Neutral Citation [2012] IEHC 463

THE HIGH COURT

[2012 No. 121 MCA]

IN THE MATTER OF SECTION 45 OF THE ARBITRATION ACT 1954, AND IN THE MATTER OF AN INTENDED ARBITRATION

BETWEEN/

REGAN CIVIL ENGINEERING LIMITED

APPLICANT

AND

MINISTER FOR DEFENCE

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 6th November, 2012

1. This application for an extension of time under s. 45 of the Arbitration Act 1954 ("the 1954 Act"), arises in the following circumstances. On 18th October, 2002, the applicant, Regan Civil Engineering Ltd. ("Regan Engineering"), entered into a contract with the Minister for Defence to execute and complete certain engineering works. The Minister appointed Ryan Hanley Consulting Engineers ("the engineer") to act as the contract administrator on his behalf.

2. Regan Engineer had originally submitted a tender for some €632,000. It appears, however, that the value of the actual works actually amounted to a figure in excess of €1.3m. (excluding VAT). In June 2005 the applicant applied to the engineer for payment of the latter sum. When, however, the engineer certified only a sum of€640,756 (excluding VAT), Regan Engineer invoked clause 66 of the contract on 4th October, 2006, by notifying the engineer that a dispute existed.

3. The engineer delivered his decision in writing on 2nd January, 2007. By virtue of clause 66(5)(a) then either the employer or the contractor might

> "...within three calendar months after receiving notice of such decision ....refer the dispute to arbitration of a person to be agreed upon by the parties by serving on the other party a written notice (herein referred to [as] 'the Notice to Refer')."

4. As it happens, Regan Engineering referred the dispute to the engineer (and *not* to the Minister) on 2 April2007. (The question of whether this was a valid and timely reference will be considered presently). On 10th April, 2007, the engineer replied to this letter, advising that any such reference must, under the terms of the contract, be sent to the Minister. Regan duly sent such a letter to the Minister on 30th April, 2007.

5. As it happens, however, the Minister raised any issue as to the validity of or timeliness of the notice. Rather, by letter dated 31st May, 2007, the Minister refuted the merits of the claim and invited Regan Engineering to substantiate it, as otherwise the "Department will be left with no option but to proceed to arbitration".

6. A long silence then fell over the arbitral claim. The claim only then emerged from what appears to have been a long slumber when the applicant's solicitors wrote on 2nd February 2011 to the Minister indicating that, further to the notice to refer, Regan Engineering wished to engage in conciliation in respect of the dispute before proceeding to arbitration, as required by clause 66. In its response of 16th February, 2011, the Minister raised the question- admittedly for the first time- of whether the notice to refer was a valid and timely one.

7. The letter further indicated that as the Minister did not accept that there had been a valid reference, he did not propose to engage with the claim. The Minister observed, moreover:

> "The Department did give Regan Engineering the opportunity to provide hard evidence supporting its claims for the substantial increase in costs. However, nothing further was heard on the matter from Regan Engineering since 2007 and the Department considers the matters closed."

8. All of these events put in train this application for an extension of time under s. 45 of the 1954 Act. But before considering the possible import of this section, it is necessary to address two preliminary issues.

Whether the Arbitration Act 2010 applies to this claim?

9. The Arbitration Act 2010 ("the 2010 Act") came into effect on 8th June, 20 I 0, three months after its enactment. While s. 4(1) of the 2010 Act repealed the 1954 Act, the parties are agreed that the earlier legislation applies to this claim, its repeal notwithstanding. Section 4(2) contained a saving clause which preserves acquired rights which pre-existed the operative date of 8th June, 2010. In this case, Regan Engineering had acquired a right prior to this date, namely, in the words of Laffoy J. in *On-Site Welding Ltd. v. Quinn Insurance* [2011] IEHC 215, "the right to request the Court to extend the time for referring to arbitration the dispute which has arisen as a result of the respondent not to indemnify the applicant".

10. In *On-Site Welding* the circumstances were not entirely dissimilar, inasmuch as the applicant had sought to make a late reference to arbitration. As this event had preceded the operative date of 8th June, 2010, Laffoy J. considered that it came within the saving clause contained ins. 4(2) as the right to apply for an extension of time under s. 45 of the 1954 Act was an acquired right for the purposes of that sub-section. As I have noted, the parties are agreed that the present case is governed by *On-Site Welding* so that this application for an extension is governed by the 1954 Act. If, nevertheless, an extension of time were to be granted and the matter did proceed to arbitration, then that arbitration would be governed by the terms of the 2010 Act: sees. 3(1) of the 2010 Act.

Was the notice to refer served in a timely fashion?
11. It is not clear whether Regan actually received the engineer's letter which was dated 2nd January, 2007, on that day. Unlike other correspondence exchanged between the parties (e.g., Regan's letter of 2nd April2007), there is nothing in the letter to suggest it was also sent by electronic mail. If one applies by analogy the principle regarding service by post contained ins. 25 of the Interpretation Act 2005, then the letter must be "deemed, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post". Since the 2nd January, 2007, was a Tuesday, it may be presumed that Regan received the notice at the earliest on the following day, 3rd January. This is potentially of some importance since the three month period runs from the *date of receipt of the notice*. If, however, time began to run on 3rd January, 2007, then the three month period would have expired on 2nd April, 2007.

