CONSTRUCTION LAW PERIODICAL

Editorial Committee's Note

The Construction Law Periodical provides all members of the CBA with a regular summation of judgments and dispute resolution decisions drawn from Ireland and other common law and model law jurisdictions that touch upon and/or are relevant to matters of construction law and/or the resolution of construction disputes in this jurisdiction.

The Editorial Committee's endeavor is that the Periodical be a useful and habitual resource to all practitioners.

The Editorial Committee welcome and encourage submissions from all Members for inclusion in Edition 5, due for publication in November 2017. Please contact the Editorial Committee below, for further information.

Claire Cummins BL
Sinead Drinan BL
Micheál Munnelly BL

Kellys of Fantane (Concrete) Limited (In Receivership) v Bowen Construction Limited (In Receivership) and Somague Engenharia Sociedad Anonim together Trading As Bowen Somague Joint Venture [2017] IEHC 357 (Unreported, High Court, McGovern J., 1 June 2017)

Arbitration – The Arbitration Act 2010 – Contract – Summary Judgment – Whether valid grounds not to pay a bonded Conciliator's Recommendation – Whether grounds are justiciable – Stay on Proceedings pursuant to Article 8(1) UNCITRAL Model Law.

Facts: The defendants were engaged as Contractors to Laois County Council (LCC) on the N7 Castletown to Nenagh Road Scheme. The defendants entered into a sub-contract with the plaintiff on 19 January 2009 to carry out paving and other works. A dispute arose between the parties and the plaintiff, per the sub-contract, issued notice to refer the dispute to arbitration dated 13 March 2015. The sub-contract provided that no step was to be taken in an arbitration after the notice to refer had been served unless the dispute had first been referred to conciliation. It is also a term of the contract that 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. Thereafter, the matter shall proceed to arbitration.

The matter was referred to conciliation and the Conciliator recommended a sum to be paid to the plaintiff. The defendants failed to pay the sum determined by the Conciliator (pursuant to the contract between defendant and LCC, sub-clause 13.1.11 and incorporated into the sub-contract with the plaintiff). The Plaintiff by way of summary summons, sought judgment against the defendants for payment. The defendants applied to the High Court for a stay on the plaintiff's proceedings, arguing that the dispute between the parties was not justiciable and it must return to arbitration.

McGovern J. found that it was a condition of the contract that the sum recommended by the Conciliator should be paid, even if notice of dissatisfaction with the Conciliator's recommendation was given. It was a term that the other party first gave the paying party a bond executed by a surety approved by the paying party. McGovern J. also stated that it was necessary that the other party gave notice referring the matter to arbitration.

The relevant Clause 13.1.11 read as follows:

'If the conciliator has recommended the payment of money, and a notice of dissatisfaction is given, the following shall apply:

(i) 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 Requirement or if there is none, a form approved by the paying party, acting reasonably, for the amount of the payment.'

In compliance with Clause 13.1.11, the defendants delivered a notice of dissatisfaction and the plaintiffs furnished the defendants with a bond

executed by Ulster Bank Ireland DAC, a surety approved by the defendants, who also gave notice referring the dispute to arbitration.

In their application for an order pursuant to Article 8(1) of the UNCITRAL Model Law, as adopted by s.6 of the Arbitration Act 2010, staying the summary judgment proceedings, the defendants argued that the dispute between the parties is the subject of an arbitration agreement and, therefore, not justiciable before the Court.

The Court found that the plaintiff's solicitors notified the defendants' of its intention to apply to the Court for relief under clause 13(b)(5) of the subcontract. That clause read as follows:

> *"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."*

McGovern J. noted that:

> *"The agreement at clause 13.1.11(b)(5) ring-fenced the conciliator's recommendation, to the extent of providing that the courts would have jurisdiction to deal with compliance with the recommendation without the necessity of further conciliation or arbitration. This clause does not purport to limit the power of the arbitrator to continue with the arbitration of the dispute between the parties. It is solely concerned with the procedure to be adopted to determine the obligations that arise when a recommendation is made."*

The Court held that in *"so regulating their relationship under the agreement, there is no attempt to trespass upon the role of the arbitrator in ultimately determining the dispute."*

Held: The High Court (McGovern J., on 1 June 2017) found that:

(i) If there is an arbitration clause and the dispute is within the scope of the arbitration agreement and there is no finding that the agreement is null and void, inoperative, or incapable of being performed, then by virtue of Article 8 of the Model Law, a stay of the proceedings must be granted.

