

THE HIGH COURT

COMMERCIAL

[2017 No. 272 S.]

BETWEEN

KELLYS OF FANTANE (CONCRETE) LIMITED

(IN RECEIVERSHIP)

PLAINTIFF

AND

BOWEN CONSTRUCTION LIMITED (IN RECEIVERSHIP) AND SOMAGUE ENGENHARIA SOCIEDAD ANONIMA

TRADING TOGETHER AS BOWEN SOMAGUE JOINT VENTURE

DEFENDANTS

JUDGMENT of Mr. Justice Brian McGovern delivered on the 31st day of July, 2017.

1. This is an application for summary judgment to enforce a conciliator's recommendation dated 15th December, 2015.

2. In a judgment delivered on 1st June, 2017, ([2017] IEHC 357) I refused the defendants' application to stay these proceedings pursuant to Article 8 of the Model Law and this decision should be read in conjunction with that earlier judgment in order to put it in context. The sums claimed in these proceedings are on foot of a conciliator's recommendation dated 15th December, 2015, in respect of certain disputes which are the subject of a plaintiff's notice to refer to arbitration dated 13th March, 2015, arising out of an agreement dated 19th January, 2009, pursuant to which the plaintiff agreed to carry out certain paving and other works for the defendants who had been engaged as contractor to Laois County Council as part of the N7 Castletown to Nenagh Road Scheme. The contract provided for arbitration but the matter first had to go to conciliation. The notice to refer is dated 13th March, 2015, and is deemed to be the commencement of the arbitration. Clause 13.1.11 of the contract states:-

"If the conciliator has recommended the payment of money even if a notice of dissatisfaction is given, the following shall apply:-

(1) the party concerned shall make the payment recommended by the conciliator, provide (sic) that the other party first:-

(a) gave a notice, complying with the arbitration rules referred to in sub-clause 13.2, referring the same dispute to arbitration; and,

(b) gave the paying party a bond executed by a surety approved by the paying party, acting reasonably, in the form included in the Works Requirement, or if there is none, a form approved by the paying party; acting reasonably, for the amount of the payment."

3. The defendants accept that the plaintiff has complied with the terms of clause 13.1.11(b) of the agreement but not clause 13.1.11(a) on the basis that the plaintiff has submitted some additional heads of claim in the reference to the arbitrator and it is contended, therefore, not to be the same dispute.

4. Clause 13(b)(5) of the subcontract states:-

"If a party fails to comply with a conciliator's recommendation which is binding, the other party may take such court proceedings as are appropriate to force compliance with the conciliator's recommendation without availing further of the conciliation or arbitration process."

5. In summary, the process for resolving disputes involved a referral of the dispute to arbitration by serving a notice to refer and this is deemed to be the commencement of the arbitration proceedings, but the agreement also provides that no step will be taken in the arbitration after the notice to refer has been served unless the dispute has first been referred to conciliation. If neither party gives notice of dissatisfaction within 48 days after receiving the conciliator's recommendation, the recommendation shall be conclusive and binding on the parties. However, the agreement also provides that where a notice of dissatisfaction is given, the party against whom the recommendation has been made shall pay to the other party the sum recommended provided the other party provides a suitable bond and the matter proceeds to arbitration. That is what has happened in this case.

6. In the course of the hearing on the stay application, Mr. O'Doherty, on behalf of the defendants, conceded that, if the plaintiff complied with the provisions of clause 13.1.11(a) and (b), the defendants would have to pay the amount of the conciliator's recommendation in accordance with the terms of the agreement. The only issue that arises so far as clause 13 is concerned is whether or not the plaintiff sought to introduce additional claims in the notice to refer after the recommendation of the conciliator and the service of the notice of dissatisfaction. This will be referred to as the "same dispute" defence. The other defence raised by the defendants against the claim for summary judgment arises out of clause 12(b) of the subcontract. This will be referred to as the "clause 12 defence". This defence is based on the fact that the subcontract was terminated by the defendants upon an alleged default by the plaintiff. The fact of termination is not in dispute. Clause 12.2 of the main contract, adopted by clause 12(b) of the subcontract, provides:-

"If the [plaintiff's] obligation to complete the works is terminated under sub-clause 12.1 the following shall apply:-

12.2.1 The [plaintiff] shall leave the Site in an orderly manner.

12.2.2 Payment of all sums of money that may then be due from the [defendant] to the [plaintiff] shall be postponed, and the [defendant] shall not be required to make any further payment to the [plaintiff] except as provided in this sub-clause..."

