THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 98

Record Number: 2017/408

Peart J.
Edwards J.
Baker J.

BETWEEN:

KELLYS OF FANTANE (CONCRETE) LIMITED (IN RECEIVERSHIP)

PLAINTIFF/RESPONDENT

- AND -

BOWEN CONSTRUCTION LIMITED (IN RECEIVERSHIP)

FIRST DEFENDANT

- AND –

SOMAGUE ENGENHARIA SOCIEDAD ANONIMA, TOGETHER

TRADING AS BOWEN SOMAGUE JOINT VENTURE

SECOND DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 20TH DAY OF MARCH 2019

1. This is an appeal from an order of the High Court (McGovern J.) made on the 31st July 2017 whereby summary judgment was granted to the plaintiff ("KOF") against the defendants ("Bowens") in the amount of €6,364,978 and costs as sought in notice of motion dated 3rd March 2017, the trial judge being satisfied that Bowens had not established a *bona fide* defence to the claim.

2. The amount for which judgment was granted was found to be due on foot of a binding conciliator's recommendation dated 15th December 2015 in respect of certain disputes referred to the conciliator by Notice to Refer dated 13th March 2015. Those disputes had arisen in relation to works carried out by KOF under a sub-contract dated 19th January 2009 entered into between it and Bowens, who were the main contractors engaged by Laois County Council for the N7 Castletown to Nenagh Road Scheme under "the main contract" dated 29th January 2008.

3. It is not in dispute that the sub-contract was lawfully terminated by Bowens on the 12th April pursuant to the provisions of clause 12(a)(x) of the sub-contract 2011 due to the occurrence of an event of default by KOF, namely the appointment of a receiver, whereupon the provisions of clause 12.2 of the main contract applied, including that at 12.2.2, namely:

> "Payment of all sums of money that may then be due from [Bowens] to [KOF] shall be postponed, and [Bowens] shall not be required to make any further payment to [KOF] *except as provided in this sub-clause*." [Emphasis provided]

4. Clauses 12.2.3 and 12.2.9 are then relevant because they make provision for the post-termination calculation of how much may be due to KOF by Bowens in respect of works already completed by KOF and not yet paid for ("the termination value"), and in respect of additional costs incurred by Bowens by having to engage another contractor to complete the sub-contract works ("the termination amount"). Clause 12.2.11 provides for the setting off of one against the other, and for payment as appropriate. It is in relation to these calculations that a dispute arose, which was referred to arbitration by Notice to Refer dated 13th March 2015 pursuant to clause 13.2 of the sub-contract.

5. Clause 13(b)(1) of the sub-contract provides:

> "No step will be taken in the arbitration after the Notice to Refer has been served until the disputes have first been referred to conciliation… .".

6. Accordingly, the parties agreed upon a conciliator, Brian L. Bond, and referred their dispute to him. Mr Bond issued his recommendation on the 15th December 2015, which found that the sum of €6,364,978 was due by Bowens to KOF following termination of the sub-contract. Being unhappy with this recommendation, Bowens' solicitors issued a Notice of Dissatisfaction dated 18th December 2015 in respect of the conciliator's recommendation. It is at this point that other provisions of clause 13 of the main contract which were incorporated into the sub-contract by clause 13(b)(3), come into play.

7. The most relevant sub-clause of clause 13 of the main contract is clause 13.1.11(1) which provides respectively:

> "11. If the conciliator had recommended the payment of money, and a notice of dissatisfaction is given, the following shall apply:
>
> (1) The party concerned shall make the payment recommended by the conciliator, provided 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 Requirements or, if there be none, a form approved by the paying party, acting reasonably, for the amount of the payment."

8. Clause 13(b)(5) of the sub-contract has some relevance also. It provides:

> "(5) 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."