(ii) However, the Court was satisfied that the particular dispute between the parties as to whether the Conciliator's recommendation had to be paid, following notice of dissatisfaction and pending the outcome of the arbitration, was a discrete issue which the parties had agreed should be determined by the Courts.

Accordingly, the Court refused the application to stay the summary judgment proceedings pursuant to Article 8 of the Model Law.

Deirdre Conroy BL

Persimmon Homes Ltd and Anor v Ove Arup & Partners Ltd and Anor [2017] EWCA Civ 373 (Court of Appeal, Jackson J., Beatson J., and Moylan J., 25 May 2017)

Negligence – Construction Contracts – Exclusion Clauses – Warranties – Interpretation – Contra proferentem – Claimants appealing against judge's decision that defendants not liable to claimant for failing to identify unexpected quantities of asbestos – Whether exclusion clause exempting defendants from liability for asbestos failing to identify.

Facts: The parties entered into a written contract of engagement for the defendants to provide engineering services for a project. When asbestos was encountered, the claimants maintained that its quantity was substantially more than expected and claimed damages against the defendants for breach of contract, negligence and breach of statutory duty. The defendants denied liability and contended that their liability, if any, in respect of asbestos was excluded by a clause in the agreement and warranties which provided that: *"Liability for any claim in relation to asbestos is excluded"*.

Each of the exemption clauses had three separate limbs: (i) an overall limit of liability; (ii) a limit on liability for pollution and contamination; and (iii) an exclusion in relation to asbestos. At a preliminary issues hearing, the claimants argued that the exemption clause was limited to pollution, contamination and asbestos "caused" by the defendants and that negligence was not excluded.

In his judgment ([2015] EWHC 3573 (TCC)) Stuart-Smith J., found against the claimants holding that the wording of the clause represented an agreed allocation of risk. The judge considered recent case law limiting the effect of the *contra proferentem* rule, and held that the court's task was "*essentially the same*" when interpreting exclusion or limitation clauses as for any other contractual provision. The judge found that the exemption clause excluded all liability relating to asbestos, whether arising from negligence or not.

Stuart-Smith J., held that the defendants had no liability and the appellant development consortium appealed to the Court of Appeal on the following grounds:

(i) The phrase "liability for pollution and contamination" in the first sentence of the two exemption clauses meant "liability for causing pollution and contamination". It did not mean any liability in connection with pollution and contamination.

(ii) The phrase "liability for any claim in relation to asbestos" in the second sentence of the two exemption clauses should be construed in the same way. The respondents' liability was thereby only excluded for any claim against them for causing the presence of asbestos.

(iii) Even if the above arguments are rejected, the second sentence of the clauses does not exclude liability for negligence.

(iv) The judge had erred in having failed to apply the *contra proferentem* rule and the rules governing the construction of exemption clauses.

Held: The Court of Appeal (Jackson LJ, on 27 May 2017) found that:

(i) Both the language used by the parties and any application of business common sense led to the same conclusion. Limb (ii) of the exemption clauses limited the defendants' liability for claims in relation to pollution and contamination. Limb (iii) excluded the defendant's liability for claims in relation to asbestos. Limbs (ii) and (iii) were not limited to claims for causing the spread of contamination or asbestos.

(ii) The *contra proferentem* rule requires any ambiguity in an exemption clause to be resolved against the party who put the clause forward and relies upon it. In relation to commercial contracts, negotiated between parties of equal bargaining power, that rule now has a very limited role. *K/S Victoria Street v House of Fraser (Store Management) Ltd [2011] EWCA Civ 904* and *Transocean Drilling UK Ltd v Providence Resources Plc [2016] EWCA Civ 372* applied.

(iii) In recent years, the courts have softened their approach to both indemnity clauses and exemption clauses. As a general principle, exemption clauses were part of the contractual apparatus for allocating risk in commercial contracts. There was no need to approach such clauses with horror or with a mindset determined to cut them down.

(iv) Although the instant judgment was not the place for a general review of commercial contract law, the *Canada Steamships* guidelines espousing the *contra proferentem* rule, in so far as they survived, were now more relevant to indemnity clauses than to exemption clauses, and were of very little assistance in the instant case. *Canada Steamship Lines Ltd v R* [1952] 1 All ER 305 distinguished.