7. The defendants wrote to the plaintiff by letter of 3rd June, 2011, notifying it that the "termination value per sub-clause 12.2.3 had been determined at 'nil'" and the defendants further wrote on 21st October, 2011, giving notice that it had determined the "termination amount" per sub-clause 12.2.9 to be in the sum of €768,911.27".

8. The defendants, therefore, submit that they are not obliged to make any further payment to the plaintiff except in accordance with sub-clause 12(b) and, therefore, it has no obligation to pay on foot of the recommendation.

Jurisdiction to Award Summary Judgment

9. There is no dispute between the parties as to the relevant jurisprudence governing the court's entitlement to award summary judgment. The law is to be found in *Aer Rianta cpt. v. Ryanair Ltd.* [2001] 4 I.R. 607 and *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 and the law is now so settled that there is no need to repeat it here.

10. The circumstances of this case are somewhat unusual and do not fit comfortably into the template provided by the above cases. The reason for that is due to the fact that the conciliator's recommendation is only final and conclusive if no notice of dissatisfaction is served. But in cases such as the present, where notice of dissatisfaction is served and a suitable bond is provided and the matter referred on to arbitration, then the agreement provides that the sum recommended by the conciliator must be paid but on the understanding that the arbitrator may reach a different conclusion which could give rise to a number of possibilities; namely, (i) an increase in the award; (ii) a decrease in the award; or, (iii) a finding that the plaintiff is not entitled to any award. In cases (ii) and (iii), the sum recommended by the conciliator (or an appropriate part thereof) would have to be returned.

11. Therefore in approaching the question of the plaintiff's entitlement to summary judgment, the court is not concerned with whether the defendants meet the low threshold required for a plenary hearing on the defence in respect of the sum claimed under the contract; rather, it is concerned with whether they have met the threshold required for the issue of the payment of the conciliator's recommendation to be remitted for plenary hearing.

12. It is clear that, if no notice of dissatisfaction was served by the defendants, the recommendation of the conciliator would become final and binding. But once the notice was served then, if the requirement for a bond and a referral to arbitration was met, the issue before the court is whether or not the sum in the conciliator's recommendation must be paid pending the outcome of the arbitration. In these proceedings, the court has no role in determining what amount (if any) is due by the defendants to the plaintiff on foot of the contract. This is a matter for the arbitration.

13. What the plaintiff seeks in this action is not a determination of its claim but merely a finding that the defendants are obliged at this stage to pay the recommended sum in accordance with the terms of the agreement and in circumstances where the agreement provides that this sum may ultimately be varied or cancelled by the arbitrator.

The "Same Dispute" Defence

14. The dispute referred to conciliation was the dispute described in the notice to refer dated 13th March, 2015. After notice of dissatisfaction was served, the defendants accept that they did not require the plaintiff to serve a second notice to refer and accordingly the notice to refer conferred jurisdiction on the arbitrator and defines the dispute. There can be no doubt that the matter before the conciliator and the arbitrator is the "same dispute". In giving his reasons for the recommendation the conciliator stated at para. 1.24:-

"The respondents' conciliation statement was submitted on 4th September, 2015, as arranged. It was devoted solely to arguing that the claim had no merit and no contractual entitlement (sic). It was argued that it was a completely different claim from that [the Plaintiff] submitted in March, 2011. While there are differences, outlined in paragraph 1.20 above, I do not agree with that assertion. The March 2011 claim had been reviewed and revised, but this was mostly entirely transparent. It was still essentially the same claim."

