Neutral Citation Number: [2009] IEHC 403

THE HIGH COURT

2009 5957 P

BETWEEN

CLARKE QUARRIES LIMITED

PLAINTIFF

AND

P. T. McWILLIAMS LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 24th day of August 2009

Background

The issue with which the court is concerned in this case arises out of a Design and Build Contract dated 1st May, 2007 (the contract) made between the plaintiff, as employer, and the defendant, as contractor for the construction of a multi-storey car park and site enabling works as part of a major development in Monaghan. The work commenced on 23rd July, 2007 and was due for completion on 24th September, 2008, but, as a result of two extensions, the date for completion was extended to 24th February, 2009. However, disputes arose between the parties in late November and early December, 2008 which resulted in the parties resorting to the dispute resolution mechanisms provided for in the contract.

The chronology of the salient events which have led to these proceedings is as follows:

• On 27th November, 2008 the defendant gave the purchaser notice of suspension of the contract works pursuant to clause 11.2 of the contract, alleging that a "Contractor Termination Event" had occurred.

• On 4th December, 2008 the plaintiff responded by letter alleging that the defendant was in breach of the contract, thus entitling the plaintiff to terminate the contract forthwith and stating that this letter was the plaintiff's notice of termination in accordance with clause 11.1(d)(ii), which was to have immediate effect.

While the Court is concerned with identifying the processes by which the disputes between the parties are to be resolved, rather than the resolution of the substantive issues between the parties, the Court's attention was drawn to the fact that the response of the defendant was that it did not accept that the plaintiff was entitled to terminate the contract under clause 11.1(d)(ii) "or at all" and the defendant contended that what was referred to as the "purported" notice of termination was in breach of contract. By letter dated 31st December, 2008 the plaintiff clarified the position stating that the notice of termination should have referred to clause 11.1(b) and the termination would take place ten working days after the receipt of the notice. The position then adopted by the defendant was that it was not open to the plaintiff to both unilaterally and retrospectively seek to change the grounds upon which the contract was terminated. Later, by letter of 6th February, 2009, the plaintiff informed the defendant that, by failing to proceed regularly and diligently with the works and by wrongfully suspending and abandoning the works on or about 28th November, 2008, the defendant had repudiated the Contract and confirmed the plaintiff's acceptance of the repudiation and termination of the contract at common law. That letter was expressed to be without prejudice to the notice of termination of 4th December, 2008.

The only purpose of outlining those matters is to illuminate what the references to adjudication and arbitration, which followed, were about.

• The defendant's reaction to the notice of termination was to initiate the adjudication process provided for in the contract by service of a notice of adjudication dated 17th December, 2008 on the plaintiff. The redress sought was a declaration that the plaintiff had wrongfully terminated the contract under clause 11.1(d)(ii). For reasons which are not material, the defendant served a further notice of adjudication dated 5th February, 2009 (the February Adjudication Notice), which was a replica of the first notice, on the plaintiff.

• At the request of the solicitors for the defendant, the Chairman of the Chartered Institute of Arbitrators, Irish Branch, appointed Mr. Anthony Hussey to act as adjudicator in relation to the dispute the subject of the February Adjudication Notice. Mr. Hussey gave his reasoned decision on the reference on 24th February, 2009. He found that the notice of termination dated 4th December, 2008 was wrongful.

• Following the decision of Mr. Hussey, the plaintiff initiated the arbitration process provided for in the contract. On 6th March, 2009 the plaintiff issued two notices of referral to arbitration. One related to the dispute which was the subject of Mr. Hussey's decision of 24th February, 2009 – whether the plaintiff wrongfully terminated the contract on 4th December, 2008. The other related to the notice of suspension dated the 27th November, 2008 and raised the issue whether the defendant was entitled to suspend or abandon the works.

• On 13th March, 2009 the defendant, in turn, served notice of arbitration on the plaintiff, itemising the disputes and differences the defendant required to be referred to arbitration as:

(a) the plaintiff's wrongful termination of the contract;

(b) the failure on the part of the plaintiff, its servants and agents to properly administer the contract; and

(c) the failure on the part of the plaintiff to pay to the defendant all sums properly due and owing under the contract.

