Neutral Citation Number: [2012] IEHC 525

THE HIGH COURT

[2012 No. 11239 P.]

BETWEEN

WHITE CEDAR DEVELOPMENTS LIMITED

PLAINTIFF

AND

CORDIL CONSTRUCTION LIMITED (IN RECEIVERSHIP)

DEFENDANT

JUDGMENT of Ms. Justice Laffoy delivered the 7th day of December 2012

Factual Background

1. The contractual relationship between the plaintiff and the defendant which is at the core of these proceedings is based on a so called "Design and Build Contract" dated the 11th December, 2009 (the Building Agreement) made between the plaintiff, as employer, and the defendant, as contractor. The Building Agreement was entered into to regulate the execution and completion by the defendant "of the Works" as defined therein, which related to the design and construction of a new retail and commercial centre together with associated infrastructure site works and drainage works at Pairc an Clochar, Oranmore, Co. Galway, and the terms on which the plaintiff would pay the defendant the contract sum in respect of the Works, which was €17,414,911, excluding VAT.

2. Sometime prior to the 7th March, 2011, a dispute arose between the plaintiff and the defendant regarding the sums then due to the defendant under the Building Agreement. On the 7th March, 2011, the dispute was referred by the defendant for conciliation in accordance with Clause 13.1 of the Building Agreement, which I will consider in some detail later. On the 5th May, 2011, Mr. Ciaran Fahy (the Conciliator), who had been appointed by the Chairman of the CIArb (Irish Branch), was confirmed in that role by the plaintiff and the defendant at an initial meeting held on that day.

3. On the 26th May, 2011, ACC Bank Plc appointed Michael McAteer and Aengus Burns of Grant Thornton (the Receivers) to be receivers of all of the assets of the defendant referred to and comprised in a number of debentures, mortgages and charges given by the defendant to ACC Bank plc. In effect, it is the Receivers who, on behalf of the defendant, have taken the steps which have led to these proceedings.

4. By letter dated the 18th July, 2011 from the plaintiff to the defendant, the plaintiff notified the defendant and the Receivers of the termination of the obligation of the defendant to complete the Works pursuant to the terms of Clause 12.1 of the Building Agreement. A series of provisions of Building Agreement were invoked in giving such notice, including, *inter alia*, –

> (a) Clause 12.1.1(11)(d), which provided that the plaintiff might terminate the defendant's obligation to complete the Works by notice to the defendant if a receiver were to take possession of/or be appointed over the defendant or any of its assets, and
>
> (b) Clause 12.1.1(11)(e), which pointed to a similar outcome if the defendant should cease or threaten to cease carrying on business.

5. There is no issue in these proceedings as to the entitlement of the plaintiff to terminate the defendant's obligation to complete the Works, as it did by the letter of the 18th July, 2011.

6. However, notwithstanding such termination, the conciliation process before the Conciliator continued. At the conclusion of the conciliation on the 28th October, 2011, the Conciliator issued his recommendation (the Recommendation). In the Recommendation it was recited that it was agreed that the Conciliator would only deal with claims advanced by the defendant. It was further recited that initially those claims, under nine separate headings, amounted to €2,942,281.95, exclusive of VAT, but during the course of the process the claim was modified to €2,047,187 exclusive of VAT under the nine headings which were set out in tabular form in a table within the Recommendation. The outcome of the process was that the Conciliator made the following recommendation:-

> "[The plaintiff] pay [the defendant] the sum of €700,649.00, exclusive of VAT, in respect of claims listed in Table No. 1 above."

It was pointed out in the Recommendation that the figure made no allowance for payment arising in respect of claim No. 9, which was concerned with Late Payment interest. However, no issue arises in relation to that exception, which was elaborated on by the Conciliator. Neither party gave notice of dissatisfaction with the Recommendation at any time thereafter.

7. After the termination of the defendant's obligation to complete the Works in accordance with the notice of the 18th July, 2011, the plaintiff, as it was entitled to do, made alternative arrangements for completion of the Works, which are now nearing completion.