Accordingly, the Court of Appeal in dismissed the appeal and held that the respondents were not liable for the unexpected quantities of asbestos. The exemption clauses excluded liability for all of the appellants' pleaded claims in respect of asbestos.

Claire Cummins BL

W. L. Construction v Chawke & Anor [2017] IEHC 319 (Unreported, High Court, Noonan J., 19th May 2017)

Application to Join Principle as Co-defendant – Liability of a Principle of a Company – Abuse of Process – Fraud and Dishonesty – Litigation Misconduct – Lifting of the Corporate Veil – Exceptional Circumstances

Facts: This action concerns an application to join Mr. William Loughnane, principle of the plaintiff, as a co-defendant to the proceedings for the purposes of applying to hold Mr. Loughnane liable for the defendants' costs of the proceedings.

The application arises from an earlier decision of Noonan J. in *W.L. Construction Ltd v Chawke & Anor* [2016] IEHC 539 in which Noonan J. dismissed the plaintiff's claim and awarded the defendant their costs of the proceedings.

The substantive proceedings concerned sums allegedly due on foot of a building contract dispute. The plaintiff's main witnesses during the trial were Mr. Loughnane and an expert quantity surveyor.

Noonan J. found there to be various, conflicting versions of the claim advanced by the plaintiff. The trial judge was critical of the inclusion of falsified invoices in the documentary evidence. At the conclusion of the plaintiff's evidence the defendants' applied to dismiss the plaintiff's claim arising from litigation misconduct amounting to an abuse of process and failure to establish a prima facie case. The defendants were successful in their application and the plaintiff's claim was dismissed on the following two grounds:

(i) There was litigation misconduct arising from dishonest testimony of Mr. Loughnane and the manner in which the case was presented and prosecuted which amounted to an abuse of process.

(ii) The plaintiff had failed to establish a prima facie case that there were sums due and owing arising from the building contract.

Arising from the foregoing the defendants initiated the application to join Mr. Loughnane as a co-defendant having established the fact that the plaintiff company is insolvent. It was argued by the defendants that Mr. Loughnane is the owner and controller of the plaintiff and holder of 99% of the issued share capital. The defence argued that the costs of the proceedings arose as a direct result of the litigation misconduct of the plaintiff, which was orchestrated by Mr. Loughnane.

The defendants submitted that the Court has jurisdiction to make the order of the kind sought in the proceedings arising from the decisions in *Moorview Developments Limited v. First Active Plc.* [2011] 3 I.R. 615, *Thema International Fund Plc. v. HSBC* [2011] 3 I.R. 654 and *Used Car Importers of Ireland Limited v. Minister for Finance & Ors.* [2014] IEHC 256 in which it was held that there must be impropriety, fraud or bad faith on the part of the non-party before costs should be awarded against said party.

In response the plaintiff argued that:

(i) Mr. Loughnane was not the main beneficiary of the substantive proceedings, had they been successful;

(ii) The substantive proceedings that initiated were legitimate;

(iii) The plaintiff had engaged experts to assist in formulating the claim and the claim was not based solely on the evidence of Mr. Loughnane;

(iv) Mr. Loughnane could not be blamed for all the findings of misconduct;

(v) There were other factors affecting the conduct of the proceedings which contributed to a delay in the proceedings;

(vi) Mr. Loughnane was not on reasonable notice that he was to be joined as a co-defendant for the purposes of a costs order;

(vii) The Court did not have jurisdiction to make the Order sought; and,

(viii) Arising from the fact that the defendants were not required to go into evidence in the substantive proceedings due to the fact that the plaintiff was insolvent it would now be unfair to allow them to resile from that position by seeking to make Mr. Loughnane liable.

Held: The High Court (Noonan, J., on 19th May 2017) found that the Mr. Loughnane should be joined as a co-defendant. Noonan J. made the following comments on arguments (i) to (viii) put forward by the plaintiff:

(i) Mr. Loughnane is the holder of 99% of the issued share capital of the plaintiff which is owned and controlled by him;

(ii) The claim as initiated appeared reasonable; however, Noonan J. did not accept that it was reasonable to bring a claim based on, *inter alia*, fraudulently altered invoices in an effort to show a liability on the part of the defendants;

(iii) An expert was retained to give testimony; however, the expert's evidence can only be as good as the instructions upon which the findings are based;

(iv) The expert was not involved in litigation misconduct as his testimony arose from instructions given by Mr. Loughnane;