• In the context of an application by the plaintiff to have an arbitrator appointed, the defendant's solicitors in Northern Ireland, in a letter dated 31st March, 2009 to IDRS Limited, the company which represents the Chartered Institute of Arbitrators in the United Kingdom, having furnished a copy of the defendant's notice of arbitration dated 13th March, 2009, stated that "it would be sensible if the same Arbitrator dealt with all matters that have now been referred to Arbitration".

• On 20th April, 2009 Dr. Nael G. Bunni was appointed arbitrator, apparently in response to the plaintiff's request. Dr. Bunni convened a preliminary meeting on 11th June, 2009, which was attended by the representatives of the plaintiff and the representatives of the defendant, at which he gave directions as to the conduct of the arbitration. Prior to the preliminary meeting, the defendant's Northern Ireland solicitors had made it clear, in a letter of 28th May, 2009 to Dr. Bunni, that, while the defendant agreed to Dr. Bunni's terms and conditions, that agreement and its participation in the arbitration was "without prejudice to our client's rights to launch further Adjudication(s) whilst this Arbitration is proceeding".

• In fact, the defendant had already initiated a second adjudication process. Following the decision of Mr. Hussey dated 24th February, 2009, the defendant had sent to the plaintiff an application for compensation in accordance with clause 11.6 and clause 13.4 of the contract. It had sought payment in the sum of €4,456,302.50. Subsequently, the defendant had served notice of adjudication dated 15th May, 2009 (the May Adjudication Notice) on the plaintiff. The dispute, the subject of the notice, was described therein as a "dispute concerning monies due and owing to the [defendant] as a result of the [plaintiff's] wrongful termination of the contract". The plaintiff's position, and this is the nub of the plaintiff's claim in these proceedings, is that that matter is the same as the third matter in the defendant's notice of arbitration dated 13th March, 2009. The redress sought by the defendant in the May Adjudication Notice is payment of the sum of €4,456,302.50 plus VAT as applicable or such other sum as the Adjudicator shall deem fair and reasonable.

• On 23rd June, 2009 the Chairman of the Chartered Institute of Arbitrators, Irish Branch, on the application of the defendant, appointed Mr. Hussey as sole adjudicator, pursuant to the May Adjudication Notice in relation to what has been referred to by the parties as "the quantum claim".

• The plaintiff's reaction to the appointment of Mr. Hussey was to institute these proceedings, having failed to procure an undertaking from the defendant that it would cease to have its quantum claim addressed through adjudication.

The proceedings
The plenary summons in this matter was issued on 1st July, 2009 and contemporaneously with it the plaintiff issued a motion seeking an interlocutory injunction restraining the defendant from further prosecuting, conducting or participating in a "purported referral to adjudication" on foot of the May Adjudication Notice pending the trial of the proceedings.

The terms of the contract
The parties focused on clause 26 of the contract, which is headed "Governing Law and Dispute Resolution", and the Sixth Schedule, which is headed "Disputes *(sic)* Resolution Procedure".

In my view, it is also pertinent to consider the definitions clause, clause 1.1. "Dispute" is defined therein as meaning "a difference or dispute of whatever nature between the [plaintiff] of the one part and the [defendant] of the other part arising under, out of or in connection with this Contract (including, without limitation, any question of interpretation of this Contract)". The expression "Disputes Resolution Procedure" is defined as meaning "the procedure referred to clause 26 … and set out in the Sixth Schedule …".

Turning to clause 26, clause 26.1 provides that the contract and any dispute arising out of it will be governed by the laws of Ireland. Clause 26.2 provides that, except as expressly provided in any other provision, all disputes will be resolved in accordance with the provisions set out in the Sixth Schedule. Clause 26.3 then goes on to deal with "Referral to Arbitration" and provides as follows:

> "Subject to the provisions of the Disputes Resolution Procedure, if any Dispute arising out of or in connection with this Contract cannot be settled amicably between the Parties within 7 (seven) Working Days after written notice that such a situation exists, then at the election of either Party the matter may be referred to arbitration. Any such arbitration will be governed by the Arbitration Acts 1954 to 1998 as amended from time to time. The language of the arbitration will be English and the seat of the arbitration will be Dublin, Ireland."