8. It has been disclosed on this application that the plaintiff carried out the development through funding from a "participating institution", namely, Irish Bank Resolution Corporation, as designated pursuant to the National Asset Management Agency Act 2009, (the Act of 2009). It has further been disclosed that in or about October 2010, in accordance with the provisions of the Act of 2009, the loan from Irish Bank Resolution Corporation was transferred to the National Assets Loan Management Limited (NALM) and that it is now subject to a facility agreement between the plaintiff and NALM, the latest iteration of which was dated the 18th July, 2012. That document has been exhibited on this application. As I understand the position, the facilities provided by NALM have now expired.

9. As between the defendant and the plaintiff, nothing transpired after the Recommendation of the Conciliator was handed down on the 28th October, 2011 until by letter dated the 19th October, 2012, from the Receivers to the plaintiff the sum of €700,649 plus VAT, which the Conciliator had recommended be paid to the defendant in the Recommendation, was demanded. The letter was

expressed to be a notice pursuant to s. 214 of the Companies Act 1963 (the Act of 1963). Proceedings to wind up the plaintiff were threatened in the event of the amount claimed not being discharged.

10. That demand gave rise to correspondence between the plaintiff's solicitors, Mason Hayes and Curran, and the defendant's solicitors, Maples and Calder, which culminated in a letter dated the 6th November, 2012 from Mason Hayes and Curran to the effect that, as the defendant was not agreeable to withdrawing the threatened winding up petition, the plaintiff intended bringing proceedings to restrain the presentation of a petition.

The Proceedings and the Application

11. The proceedings were commenced by plenary summons which issued on the 7th November, 2012. On the 9th November, 2012, pursuant to an ex parte application made by the plaintiff, the plaintiff was granted an interim injunction until the 14th November, 2012 or until further order restraining the defendant from advertising, presenting or otherwise proceeding with a petition to wind up the plaintiff.

12. The application which is the subject of this judgment is the plaintiff's application for an interlocutory injunction restraining the defendant from advertising, presenting or otherwise proceeding with any petition pursuant to s. 213 of the Act of 1963 to wind up the plaintiff.

13. In essence, the basis on which the plaintiff seeks that relief is that, when the s. 214 demand was served on the plaintiff on the 30th October, 2012, there was no debt due by the plaintiff to the defendant and that is still the position. Alternatively, if the plaintiff is currently indebted to the defendant, the amount the subject of the demand, that is to say €700,649 exclusive of VAT, is less than the amount due to the plaintiff on a cross-claim which the plaintiff has against the defendant, the cross-claim being in an amount which would eliminate that debt. In order to assess the sustainability of those assertions, it is necessary to consider the provisions of the Building Agreement which were relied on by both sides in some detail.

Relevant Provisions of the Building Agreement

14. The Building Agreement incorporates the Conditions of the Public Works Contract for Building Works Designed by the Contractor (Document Reference PW-CF2 v. 1.5, 4 November 2009), which reflects the involvement of NALM in the project. That part of the Building Agreement is the source of the clauses which I am about to consider.

15. Clause 11 is headed "Payment" and, in broad terms, it expresses the manner in which the contract sum is to be paid to the defendant. Counsel for the plaintiff referred to Clause 11.1.4 which provides that, if there is a sum due to the defendant, the defendant shall send an invoice to the plaintiff for that sum after receiving the relevant interim certificate. It was pointed out that the defendant had issued no invoice for the sum claimed in the s. 214 demand. In my view, that provision is wholly irrelevant, as the defendant's claim was based on the Recommendation of the Conciliator, and is not sought by way of interim payment on foot of an interim certificate.

16. The provisions of Clause 12 which is headed "Termination" are relevant. I have already referred to the provisions of Clause 12.1, which deal with termination on the contractor's default and were invoked by the plaintiff as entitling the plaintiff to terminate the defendant's obligation to complete the Works. No issue has been raised by the defendant in relation to the termination. I am satisfied on the evidence before the Court that the Building Agreement was properly terminated on the basis of the defendant's default. Clause 12.2 is headed "Consequences of Default Termination". Clause 12.2.2 provides:-

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

The remaining provisions of Clause 12.2 which are relevant for present purposes provide as follows:-