(v) There were other factors affecting delay but it was not suggested that the defendant accepted improperly;

(vi) Noonan J. rejected the suggestion that the defendant should have notified Mr. Loughnane in advance of their suspicions for the purposes of a potential costs application;

(vii) Noonan J accepted jurisdiction to make an order of the kind sought arising from the decisions in *Moorview Developments Limited v. First Active Plc.* [2011] 3 I.R. 615, *Thema International Fund Plc. v. HSBC* [2011] 3 I.R. 654 and *Used Car Importers of Ireland Limited v. Minister for Finance & Ors.* [2014] IEHC 256

(viii) Noonan J. stated that insolvency of the plaintiff argument ignores the fact that the claim failed due to the abuses of process and the plaintiff's insolvency was an incidental factor.

Noonan J. concluded that the plaintiffs' activities of fraud and dishonesty in preparation and during the trial amounted to litigation misconduct rendering it an abuse of process. Noonan J. found that Mr. Loughnane was solely responsible for initiating the proceedings and was responsible for the result of the proceedings.

Accordingly, Noonan J. permitted the defendants' application and made an order joining Mr. Loughnane as a co-defendant to the proceedings and directed that he be liable for the costs of the defendants.

Sinead Drinan BL

Fergus Hoban (Applicant) v Kieran Coughlan and Claire Riordan (Respondents) and Frank Nyham (Notice Party) [2017] IEHC 301, (Unreported, High Court, Commercial, McGovern J., 12 May 2017)

Arbitration – Order 56, rule 3(1)(i) of the Rules of the Superior Courts - Article 34(2)(a)(ii) and (iv) and Article 31(2) of the UNCITRAL Model Law – Application to set aside arbitral award – Article 18 of the Model Law – Opportunity to present case – Requirement to give reasoned award.

Facts: Two companies connected with the applicant entered into two thirty-five-year leases with the respondent in 2012 in respect of commercial premises at Blackrock Hall, Blackrock, Co. Cork. The said companies had been in possession of the properties since February 2010 and the applicant had provided written personal guarantees in respect of the liabilities of his companies to the respondents on the 15 October 2009.

On the 28 January 2015 the respondents called upon the applicant to discharge the sum of €400,049.42 which was claimed to be due and owing by the applicant in respect of his liabilities on foot of the 2012 leases and pursuant to the said guarantee dated the 15 October 2009.

On the 29 January 2015 a notice to refer to arbitration was sent by the respondents' solicitor to the applicant and to the applicant's solicitor at the time.

The arbitrator wrote to the applicant and respondents on the 21 May 2015 advising that he had been nominated by the President of the Law Society of Ireland to act as arbitrator. No response was received from the applicant. The arbitrator wrote again to the applicant on the 24 June 2015 stating that if he did not hear from the applicant within seven days he proposed to accept his appointment and to issue preliminary directions. No response was received from the applicant. By a further letter of the 31 July 2015 the arbitrator confirmed that he was accepting his appointment and that he would issue preliminary directions. Again, no response was received from the applicant.

The arbitrator wrote to the parties on the 9 October 2015 advising that he intended to conduct a preliminary meeting on the 21 October 2015. No response was received from the applicant. The preliminary meeting proceeded on the 21 October 2015. The respondents' solicitor was present but there was no representation by or on behalf of the applicant. The arbitrator issued preliminary directions to the parties on the 28 October 2015 and points of claim were delivered on the 8 April 2016.

On the 12 April 2016 solicitors for the applicant wrote to the arbitrator seeking all relevant documentation and the arbitrator responded and furnished the relevant documentation. On the 13 June 2016 the arbitrator wrote to the applicant's solicitors and informed them that the time for delivery of points of defence had expired and he requested to hear from them.

The applicant's solicitors claim that a letter of response was sent to the arbitrator on the 24 June 2016 but the arbitrator claims that he did not receive this. The letter stated, *inter alia*, that the applicant was "*…out of the country at the time but available to us*". The letter further stated that the applicant's solicitors would update the arbitrator "*as to the timeframe in which we will have our response*" to him. No date was provided to the arbitrator.

On the 12 July 2016 the arbitrator wrote to the applicant's solicitor referring to earlier correspondence to which no reply had been received and he stated that he would allow a further extension of time for seven days to deliver points of defence. No reply was received to that letter.