Clause 26.4 deals with the powers of the arbitrator and clause 26.5 with his appointment. Clause 26.6 deals with confidentiality in relation to the arbitration process. The last provision in clause 26, clause 26.7, provides that neither party will be entitled to suspend performance of the contract or delay in making any payment required under the contract merely by reason of the reference of a dispute to adjudication, arbitration or to the courts.

Paragraph 1 of the Sixth Schedule provides as follows:

> "Any Dispute will, except where otherwise specifically provided in this Contract, be subject to the provisions of this Schedule."

The use of the word "will" in that provision would suggest that it is mandatory. Paragraph 2 requires the parties to use their best endeavours to resolve the dispute "through liaison". If they fail to achieve resolution within seven working days, then either party "may refer the Dispute to an adjudicator in accordance with paragraph 3". The procedure for initiating and conducting the adjudication process is set out in paragraph 3. Paragraph 3.14 provides that the adjudicator will be deemed not to be an arbitrator but will render his decision as an expert. The Adjudicator is required to provide both

parties with his written decision on the dispute within twenty working days of the date the referral notice is received by him (para. 3.11). Paragraph 3.12 is of particular relevance to the issue with which the Court is concerned and provides as follows:

> "Unless and until the Dispute is finally determined by arbitration, by legal proceedings or by a written agreement between the Parties, the Adjudicator's decision will be binding on both Parties who will forthwith give effect to the decision. If either Party does not comply with the Adjudicator's decision, the other may bring Court proceedings to secure such compliance."

Paragraph 4 deals with "final resolution". Paragraph 4.1 gives the option to either party of arbitrating a dispute which has been the subject of an adjudication process and provides:

> "Unless the Parties have agreed in writing that the Adjudicator's decision will be final, either Party may, at any time within 15 (fifteen) Working Days after both Parties have received the decision of the Adjudicator together with his reasons, refer the Dispute to arbitration in accordance with Clause 26 …."

Paragraph 4.2 is consequential on paragraph 3.12 and provides:

> "If the Parties have agreed that the Adjudicator's decision will be final, or if neither Party refers the Dispute to arbitration within the said 15 (fifteen) Working Days of the Adjudicator's decision in accordance with Paragraph 4.1, the Adjudicator's decision will be deemed final and binding on both Parties."

The combined effect of paragraph 3.12 and paragraph 4.2 is that, absent agreement, the decision of the Adjudicator, although binding from the time it is given, only becomes final when the period for referring to arbitration in clause 4.1 has expired without any reference to arbitration having been made, or, alternatively, if there is a reference to arbitration, when the arbitrator determines the matter, or, if there are legal proceedings arising out of the arbitration, when the legal proceedings are resolved.

Paragraph 6 provides for a fast track procedure under which the Adjudicator is required to deliver his written decision as soon as practicable but in any event within ten working days of the date of the receipt of the referral notice.

As is outlined in the chronology, in claiming compensation the defendant has invoked, *inter alia*, clause 13.4 of the Contract. While emphasising again that the Court is not concerned with the substance of the disputes between the parties, it is to be noted that clause 13.8 provides that any dispute in relation to clause 13, including "as to any amount claimed by the [defendant]" will be referred to the fast track procedure.

The issue and the Court's function
While the matter came before the court as an application for an interlocutory injunction, it was agreed at the hearing that, as the issue which arises is one of interpretation of the contract, the court should treat the application as the trial of the issue. The issue is whether, in accordance with the contract, the defendant is not entitled to pursue the quantum claim on foot of the May Adjudication Notice until the pending arbitration is concluded.

The submissions of the parties in outline
In the plaintiff's grounding affidavit sworn by Tommy Clarke on 1st July, 2009, the referral by the defendant of the quantum claim to adjudication is characterised as being "an abuse of process", as well as being alleged to be contrary to the contractual arrangements between the parties. Counsel for the plaintiff submitted that it is not open to a party to a contract to refer a dispute to arbitration and subsequently to refer the same dispute to adjudication. The principle on which counsel relied is that a litigant cannot vent the same issue in two different forums. On the facts of this case, by serving its notice of arbitration of 13th March, 2009, the defendant elected to refer the quantum claim to arbitration, it was submitted. By virtue of s. 3 of the Arbitration Act 1954 (the Act of 1954), thereupon the arbitration commenced. Having elected for arbitration in accordance with clause 26.3 of the contract it was not open to the defendant to subsequently elect to refer the same matter to adjudication. It was noted that the defendant had not invoked s. 9 of the Act of 1954, which provides that the authority of an arbitrator shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the Court.