15. In any event, whether or not the claim before the arbitrator is the same as that raised in the notice to refer is a matter for the arbitrator. The contract (including the sub-contract) clearly envisages that the arbitrator might come to a different conclusion to that recommended by the conciliator but it recognised that, in the meantime, the amount recommended by the conciliator must be paid provided the issue has been subsequently placed before an arbitrator and a bond has been furnished in respect of the sum by the party to be paid.

The "Clause 12 Defence"

16. The plaintiff did not contest the defendants' assertions that the sub-contract was terminated. This arose upon an alleged default of the plaintiff. The consequences of default termination were set out in clause 12.2 of the main contract and included the requirement that the plaintiff shall leave the site in an orderly manner and that payment of all monies that might be due to the plaintiff shall be postponed and the defendants shall not be required to make further payment to the plaintiff except as provided for in the sub-clause.

17. While the defendants contend that no payment is due under that clause, it is clear that the plaintiff is not seeking to enforce a payment directed to be made pursuant to sub-clause 12(b) of the subcontract. What it seeks in these proceedings is an order enforcing the conciliator's recommendation pursuant to sub-clause 13.1.11(1) of the main contract as adopted by the subcontract. Ultimately, the amount of the claim and the effect of the termination value and the termination amount in dispute will be matters for the arbitrator but it does not preclude the conciliator from considering the plaintiff's claim and making a recommendation.

18. Clause 13.1.8 of the main contract as adopted by the subcontract provides that the conciliator is obliged, in default of settlement, to "...give both parties a written recommendation" which is to be based "...on the party's rights and obligations under the contract".

19. The conciliator was clearly aware from the terms of the plaintiff's solicitor's letter of 13th November, 2004, that the plaintiff was disputing the defendants' determinations as to the termination value and termination amount and this formed part of the background to the notice to refer. Based on his knowledge of these facts, the conciliator recommended the defendants pay a sum to the plaintiff. The conciliator's reasons at para. 1.17 showed that he was aware of the defendants' argument on termination. No submission was made to the conciliator that, by virtue of clause 12.2, he was disentitled to recommend any payment to the plaintiff. The effect of the termination clause is a matter for the arbitrator in determining what amount (if any) to award the plaintiff on the contract.

The Binding Nature of the Conciliator's Recommendation

20. Because notice of dissatisfaction was served by the defendants, the recommendation is not binding and conclusive to the extent that it cannot be challenged and, therefore, can be recovered, if necessary, by summary proceedings. The issue in this case is whether the terms of clause 13 are binding on the defendants so as to require them to pay on account the sum recommended pending the final determination of the amount due by the arbitrator.

21. That is why this case does not fit into the normal pattern of cases where the judgment sought in the courts, if granted, would be final as to amount. No prejudice is occasioned to the defendants by virtue of the fact that the monies due, secured by bond, shall only be held pending the outcome of the arbitration and the decision of the arbitrator in respect of it.

Other Issues Raised by Defendants

22. The defendants argue that the granting of summary judgment would encroach upon the role of the arbitrator. I disagree. In making that argument, the defendants are conflating the issues of the conciliator's recommendation in respect of which a notice of dissatisfaction has been served on the one hand with the arbitrator's role on the other. The terms of the contract clearly envisage a situation where the amount recommended by the conciliator might be varied by the terms of the arbitral award. If the plaintiff obtains summary judgment in these proceedings, it does no more than give effect to the provisions of clause 13.

23. The defendants contend that the conciliator's recommendation is not binding because notice of dissatisfaction was served within the prescribed period. While it is true that it is not binding on the arbitrator, who will ultimately determine the dispute, the obligation to pay the recommended sum, once a bond has been provided and the matter has been referred to arbitrator in accordance with clause 13, is a binding obligation because that is what the parties have agreed.

24. If the court were to permit arguments or defences properly raised in the arbitration to constitute a defence to the obligation to pay the conciliator's recommendation on account, it would entirely frustrate the agreement and the purpose of same as set out in my judgment of 1st June, 2017, [2017] IEHC 357.

25. I am satisfied that the defendants have not established a *bona fide* defence to this claim and that the plaintiff is entitled to the relief sought.