9. By reference to these clauses KOF's case is a simple one. It accepts that the sub-contract was lawfully terminated. Following termination, Bowens determined the termination value to be 'nil' and the termination amount to be €768,911, and as provided for in clause 12.2 of the main contract demanded payment thereof. KOF did not accept Bowen's calculations and issued a Notice to Refer the dispute to arbitration, as it was entitled to do under clause 13(a) of the sub-contract, whereupon the provisions of clause 13(b) of the sub-contract were applicable, requiring that no step be taken in the arbitration until the dispute was first referred for conciliation. This happened, and in due course the conciliator issued his recommendation for the payment of the sum of €6,364,978 to KOF by Bowens, following which Bowens issued a notice of dissatisfaction. KOF maintain that upon the issue of that notice of dissatisfaction the provisions of clause 13.1.11(1) applied, and that they have complied with the conditions therein, namely (a) that *the same dispute* was the subject of the Notice to Refer to the arbitrator on 13th March 2015, and (b) they provided the required *bond* in a form approved by Bowens, and for the amount in question.

10. It is submitted therefore that the amount specified in the conciliator's recommendation, namely €6,364,978, became payable by Bowens once those conditions were fulfilled notwithstanding that the arbitration is ongoing, that Bowens have refused to pay same and, as provided for in clause 13(b)(5) of the sub-contract, KOF were entitled to issue proceedings for its recovery without awaiting the eventual outcome of the arbitration. KOF submits that these provisions are pellucidly clear in their terms, and that the trial judge was correct to reject the grounds of defence put forward by Bowens, and to grant a summary judgment in its favour.

The grounds of defence advanced by Bowens

11. Bowens consider that KOF have not complied with clause 13.1.11(1)(a) of the main contract (as incorporated into the sub-contract) because the dispute that was the subject of the Notice to Refer to arbitration is not "the same dispute" as that the subject of the conciliator's recommendation. In his affidavit sworn on the 13th March 2017 for the purpose of an application to stay these proceedings pending completion of the arbitration (refused by McGovern J. by order dated 1st June 2017), Brian Barron of Bowens states:

> "41. In broad terms, the defendant contends that the dispute the subject of the plaintiff's notice to refer (clarified in a subsequent affidavit to refer to the plaintiff's 'statement of claim' rather than the 'notice to refer') is not the same as that which was the subject of the recommendation because:
>
> (i) The dispute submitted by the plaintiff to conciliation was a prolongation claim, i.e. a claim for extension of time and losses and expenses related to the delay that the defendant allegedly caused to the plaintiff, being the subject of the extension of time claim; and
>
> (ii) The plaintiff's statement of claim, as delivered on 1st July 2016, describes a different dispute which seeks no extension, and which instead seeks a variety of other reliefs pursuant to the sub- contract and damages."

12. Mr Barron went on to state in that affidavit that Bowens intended to bring a jurisdictional challenge to the arbitration on the same basis, namely the difference between the two disputes. He also stated at para. 45 of his affidavit that the High Court lacked jurisdiction to determine the merits of the parties' respective positions in respect of the "same dispute" issue, which, he submitted, must be determined in order to ascertain whether the plaintiff is entitled to the temporary payment (i.e. the amount recommended by the conciliator) which it seeks under sub-clause 13.1.11 (1) of the main contract, as incorporated into the sub- contract.

13. Linked to that 'same dispute' defence, is Bowen's reliance on clause 12(b) of the sub-contract which, as they contend, provides that Bowens are not obliged to make any further payment to KOF except in accordance with that clause, and because the conciliator's recommendation does not relate to the 'same dispute', Bowens are not obliged to make any further payment (*i.e.* the recommended sum) under clause 13.1.11(1) of the sub-contract.

14. In his replying affidavit sworn on the 14th June 2017 for the purpose of responding to KOF's affidavit grounding its application for summary judgment, Mr Barron identified three bases by way of defence to the application for summary judgment, the first two being the 'same dispute' ground and the 'clause 12' ground. The third basis identified is stated as follows:

> "iii. For this Honourable Court to determine either of those issues would be for this Honourable Court to encroach upon the jurisdiction of the arbitrator appointed by the parties to determine the dispute between them …, would risk prejudicing the arbitration, and would be impermissible by virtue of the arbitration agreement between the parties."