12. Regan Engineering certainly sent a notice to refer on 2nd April, 2007, which appears to have been sent by both electronic mail and by post. But clause 66(5)(a) required that it do so by "serving on the other party a written notice". All of this means that for the notice to refer to be valid and timely, it would have to have been *served* on the *other party* (i.e., the Minister) by 2nd April, 2007.

13. All of this means is that, strictly speaking, the notice to refer was not validly served on the correct person within the relevant time period. This in turn meant that an application pursuant to s. 45 of the 1954 Act for an extension of time to this Court was accordingly necessary.

Whether time should be extended?
14. The power to extend time is, in many respect, an inherent feature of the administration of justice and the statutory power to do so has been expressed in a multitude of different fashions by the Oireachtas. Sometimes the power to extend time is contingent on the court considering that there would be good reason to do so, while in other circumstances exceptional circumstances must exist before this is done.

15. In the case of s. 45 of the 1954 Act a somewhat different formulation of the power to extend time has been employed, namely, whether, "undue hardship would otherwise be caused". It is, however, necessary to set out the full statutory context in which these words appear. Section 45 provides:-

> "Where
>
> (a) the terms of any agreement refer disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a fixed time fixed by the agreement, and
>
> (b) a dispute arises to which agreement applies, the Court, if it is opinion that in the circumstances of the case undue hardship would otherwise be caused and notwithstanding the time so fixed has expired, may on such terms, if any, as the justice of the case may require, and without prejudice to s. 42 of this Act extend the time for such period as it thinks proper."

This test was borrowed from the equivalent provision contained ins. 27 of the UK Arbitration Act 1950. The classic exposition of the meaning of this phrase is contained in the judgment of Brandon L.J. in *Moscow V/0 Export Khleb v. Helmville Ltd* ("*The Jocelyne"*) [1977] 2 Lloyds. Rep. 121 at 129:-

> "(1) The words "undue hardship" ins. 27 should not be construed too narrowly.
>
> (2) "undue hardship" means excessive hardship and, where the hardship is due to the fault of the claimant, it means hardship the consequences of which are out of proportion to such fault.
>
> (3) In deciding whether to extend time or not, the court should look to all relevant circumstances of the particular case.
>
> (4) In particular the following circumstances should be considered:-
>
> (a) the length of the delay;
>
> (b) the amount at stake;
>
> (c) whether the delay was due to the fault of the claimant or to circumstances outside of his control;
>
> (d) if it was due to the fault of the claimant, the degree of such fault;
>
> (e) whether the claimant was misled by the other party;
>
> (f) whether the other party has been prejudiced by the delay, and if so, the degree of such prejudice."

16. In essence, therefore, the question is whether the refusal to extend time would be out of proportion to the degree of the fault on the part of the Regan Engineering. If one looked at the matter in isolation- so that, in other words, one had regard *simply* to the events of April and May, 2007 -I have no doubt but that a refusal to extend time would have caused Regan Engineering "undue hardship" in this sense. After all, a notice of referral was sent within time, albeit that it was neither served *within* time and nor was it served initially on the correct party. The notice also indicated that it would be sent under separate cover to the contracts manager in the Department of Defence. In his reply of 10th April, 2007, the engineer pointed out that the notice was to be served on the Minister and the Contracts Manager in the Department of Defence was also copied with this correspondence.

17. Once this was pointed out to Regan Engineering by the engineer, the notice was duly served on the Minister within a relatively short period thereafter. Such errors as Regan Engineering had made - in particular in sending the notice of reference to the engineer and not to the Minister- were relatively trifling in the context of a short and non-prejudicial delay where a substantial sum was now being claimed. In that sense, therefore, the degree of fault was minimal and the hardship in striking out the claim would have been considerable.

18. This, however, cannot be regarded as dispositive in itself. It must be recalled that this Court is being asked to exercise its statutory discretion pursuant to a motion which was issued on 3rd April, 2012, almost five years to the day since the issue first potentially arose. This application itself relates to a dispute which arises from works carried out sometime between 2005 and 2006.

Before examining the reasons for the delay and whether such are excusable, the preliminary question which arises is whether this delay is relevant at all to the exercise of my discretion.

19. It is true that so far as the arbitration process itself is concerned, the principle of striking out for inordinate or prejudicial delay does not seem heretofore to have been developed. In other words, once the arbitration process itself has properly commenced the arbitrator generally does not enjoy the power to strike out for inordinate delay. There may be several reasons for this. It may be supposed that this is mainly because for the most part arbitration is an expeditious means of resolving commercial disputes and that it is neither party's interest to delay unduly. Another possible, if related, explanation is that it is heretofore never been considered necessary to clothe arbitrators with these sort of powers.