It was also submitted on behalf of the plaintiff that the quantification of compensation was not a suitable matter to be referred to adjudication.

The position of the defendant was addressed in the grounding affidavit of Conor McNelis sworn on 10th July, 2009. Mr. McNelis made the point that under the terms of the contract the parties are contractually required to adjudicate the dispute before proceeding any further with arbitration. Counsel for the plaintiff rejected that proposition and submitted that clause 26 of the Contract was to be interpreted on the basis that a party had the right to elect between referring a dispute to adjudication or referring it to arbitration and, once the election was made, the party was bound by it. The argument pursued by counsel for the defendant was that there is nothing in the contract which prohibits the adjudication process and the arbitration process running parallel. Further, clause 26.3 of the Contract does not say that, if a party elects to go to arbitration, it has made a binding choice for arbitration, as opposed to adjudication, and that cannot be reasonably inferred from the clause.

While accepting that the submission of counsel for the plaintiff that a dispute cannot be arbitrated under an arbitration agreement and litigated in a court in parallel is correct, counsel for the defendant submitted that the underlying basis of that restraint does not apply to running an adjudication process and an arbitration process in parallel. What the Court does, it was submitted, when it stays an arbitration pursuant to s. 5 of the Arbitration Act 1980 is to enforce the parties' bargain. Aside from that, the analogy is not apt, because both the arbitrator's determination and the Court's decision are intended to be final, whereas the outcome of the adjudication is not intended to be final. In this connection, counsel referred the Court to passages from Coulson on *Construction Adjudication* (Oxford) at paras. 2.85 to 2.90 and the decision of the High Court of England and Wales in *Herschel Engineering Limited v. Breen Property Limited* [2000] BLR 272.

In arguing against the submission made on behalf of the plaintiff that the quantification of compensation is not a suitable matter for adjudication, counsel for the defendant submitted that it was a suitable matter because it may ensure that the

defendant has interim cash flow, to which the riposte of the plaintiff was that no question of interim cash flow arises here because the contract has been terminated. The principal argument made by counsel for the defendant on this point was that in the Sixth Schedule the contract makes provision for speedy determination of disputes and it gives an immediate enforceable right to the successful party. Counsel for the defendant emphasised, in particular, the provision in clause 3.12 which makes the adjudicator's decision binding on both parties who are required "forthwith" to give effect to it.

Conclusions
While the adjudication process under consideration by Dyson J. in *Herschel Engineering Limited v. Breen Property Limited* had a statutory basis in an Act of Parliament (Housing Grants, Construction and Regeneration Act 1996), the reasoning he adopted in deciding the issue before him, in my view, is helpful in understanding the rationale underlying the provisions of clause 26, and the Sixth Schedule to, the contract.

In that case, Herschel, the contractor, had obtained judgment in default of defence in respect of its claim for unpaid invoices. The judgment was subsequently set aside and Breen, the employer, was given unconditional leave to defend. Herschel served notice of appeal and the appeal was set down. However, immediately prior to serving its notice of appeal, Herschel had referred the dispute arising from non-payment of the invoices to adjudication. Despite being requested by the adjudicator to participate in the adjudication, Breen had chosen not to. The adjudicator had ordered Breen to pay Herschel a certain sum. Following non-payment by Breen, Herschel issued an application for summary judgment, which was defended by Breen, which asserted that the Court could not countenance two concurrent proceedings. The effect of the Act of 1996, on its application to the facts, was that the adjudication provisions of the Scheme for Construction of Contracts applied and the court had to consider two of its provisions. The first provided that any party to a construction contract might give written notice of his intention to refer any dispute arising under the contract to adjudication. Construing that provision in the light of the relevant provision of the Act, Dyson J. held that the written notice might be given "at any time". The second (para. 23(2)) provided as follows:

> "The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

The kernel of the decision of Dyson J. was his interpretation of the Scheme as entitling a party to refer a dispute to an adjudicator "at any time". He quoted a passage from a judgment of his delivered in the previous year *(Macob Civil Engineering Ltd. v. Morrison Construction Ltd.* [1999] BLR 93 at p. 97) in which he had explained the intention of Parliament in enacting the Act of 1996 as follows:

> "It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement."