15. In that affidavit, Mr Barron sets out in some detail the basis for Bowens' contention that the dispute referred to the conciliator on the 19th August 2015 is different to that referenced in the Notice to Refer dated 13th March 2015 (being the same as an earlier dispute raised by notice dated 9th March 2011 per the arbitrator's finding dated 25th May 2016), and in particular he characterises the latter as being one seeking an extension of time, as well as a claim for additional costs incurred by KOF as a result of delays incurred which were outside their control (*i.e.* a prolongation claim), whereas the dispute referred to the conciliator lacked any reference to an extension of time. Mr Barron described this as being "a fundamental difference". He also referred to what the conciliator had stated at para. 1.16 of the recommendation, namely: "For the Conciliation [the plaintiff] reviewed and revised the claim [that the plaintiff] had submitted [to the defendant] in March 2011". He considers this to be an acknowledgement by the conciliator that the dispute referred to him is different from the dispute referred to the arbitrator. He also draws attention to KOF's statement of case to the arbitrator dated 1st July 2016 which he says again makes clear that what is before the arbitrator is different to the dispute that was the subject of the conciliator's recommendation.

16. The second ground of defence put forward in the event that the Court did not accept the 'same dispute' point is based upon clause 12.2.2 of the main contract (incorporated into the sub-contract by clause 12(b) thereof) which I have already set forth and which provides that where the sub-contract is terminated "all sums .. due from [Bowens] to [KOF] will be postponed, and no further

payment will be required to be made by Bowens except as provided in sub-clause 12.2 of the main contract". Accordingly, it was submitted that since the sub-contract was validly terminated, no further payment is payable until such time as the arbitration has been completed.

17. The third ground of defence is that for the Court to determine in these proceedings the question whether the dispute referred to the arbitrator is or is not the same dispute as that which is the subject of the conciliator's recommendation would be for the Court to encroach upon the jurisdiction of the arbitrator, since the same grounds of defence were raised by Bowens in an application to the arbitrator dated 15th July 2016 for security for costs, and where the arbitrator found the 'same dispute' defence and the 'clause 12' defence to be *prima facie* defences. It is contended therefore that the arbitrator will in due course be addressing the jurisdictional issue raised in the arbitration, and that the Court should not encroach upon the arbitrator's jurisdiction by making findings on the same issues in these summary summons proceedings.

18. Before the trial judge KOF disputed that there was any merit in the defences being put forward against its claim for summary judgment. In his supplemental affidavit sworn on the 28th June 2017 in reply to the said affidavit of Mr Barron, Brian McEnery of KOF addressed the 'same dispute' defence at paras. 14-18 thereof. He makes the point, *inter alia*, that the dispute that was referred to the conciliator was defined by the Notice to Refer dated 13th March 2015 when properly construed, and that no subsequent document such as KOF's statement of case to the arbitrator dated 1st July 2016 could have the effect of retrospectively re-defining the dispute referred to conciliation. He goes on to say that in fact Bowens made the same point in a submission to the conciliator in 2015 but that the conciliator had disagreed. Mr McEnery refers to a statement of reasons furnished to the parties by the conciliator, separately from his recommendation, which referred to the fact that the prolongation claim by KOF had been dropped. The conciliator stated at para. 1.24 of his reasons document:

> "The Respondent's Conciliation Statement was submitted on 4 September 2015 as arranged. It was devoted solely to arguing that the claim had no merit and no contractual entitlement. It was argued that it was a completely different claim from that KOF submitted in March 2011. While there are differences, outlined in para. 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."

19. As for Bowens' contention that the dispute as contained in its statement of case to the arbitrator is different from that contained in KOF's original claim letter dated the 9th March 2011, or from that in KOF's Notice to Refer dated 13th March 2015, or from that contained in KOF's submission to the conciliator dated 19th August 2015, Mr McEnery points out that the arbitration has already commenced based on the Notice to Refer dated 13th March 2015, and that there has been no need to make any further referral. It is the same Notice to Refer as that pursuant to which the conciliator assumed jurisdiction, and which conferred jurisdiction on the arbitrator. Mr McEnery states that therefore the dispute which has been referred to the arbitrator is the same dispute which was referred to the conciliator.