> (a) The Employer's Representative shall, as soon as practicable, determine the amount due to the defendant for the Works completed in accordance with the Building Agreement and unpaid, which is referred to as the "termination value" (Clause 12.2.3).
>
> (b) The plaintiff may do anything necessary for the completion of the Works (Clause 12.2.5).
>
> (c) The Employer's Representative shall certify the total of the following, which is referred to as the "termination amount":
>
> > (i) the plaintiff's additional costs of completion of the Works compared with the cost that would have been incurred if the Works had been completed by the defendant in accordance with the Building Agreement,
> >
> > (ii) loss and damage incurred by the plaintiff as a result of the termination and its cause, and
> >
> > (iii) amounts due to the plaintiff by the defendant under or in connection with the Building Agreement or in connection with the Works.
> >
> > When the Works have been completed and the termination amount has been determined, the Employer's Representative is required to give a certificate to the defendant setting out the termination amount (Clause 12.2.9).
>
> (d) There is an alternative time frame for the giving of the certificate of the termination amount to the defendant. If the plaintiff does not put in place arrangements to complete the Works within six months after termination, the Employer's Representative shall issue the certificate as soon as practicable after the end of the six month period, based, if necessary, on estimates (Clause 12.2.10).
>
> (e) Clause 12.2.11 provides as follows:-
>
> > (i) If the termination amount is less than the termination value, the defendant shall issue an invoice to the [plaintiff] for the difference and the plaintiff shall pay the amount due on the invoice within 15 working days after receiving

the invoice.

(ii) If the termination amount is more than the termination value, the defendant shall pay to the plaintiff the difference within 10 working days of receiving the Plaintiff's demand for payment.

(f) Clause 12.8, which is headed "Payment", provides that on the termination of the defendant's obligation to complete the Works, the plaintiff's liability to the defendant under or in connection with the Building Agreement shall be limited to payment of the amount provided for in Clause 12, and any other amount that fell due thereunder before termination.

17. Clause 13 deals with disputes and their resolution and makes provision in the first instance for conciliation, and then for arbitration, and it recognises that litigation may ensue. As I have already outlined, the conciliation process in this case had commenced before termination and had continued after termination. The provisions of Clause 13 which governed the conciliation process provide as follows:-

(a) The dispute not having been resolved by agreement within 42 days after the appointment of the Conciliator, the Conciliator was obliged to give the parties a written recommendation based on the party's rights and obligations under the Building Agreement (Clause 13.1.8). This is what happened.

(b) Clause 13.1.9 provides:

"If either party is dissatisfied with the conciliator's recommendation, it may, within 42 days after receiving the conciliator's recommendation, so notify the other party . . . If notice of dissatisfaction has been given in accordance with this clause, either party may refer the dispute to arbitration under sub-clause 13.2".

As has been recorded earlier, no notice of dissatisfaction was given by either party in this case.

(c) Clause 13.1.10, provides:-

"If neither party gives notice of dissatisfaction within 42 days after receiving the conciliator's recommendation, the recommendation shall be conclusive and binding on the parties and the parties agree to comply with it. If, in such circumstances, a party fails to comply with the conciliator's recommendation, the other party may [without limiting its other rights] refer the failure itself to arbitration under sub-Clause 13.2 . . ."

(d) Clause 13.5, which is headed "Continuing Obligations", provides that, despite the existence of a dispute, the parties shall continue to perform their obligations under the Building Agreement.

18. In my view, the proper application of the foregoing provisions in the context of the factual position which has prevailed since May 2011 is clear. First, in relation to the dispute between the parties which was referred to conciliation in May 2011, the Conciliator made the Recommendation that the plaintiff pay the defendant the sum of €700,649 exclusive of VAT. Neither party gave notice of dissatisfaction in relation to that recommendation and, accordingly, it is conclusive and binding on the parties and the plaintiff is obliged to comply with it. However, that obligation is one obligation only in the overall scheme of mutual rights and obligations of the parties under the Building Agreement, all of which continue to apply notwithstanding the fact that one dispute may be resolved in accordance with Clause 13. Secondly, the rights and obligations to which the plaintiff's termination of the defendant's obligation to complete the Works gave rise under Clause 12 provide that all the defendant is entitled to following termination is the termination value, as determined in accordance with Clause 12.2.3, and the plaintiff is entitled to set off against that sum the termination amount as determined in accordance with Clause 12.2.9. Both determinations are to be carried out by the "Employer's Representative". Obviously, in determining the termination value, the Employer's Representative would have to factor in the sum which the Conciliator recommended is to be paid by the plaintiff to the defendant. Thirdly, the termination amount does not fall to be determined by the Employer's Representative until the Works have been completed.