Earlier, in rejecting the existence of a close analogy between the position of an arbitrator and that of an adjudicator, Dyson J. pointed out that the determination of an arbitrator on a dispute referred to him is final and binding on the parties, subject to a possible challenge in the Courts. The position in relation to adjudication, however, is different. A propos of the facts of the case before him he stated (at para. 17):

> "The decision of the adjudicator, however, was not final. It was only of temporary effect: see paragraph 23(2) of the Scheme. A decision of the county court, if made, will be final and binding for all time, subject only to any subsequent challenge in the higher courts. The consequence of paragraph 23(2) of the Scheme is that the decision of the adjudicator cannot give rise to any estoppel. Once the county court has given judgment, then, unless overturned on appeal *its* decision does give rise to an estoppel. Likewise in relation to the final award of an arbitrator."

Of course, this Court is concerned with the construction of the contract, not with the application of a statutory scheme. Nonetheless, because of the similarity between the contractual provisions at issue here and the provisions of the statutory Scheme under consideration by Dyson J., I consider the reasoning of Dyson J. to be persuasive. Indeed, I surmise that the contract in this case was inspired by an English precedent.

On the questions which have been raised in the submissions on the construction of the contract, I make the following observations and findings:

> (1) Without expressing a definitive view on the point, I incline to the view that the contract does envisage a dispute, which, like the dispute in issue in this proceedings, comes within the provisions of the Sixth Schedule, being referred to adjudication as a preliminary to it being referred to arbitration. This view is informed by the fact that clause 26.2 mandates that the provisions set out in the Sixth Schedule shall be utilised to resolve all disputes, except as expressly provided in any other provision of the contract. Further, the entitlement to refer to arbitration in accordance with clause 26.3 is expressly made subject to the provisions of the Sixth Schedule. The Sixth Schedule provides for a three stage process: attempted resolution through liaison; adjudication; and, finally, arbitration. Although clause 26.3 does appear to envisage a freestanding arbitral process following an attempt to amicably settle the dispute, it may be that within the four walls of the contract, which is a very comprehensive document, a particular type of dispute does not come within the Sixth Schedule.
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> (2) In any event, I can find nothing in the contract which expressly or by implication precludes a party who has referred a dispute to arbitration from referring the same dispute to adjudication prior to the determination of the arbitration. Like the provision of the statutory Scheme which was under consideration in the *Herschel* case, paragraph 3.12 of the Sixth Schedule, which, in substance, has the same effect, was clearly intended to give a party to the contract a speedy mechanism for settling disputes on a provisional interim basis and to afford the successful party the redress to which the decision of the adjudicator entitles it by enforcement against the other party pending finality through determination by arbitration, legal proceedings or the agreement of the parties. Unlike the position which arises in the case of concurrent litigation and arbitration, for the reasons identified by Dyson J. in the *Herschel* case, there are no counter indicators to allowing an adjudication process run parallel to an arbitration

process. As with the statutory Scheme under consideration by Dyson J., it is inherent in the adjudication process under the contract that a respondent may have to defend the same claim in arbitration. As Dyson J. stated (at para. 20) it is not self evident that it is more oppressive for such a respondent to be faced with both proceedings at the same time, rather than sequentially. Further, the risk of inconsistent findings is inherent in the adjudication process.

(3) In the light of clause 13 of the contract, which expressly provides that disputes in relation to the consequences of termination, including quantification of compensation on termination, are to be referred to adjudication by the fast track procedure, the plaintiff's argument that the matter of quantification is not suitable for adjudication does not stand up.

In summary, in my view, as a matter of construction of the contract, the defendant is entitled to pursue the reference to adjudication on foot of the May Adjudication Notice, notwithstanding its notice of 13th March, 2009 referring the same dispute to arbitration. Accordingly, the plaintiff is not entitled to an order restraining the defendant from prosecuting that referral to adjudication.

Order
There will be an order dismissing the plaintiff's application and, on the understanding that this was the intention of the parties in the event of the plaintiff being unsuccessful, an order dismissing the proceedings.