20. In so far as Bowens contend that the arbitrator has determined that the 'same dispute' defence and the 'clause 12' defence are *prima facie* defences when determining the security for costs application, Mr McEnery referred to another part of that decision where the arbitrator stated that her decision on the clause 12 defence was not to be taken as being either a determination or as any indication of her thinking on the merits of that defence.

21. Mr McEnery states also that he believes that the defences being put forward by Bowens are matters that will have to be determined by the arbitrator in the arbitration, but that they do not provide a defence to KOF's claim to be entitled to judgment for the amount which has been recommended by the conciliator, pursuant to clause 13.1.11(1) in circumstances where the dispute sent to the conciliator is the same as that referred to the arbitrator, and the necessary bond requirement was fulfilled. He makes the point that Bowens have the intended protection of the bond against the possibility that the arbitrator may at the end of the day find that either a lesser sum or no sum was payable by Bowens to KOF.

22. Mr McEnery also stated that he does not consider that any decision that the Court makes as to the entitlement of KOF to summary judgment constitutes an encroachment upon the arbitrator's jurisdiction. He submits that the sub-contract envisages a situation where the arbitrator might reach a decision which differs from that reached by the conciliator, and therefore that Bowens might have to have recourse to the bond furnished as a condition of the payment to KOF of the conciliator's recommendation.

The trial judge's judgment

23. The trial judge made clear in his judgment that he was not required to determine whether or not Bowens met the threshold in relation to any defence it might have to the claim on foot of the sub-contract, but rather whether it had a defence to the claim made for payment on foot of the conciliator's recommendation. That was a matter for the arbitration. I am satisfied that this was the correct approach by the trial judge.

24. The trial judge was satisfied that if no notice of dissatisfaction with the recommendation was issued by Bowens, then under clause 13 it became binding and final and would have to be paid. Clearly clause 13(b)(5) of the sub-contract would then apply entitling KOF to commence proceedings for the amount. But in this case a notice of dissatisfaction was issued, resulting in clause 13.1.11(1) coming into play, and requiring its conditions to be complied with before Bowens were obliged to pay the recommended amount pending the completion of the arbitration.

25. The trial judge then considered the 'same dispute' defence being advanced. He stated that the dispute referred to the conciliator was that described in the Notice to Refer dated 13th March 2015, and that "the defendants [Bowens] 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". That seems to be a reference to a letter dated 22nd February 2016 written by Bowens' solicitors to KOF's solicitors which was part of a series of letters at that time addressing, *inter alia*, the need for KOF to issue a second Notice to Refer. They stated in that letter "Our client also does not require a second notice to refer, as you suggest in your letter; the delivery of a statement of claim relating to the same dispute that was the subject of the conciliation will suffice to meet the requirement". The trial judge went on to state that "there can be no doubt that the matter before the conciliator and the arbitrator is the "same dispute", and referred to what the conciliator himself had stated at para. 1.24 of the reasons document provided by him separately to the parties, and to which I have already referred earlier in this judgment, in which this argument was referred to and where the conciliator concluded that "it was still essentially the same claim".

26. The trial judge went on at para 15 to state:

> "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".

27. On this appeal, Bowens have argued strongly that since a default termination notice was issued, there can be no further sums payable at all by Bowens to KOF as provided for in clause 12(b) of the sub-contract, and further that in circumstances where such a termination has occurred, the provisions of clause 13.1.11.1 have no applicability. Considerable reliance is placed on the judgment of Laffoy J. in *White Cedar Developments Ltd v. Cordil Construction Ltd* [2012] IEHC 525 ("White Cedar"). KOF on the other hand submits that *White Cedar* is readily distinguishable on the basis that in that case the dispute had been referred to a conciliator *prior to* the termination of the contract, unlike the present case. I will return to that question in due course.