On the 27 July 2016 the arbitrator wrote to the applicant's solicitor noting that he had not received any points of defence and that no application had been made seeking an extension of time for delivery of same. The arbitrator informed the applicant's solicitor that he would conduct an oral hearing on the 1 September 2016. Again, no response was received from the applicant.

On the 19 August 2016 the arbitrator wrote to the applicant's solicitor asking him to confirm whether he intended to be in attendance at the hearing on the 1 September 2016. The arbitrator also stated in the said letter that "…[a]*s no defence has been filed, the hearing will be to hear the evidence on behalf of the claimants*".

On the 31 August 2016, (being the eve of the hearing date) the applicant's solicitor made contact with the arbitrator stating that he was in difficulty in respect of attending at the arbitration the following day and requested an adjournment. The arbitrator informed him that he could not deal with such an application on an ex parte basis and he suggested that he contact the respondents' solicitor.

The following morning (the morning of the hearing) the applicant's solicitor spoke to the respondents' solicitor. The respondents were not prepared to consent to an adjournment. No application for an adjournment was made by or on behalf of the applicant to the arbitrator in the presence of the respondent or the respondents' solicitor. The arbitrator decided not to adjourn the arbitration hearing and the matter proceeded accordingly.

Almost two weeks later the applicant's solicitor requested the arbitrator to withhold publishing his award "*..while we try to file our points of defence*." The letter also stated that "*we either need to get proper instructions from Mr. Hoban or apply to come off record for him in these proceedings*."

On the 19 September 2016 the arbitrator notified the parties that he intended to proceed with the publication of his award and his award was duly published on the 4 October 2016. The award recited, *inter alia*, the fact that the arbitrator had heard evidence on oath from two witnesses on behalf of the respondent and that evidence was given in respect of the arrears of rent and service charges owing by the applicant's companies to the respondents. The award noted that the arbitrator was satisfied that the leases at issue were duly executed and stamped. The court noted that in the award the arbitrator made a number of findings of law and of fact. In particular, the arbitrator had found that the respondent to the arbitration was liable on foot of the guarantee dated the 15 October 2009.

The applicant subsequently brought an application pursuant to Order 56, rule 3(1)(i) of the Rules of the Superior Courts and under Articles 34(2)(a)(ii) and (iv) of the UNCITRAL Model Law to set aside the arbitrator's award on the grounds that he had not been given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

Further, the applicant submitted that the award should be set aside for failing to comply with the provisions of Article 31(2) of the Model Law, which provides that:

> "*The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30*."

Held: The High Court (McGovern J., on the 12 May 2017) found that:

(i) On the evidence, it was clearly established that the applicant (a) was given proper notice of the appointment of the arbitrator; (b) was given an opportunity to partake in the arbitral process; and (c) was informed of the date of the arbitration;

(ii) The right to set aside on arbitral award under Article 34 of the Model Law is very limited and it is a jurisdiction which the court should only exercise sparingly: *Snoddy & Ord v Mavroudis [2013] IEHC 285* approved;

(iii) The arbitrator was entitled to proceed with the hearing and there was no basis upon which the applicant was entitled to an order setting aside the arbitral

award pursuant to the provisions of Article 34 (2)(a)(ii);

(iv) If a party to an arbitration failed to appear at the hearing, having been given reasonable notice of the arbitration, the hearing may proceed without that party. *Grangeford Structures Ltd. (In Liquidation) v SH Ltd. [1990] 2 IR 351* approved;

(v) The provisions of Article 18 of the Model Law are designed to protect a party from egregious and injudicious conduct by the Tribunal. It is not intended to protect a party from its own failures or strategic choices: *In Re Corporación de Inversiones SA de CV et al. v STET International SpA et al. (unreported, Superior Court of Justice of Canada Lax J., 22 September 1999)* approved;

(vi) In considering whether the award was a reasoned award some regard must be had to the fact that the applicant had not engaged in the arbitration process and had not delivered a points of defence;

(vii) While an arbitrator is not under an obligation to provide the sort of reasoned judgment that would be expected from the judge of the Superior Courts, he still must give a reasoned award to the extent required to enable a party to see why he reached his decision: *Bank of Ireland Mortgage Bank v Herron [2015] IECA 66*: approved;

(viii) The award published by the arbitrator was sufficient to satisfy the requirements of Article 31(2) of the Model Law.

Accordingly, the court refused the relief sought by the applicant on both issues.

Micheál Munnelly BL