance Society Limited and Dawson (1941) 2 KB 424 and in particular the judgment of Viscount Caldecote CJ wherein at p.5 of his judgment he states;

> "In my view the marginal note in which Mr.McKenna strongly insists is an unsafe guide to proper interpretation of this condition".

14. In the context of the judgment it is clear that Viscount Caldecote was dealing with a matter of interpretation and following a strong line of authority but that is not the situation that gives rise to the issue that I have to decide.

15. He further refers to the content of the letter of 24th October, 1994 from Matthew Wallace Limited to the defendant company giving rise to two amendments in the printed form of the contract and if the parties intended to strike out clause 11(f) the presumption is that they would have said so.Further clause 11(f) in the contract is the only clause which requires a choice to be made and the parties knew what they were doing in the letter of 24th October, 1994 when they left it in and made no reference to the deletion of clause 11(f).

16. Mr.Stimpson further refers to clause 21 of the printed form of contract which in his submission assumes that clause 11(f) has survived and further to the second recital which states inter alia that "no additions or omissions to any part of this document shall be made by either signatory accept by mutual agreement".While he accepts that there was no actual agreement ever signed the parties were signatories to various documentation giving rise to the final agreement.

17. In the circumstances I propose to rely on the criteria as agreed between the parties that the court has to decide as to what was the intention of the parties having regard to the circumstances by which the agreement was reached.

18. The defendant was aware as of the 24th October, 1994 that he was not a nominated sub-contractor but was a domestic sub-contractor and the relevant note is quite clear in stating that the sub-clause should be struck out when the sub-contractor is not nominated or selected by the architect under the main contract.It is not disputed by the defendant that the normal practice adopted in the construction industry is that clause 11(f) would be deleted in the case of a domestic sub-contractor but does apply to a nominated sub-contractor and to a contractor selected by the architect under the main contract.It does appear to follow that in the particular circumstances of this case where both parties knew that the defendant was a domestic sub-contractor that there would be some clear indication that the norm was going to be departed from thereby giving the defendant as a domestic sub-contractor the significant benefit of clause 11(f) in the event as happened that the main contractor failed to pay him and ceased trading due to financial difficulties.

19. The court clearly has to tread carefully not to reach a decision in relation to the intention of the parties which clearly was not intended.

20. I have been furnished with the letter from Hussey and O'Higgins Solicitors of 9th January, 2001 which gave rise to the reply from Arthur Cox on 20th February, 2001 but I am not satisfied that the content of this letter written on Mr.O'Ferrall's behalf in February 2001 could be relied on by this court as an indicator that Matthew Wallace Limited and the defendant company had agreed in or about the 24th October, 1994 that clause 11(f) of the contract was agreed upon or was intended to be agreed upon.

21. take the view that as pointed out by Mr.Stimpson on the defendant's behalf certain clarification/changes were spelt out in the letter of 24th October, 1994 from Matthew Wallace Limited to the defendant company.I take the view that the normal situation would have been that clause 11(f) would not have been included because the defendant was a domestic sub-contractor and thus if it was the intention of the parties that clause 11(f) was to remain in and be agreed upon such a situation to have arisen would have required some clear indication because the parties would have been agreeing on the defendant having superior rights to the ordinary domestic sub-contractor and in fact no indication whatsoever was given that clause 11(f) was agreed upon in the interest of the defendant.In my view the intentions of the parties was, subject to whatever agreed clarification/changes that were to be made to the sub-contract agreement, the normal situation was to apply and that was to the effect that with regard to this defendant clause 11(f) "should be struck out" as it was neither a nominated sub-contractor or selected by an architect under the main contract.

22. In these circumstances I come to the conclusion that it was not the intention of the parties as of 24th October, 1994 that clause 11(f) was agreed between the parties to the exclusion of the indication as set out in the note.

23. Accordingly the plaintiff is entitled to a declaration that the appointment of the second named defendant as arbitrator in a dispute between the first named defendant as claimant and the plaintiff as respondent is void and of no effect there being no arbitration agreement between the plaintiff and the first named defendant.