28. In my view Bowens are incorrect to state that upon termination of the sub-contract clause 12(b) thereof absolves it altogether from any obligation to make a further payment to KOF pending the determination of the arbitration. It is true that when read in isolation, that is what clause 12.2.2 of the main contract provides. The words "except as provided in this sub-clause" relate to the mechanism contained within the remainder of clause 12.2 whereby the termination value and the termination amount are certified by the employer [Bowens], and clause 12.2.11 provides for a payment in either direction, depending on which amount exceeds the other. But what is markedly absent from clause 12 is any discrete mechanism either within clause 12 itself or beyond it whereby a dispute by the contractor as to the amounts certified by the employer in relation to the termination value and the termination amount may be resolved. Such a dispute is clearly one which comes within clause 13 which, as relevant, provides: "If a dispute arises between the parties in connection with or arising out of the Sub-Contract, either party may, by Notice to the other, refer the dispute to arbitration …". A dispute in relation to the calculations certified by Bowens under clause 12.2 is clearly one that is "arising out of the Sub-Contract", albeit that it arises following its termination. This means that the provisions of clause 13 apply, mandating that once sent to arbitration the dispute must first be the subject of the conciliation provided for in clause 13(b) of the sub-contract, and the provisions of clause 13.1.3 to 13.1.12 of the main contract will apply as provided by clause 13(b)(3) of the sub-contract. Hence the provisions of clause 13.1.11(1) apply.

29. I would reject the appellant's argument that upon a default termination the respondent's claim under clause 13 must fail. The appellant has relied upon certain passages of the judgment of Laffoy J. in *White Cedar*. However, in my view that case was decided on different facts and in a different context. The context was an application for an interlocutory injunction to restrain the presentation of a petition by the employer to wind up the contractor company for failure to pay a sum recommended by a conciliator to be paid following a referral of a dispute to conciliation. Critically, however, that dispute was raised prior to a notice terminating the building contract, and therefore related to sums claimed to be due on foot of work carried out by the contractor prior to termination. In that case the recommendation had become binding as no notice of dissatisfaction having been given by either party. However, by the time the conciliator's recommendation issued the termination notice had been given. But by the time of the application for an interlocutory injunction there had been non certification of the termination value by the employer. The conclusions of Laffoy J. have to be seen through the prism of these facts which in my view distinguish that case from the present. The appellant cannot derive the support it seeks from that decision.

30. The question then arises as to whether the "same dispute" that was referred to arbitration has been the subject of the conciliator's recommendation. I am completely satisfied that the dispute that went to arbitration is essentially the same as that which became the subject of the conciliator's recommendation. The dispute which arose was referred to arbitration. That arbitration was put on hold until such time as the matter was referred to conciliation as provided for in clause 13 (b). What was referred to conciliation was the dispute that was the subject of the Notice to Refer dated 13th March 2015. As submitted by KOF it was not required by Bowens to issue any fresh Notice to Refer to the arbitrator following Bowens rejection of the conciliator's recommendation. The conciliator certainly concluded that it was the same dispute, notwithstanding that there were some differences. He concluded that despite these differences they were "essentially the same claim". While the conciliator's view does not bind the High Court or this Court, nevertheless it should not be lightly discounted given his intimate examination of the dispute for the purposes of undertaking his conciliation function. The conciliator in his statement of reasons addressed the alleged differences at paras. 1.20 and 1.24 of his reasons. I am satisfied that the trial judge was entitled on the evidence before him to conclude that the dispute which was the subject of the Notice to Refer dated 9th March 2011is the same dispute that was referred to the conciliator and became the subject of his recommendation.

31. I am satisfied that the trial judge was entitled to find that KOF is entitled to judgment in the amount claimed to be payable on foot of the conciliator's recommendation in accordance with the relevant provisions of clause 13 of the sub-contract. For the reasons I have stated, I would dismiss this appeal.

32. It should be noted that during the course of this appeal it has been disclosed that since the proceedings were determined in the High Court the bond that was put in place for the purposes of clause 13.1.11 has expired. It was always of limited duration, and therefore there was always the possibility that it might have expired by the time the arbitration was completed, and therefore might not be available to Bowens in the event that the arbitration resulted in a sum less than the sum recommended by the conciliator being found to be payable to KOF. While the expiry of the bond is undoubtedly a significant event, nevertheless this Court must determine the appeal on the basis of what was before the trial judge. It will be a matter for the parties to decide how to address the new situation which has arisen upon the expiry of the bond. The result of this appeal is simply to confirm the correctness of the trial judge's decision.