19. In relation to assessing the current position in relation to completion of the Works, and the application of the foregoing principles, the relevant evidence is to be found in the second affidavit of Timothy Bohan, a director of the plaintiff, sworn on the 20th November, 2012. That affidavit discloses that after the plaintiff took back control of the Works, following termination, it embarked on a staged process of completion of the Works. The Works were commenced in October 2011, that is to say, within four months of termination and were virtually complete at the date of swearing of the affidavit. Mr. Bohan averred that the plaintiff had made payments amounting to €924,046 to sub-contractors since termination in relation to completing the Works. He addressed a complaint made by Mr. Burns, one of the joint Receivers, who swore the replying affidavit on behalf of the defendant on the 15th November, 2012, that neither the termination amount nor the termination value had been determined, commenting that the defendant had never requested the determination of the termination value and that the termination amount cannot be ascertained until the Works are complete. However, he confirmed that the Employer's Representative has calculated the termination value at €710,746 and he exhibited a copy of the breakdown of that amount, which clearly included the amount recommended by the Conciliator.

20. In his grounding affidavit sworn on the 8th November, 2012, Mr. Bohan had averred that he believed from his discussions with the Employer's Representative, whom he named as Tobin's Consulting Engineers, that the termination amount likely to be certified will be well in excess of the termination value, so that there will be no sum due to the defendant from the plaintiff, rather that the reverse will be the case. But he acknowledged that it is a matter for the Employer's Representative to determine both.

21. At the hearing of the application, counsel for the defendant complained that the information given by Mr. Bohan, which had been derived from the Employer's Representative, was hearsay. Moreover, he handed in an analysis of two tables which had been exhibited by Mr. Bohan in his final affidavit, the table setting out money paid to sub-contractors since termination and the table setting out the termination value in accordance with Clause 12.2.3, and he contended that what that analysis showed was that there is a balance of €149,841 owing to the defendant.

22. In his final affidavit, Mr. Bohan has exhibited a comprehensive document prepared by the Conciliator subsequent to the issuing of his recommendations entitled "Reasons for the Conciliator's Recommendation". For the avoidance of doubt, I have not had regard to that document in arriving at the conclusions set out later.

The Law
23. The law as to the principles which should guide the court in determining whether to dismiss a petition to wind up a company or, alternatively, to restrain the presentation of a petition is well settled. The following passage from the judgment of Keane J. in *Truck and Machinery Sales Limited v. Marubeni Komatsu Limited* [1996] 1 I.R. 12 (at p. 24), is probably most frequently cited:-

> "It is clear that where the company in good faith and on substantial grounds, disputes any liability in respect of the alleged debt, the petition will be dismissed, or if the matter is brought before the court before the petition is issued, its presentation will in normal circumstances be restrained. This is on the ground that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed. That was the effect of the decision of Ungoed-Thomas J. in *Mann v. Goldstein* [1968] 1 W.L.R. 1091, which was subsequently approved of by the Court of Appeal in *Stonegate Securities v. Gregory* [1980] Ch. 576, both of which decisions were expressly adopted by O'Hanlon J. in In *re Pageboy Couriers Ltd*. [1983] I.L.R.M. 510."

24. The same authorities were cited by McCracken J. when delivering judgment in the Supreme Court in *Re WMG Toughening Limited (No. 2)* [2003] 1 I.R. 389 (at p. 392) and he went on to say:-

> "It is also accepted by the parties that the subject matter of the *bona fide* dispute may in fact not be the debt itself but rather a cross-claim by the company against the petitioner. The issue, therefore, is whether the company's claim in the present case is a claim made in good faith and on substantial grounds. It is clear that the issue is not whether the company will succeed in its claim, but whether it is a bona fide dispute which should be determined by the courts in the normal way without putting the company's existence at risk."