20. But it would be strange and anomalous if questions of delay of this sort did not feature in an application pursuant to s. 45 of the 1954 Act. The discretion must, after all, be exercised by this Court in a constitutional fashion - is it even necessary to cite *East Donegal Co-Operatives Ltd. v. Attorney General* [1970] I.R. 317 for this purpose?- and it may be recalled that the resolution of civil litigation within a reasonable time is a key and inherent feature of the judicial mandate as provided for by Article 34.1: see, *e.g.*, my own judgment in *Donnellan v. Westport Textiles Ltd*. [2011] IEHC 11. The overlapping guarantee of trial within a reasonable time contained in Article 6(1) ECHR also hovers in the background.

21. Here particularly it may be noted that no action was taken by Regan Engineering in the interval between 31st May, 2007 and February, 2011. In passing, I would be prepared for present purposes to excuse the delay between February, 2011 and April, 2012 by reason of the endeavours of the plaintiff to have the matter resolved by a conciliation process. But what about the remarkable delay which took place between 31st May, 2007, the start of February 2011? The proprietor of the plaintiff, Mr. Bartley Regan, ventured the following explanation for this delay:-

> "The applicant was engaged in a number of other civil engineering projects at the time and was also in the process of commencing arbitration in respect of another significant project. As such, and in the belief that it had properly referred the dispute with the respondent to arbitration, it made the commercial decision to prioritise completing those projects over resolving this dispute with the respondent."

This decision was, however, taken *unilaterally* and was never communicated to the Minister. Where the delay is otherwise inordinate, a litigant generally cannot take it upon itself not to take any further action without communicating this fact to the other party. As Macken J. said in her judgment in *Desmond v. MG.N Limited* [2009] 1 I.R. 737, 759:

> "It is certainly a telling factor against excusing delay, if a party retains to himself, as the plaintiff did here, the right unilaterally to take no further steps in the proceedings for an indeterminate period into the future without, as a very minimum, notifying the other party of his intention to do so."

22. In fairness to Regan Engineering, it may be that the company was lulled into a false sense of security by the terms of the letter from the Minister of 31st May, 2007, which did not raise any questions in relation to the validity of the notice to refer. That letter did, however, invite a response on the merits and it was necessarily implicit therein that the response was to be expected within, at most, a matter of months.

23. When that response did not materialise and when no further action was taken for another three years and six months by reason of a unilateral decision taken by it to prioritise other work, I fear that Regan Engineering cannot be heard to complain if, when the arbitral process resurrects itself after such a long period of abeyance, the necessity for a court application is maintained by a respondent.

24. In the context of commercial arbitration, a delay of this period is plainly inordinate and in itself prejudicial. The Department had, after all, with some justice, put away its own files and quite reasonably assumed that the claim was now dormant. Here one may also apply by analogy the comments of Fennelly J. in *Dekra Eireann Teo. v. Minister for Environment* [2003] IESC 25, [2003] 2 I.R. 270:-

> "The strictness with which the courts approach the question of an extension of time will vary with the circumstances. However, public procurement decisions are peculiarly appropriate subject-matter for a comparatively strict approach to time limits. They relate to decisions in a commercial field, where there should be very little excuse for delay."

25. While it is true that these comments were made with regard to a public procurement challenge under O. 84A to the award of a major commercial contract in which a third party had a vital interest as the operator of what, in effect, was a Government licence (namely, the testing of motor vehicles), they nonetheless have a striking resonance for the not entirely dissimilar field of commercial arbitration. This is perhaps especially so given that the delay in Dekra which required to be excused was comparatively short- namely, some ten days after the expiration of a three month limit whereas the delay principally at issue here (three years and eight months) is much longer.

Conclusions

26. In my view, therefore, the applicant cannot show that it would suffer "undue hardship" within the meaning of s. 45 if this application were to be refused. It is true that the delay which occurred in April, 2007 could and would have been excused had an application for an extension been made, for example, at some stage in 2007. This might have occurred had Regan Engineering supplied details of its claim in response to the May, 2007 letter in a timely fashion only then to be met with the objection at that point that the notice to refer was invalid.

27. But this is not what, in fact, happened. Rather, as we have seen, Regan Engineering elected unilaterally not to take any further action as it prioritised other more pressing work. Nor was the Minister informed of this development. It was for all of these reasons that the re-activation of the claim well over three and a half years later came as a complete surprise to the Minister. This delay was wholly inordinate in the context of a commercial arbitration. Such a delay is itself prejudicial and cannot be objectively excused.

28. These considerations must be regarded as critical in any assessment in *2012* as to whether the refusal to grant an extension of time would *now* cause the applicant undue hardship. Applying the approach enunciated by Brandon L.J. in The *Jocelyne*, I am of the view that it would not cause Regan Engineering undue hardship. This is because the effective striking out of the proceedings by reason of inordinate delay would itself be proportionate to the degree of objective fault which the company must bear in unilaterally deciding to wait so long before reactivating the claim in February 2011.

29. It is for these reasons that I must decline to grant an extension of time pursuant to s. 45 of the 1954 Act.