25. Counsel on both sides referred to the judgment of the High Court (Clarke J.) in *Re Emerald Portable Building Systems Limited* [2005] I.E.H.C. 301, where he considered the decision of the Court of Appeal of the United Kingdom in *Re Bayoil SA* [1991] 1 W.L.R. 147, a case in which the debt was undisputed but the company asserted that it had a *bona fide* cross claim to a greater sum, and he quoted a number of passages from the judgment of Nourse L.J. On this application, counsel for the defendant laid particular emphasis on the following passage from the judgment of Nourse L.J.:

> "I emphasise that the cross claim must be genuine and serious or if you prefer one of substance, that it must be one which the company has been unable to litigate and it must be in an amount exceeding the amount of the petitioner's debt."

26. The argument of the defendant based on that passage is that the plaintiff could have litigated its cross claim, but did not do so. That, in my view, illustrates the misconception which is at the heart of the defendant's case.

27. Both parties referred the Court to a passage in the judgment of Keane J. in the *Truck and Machinery Sales Limited* case (at p. 26) in which he distinguished the type of application which is before the court in this case and an ordinary application for an interlocutory injunction, which is governed by the principles laid down by the Supreme Court in *Campus Oil Limited v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88, as to the factors which the court must have regard to in granting or withholding interlocutory injunctive relief. Keane J. stated:-

> "Different considerations entirely apply where, as here, the object of the application is to prevent the respondent from exercising his right of access to the courts, whether by way of ordinary process or a winding-up petition. In such a case, the factors which the court should take into account were also identified in *Bryanston Finance Ltd. v. De Vries (No. 2)* [1976] Ch. 63. Thus, Buckley L.J. said at p. 76 that:-
>
> > 'The plaintiff company cannot assert such a right in respect of any particular anticipated litigation without demonstrating that, at least *prima facie*, that litigation would be an abuse.'"

Conclusions
28. The position of the defendant is that it has standing to bring a petition to wind up the plaintiff on the basis that it is a creditor of the plaintiff which has served a s. 214 demand on the plaintiff which has not been complied with. Immediately following the service of that demand, the solicitors for the plaintiff, by letter dated the 26th October, 2012 to Mr. Burns, referred to the provisions of Clause 12 of the Building Agreement in relation to the consequences of default termination. They quoted Clause 12.2.2., and underlined the words "shall be postponed". They also referred to the other provisions of Clause 12, the effect of which I have outlined earlier and contended that there was no payment then currently due and owing by plaintiff to the defendant. Further they characterised the defendant's attempt to rely on s 214 as a clear abuse of process in circumstances where no debt is due.

29. In my view, not only has the plaintiff disputed the debt claimed to be due by it to the defendant in good faith and on substantial grounds, but, and it is rare that one can so find on this type of application, it has done so in a very convincing manner. Having regard to the provisions of Clause 12.2, of the Building Agreement, until such time as the termination amount has been determined in accordance with Clause 12.2.9 whether there is any amount due to the defendant by the plaintiff cannot be determined. Once the termination amount is determined, if it is less than the termination value, the defendant will be entitled to demand repayment of the difference from the plaintiff by delivering an invoice in accordance with Clause 12.2.11 and the plaintiff will then have 15 working days in which to make payment. In short, the service of the s. 214 demand was premature. It has not been shown that the plaintiff is indebted to the defendant, and, accordingly, the defendant does not have standing to present a petition to wind up the plaintiff.

30. Aside from that, I am also of the view that presentation of a petition to wind up the plaintiff on the basis of the s. 214 demand issued on the 30th October, 2012, would constitute an abuse.

Order
31. There will be an order in the terms sought by the plaintiff on the notice of motion restraining the defendant pending the trial of the action from advertising, presenting or otherwise proceeding with the petition to wind up the plaintiff. However, it is not inconceivable that circumstances may change before the hearing of the substantive action, if it ever happens. Therefore, the order will include liberty to the defendant to apply to discharge the order if it becomes entitled to present a petition by reason of changed circumstances.