CONSTRUCTION LAW PERIODICAL

Editor's Note

The Editorial Committee's endeavor is that the Periodical provide a useful and habitual resource to all practitioners, not just those in construction. Hence, with this issue we have identified some important decisions that touch upon, and are relevant to, not only matters of construction law and dispute resolution, but also complex personal injuries cases and other non-construction professional negligence matters (Harrington v. Cork City Council). Further, we have gone further afield to identify decisions from other Common Law jurisdictions that may prove relevant to matters imminent before the Irish Courts.

Paul Harrington v. Cork City Council and Cork County Council [2015] IEHC 41, (unreported, High Court, Kearns P., 30th January 2015)

Disclosure of Reports and Statements – Expert Witnesses – Simultaneous Exchange of Reports – Whether disclosure of reports by plaintiff could be conditional on undertaking by defendant not to give them to any expert witness of theirs until after such witness has furnished their report – Rules of the Superior Courts 1986 to 2016 – Order 39 – Rule 46 – Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements), 1998 (S.I. No. 391/1998).

Facts: This action was for personal injuries alleged to have been suffered by the plaintiff while removing an injured person from a motor vehicle. The judgment given was on an application by the first named defendant directing the plaintiff to disclose the reports of expert witnesses intended to be relied on, in accordance with their obligation under Order 39, Rule 46 of the Rules of the Superior Courts.

In accordance with Rule 46(1), the plaintiff delivered a schedule of reports of all expert witnesses intended to be called to give evidence by the plaintiff, to the first named defendant.

The first named defendant did not disclose any reports of expert witnesses, as they would be required under Rule 46(1) to do if there were any, and, in accordance with Rule 46(3) certified that no such report existed. The first named defendant did state, however, that they reserved the right to call any such expert witness and/or produce expert reports.

In accordance with Rule 46(3) the plaintiff was required to deliver to the first named defendant copies of reports of expert witnesses intended to be called in evidence, and the first named defendant asked the plaintiff to do this. The plaintiff refused to do so without an undertaking from the first named defendant that that defendant would not divulge them to any experts that they retained.

The first named defendant, therefore, moved an application for an order directing the plaintiff to deliver copies of their expert reports.

Held: The High Court (Kearns P.) found that:

- Fairness requires the simultaneous exchange of expert reports, as found by the Supreme Court in *Kincaid v. Aer Lingus Teo.* [2003] 2 I.R. 314, and by the High Court (Murphy J.) in *Galvin v. Murray* [2001] 1 I.R. 331.
  Kirkup v. British Rail Engineering Ltd [1983] 1 W.L.R. 190 and *National Justice Compania Naveira SA v. Prudential Assurance Company Ltd* [1993] 2 Lloyd's Rep 68 considered.
- The jurisprudence of the European Court of Human Rights and the courts of Ireland has in recent years emphasised the concept of "*equality of arms*".
- The first named defendant could obtain a litigious advantage if any expert it retained had the opportunity of seeing the plaintiff's expert reports before giving their own.
- A party could seek a litigious advantage in this way by waiting to receive other parties' reports before retaining experts and then giving the other parties' expert reports to their own experts when retained.
- There could be an exception to the normal processes where a defendant did not intend to, or could not afford to, retain an expert.
- The principle of the requirement for the simultaneous exchange of expert reports required that, even where one party had already furnished its expert reports, any experts retained by another party should not be furnished with those reports until after they had furnished their own reports, lest the party retaining them obtain a litigious advantage.

Accordingly, the Court made an Order that the plaintiff's disclosure of expert reports as required by Rule 46(3) be conditional on an undertaking given by the first named defendant not to give, whether directly or indirectly, those reports to any expert retained by that defendant until after such expert has furnished their report. It is to be noted that the Court did not specify whether its Order was pursuant to Rule 50 of Order 39 or under the Court's inherent jurisdiction to prevent the abuse of process as found by the High Court (Kelly J.) in *P.J. Carroll & Co. Ltd. v. Minister for Health (No. 2)* [2005] 3 I.R. 457, both having been relied on as alternatives by the plaintiff.

Aodhán Ó Riain B.L.

Mayo County Council v. Joe Reilly Plant Hire Limited [2015] IEHC 544, (unreported, High Court, McGovern J., 31st July 2015)

Arbitration – Jurisdiction of Arbitrator – Competence-Competence Doctrine – Ruling on jurisdiction as preliminary issue – Articles 16(3) and 16(1) of the UNCITRAL Model Law – Order 53 Rule 1(3)(f) RSC, 1986. - High Court – Application to set aside ruling – Whether accord and satisfaction of

contract form basis of challenge to jurisdiction of arbitrator – Whether new grounds of challenge to arbitrator's jurisdiction can be raised in High Court under Article 16 (3).

Facts: In 2004 the parties entered into an agreement in relation to the remediation of a landfill site. Works were carried out by the respondent between 2004 and 2009. On completion of the works in 2009 the parties were unable to agree on the final sum owed by the applicant to the respondent. In February 2011 the engineer issued a final determination which directed a specific sum be paid. Payment of this amount issued by cheque in February 2011 and was cashed by the respondent without qualification in March 2011.

The respondent sought further sums on foot of the contract and the parties entered into conciliation as provided for in the terms of the contract but failed to reach agreement. In August 2013, the respondent issued a notice of dispute on the applicant and in February 2014 the matter was referred to arbitration pursuant to the arbitration clause in the agreement, which provided as follows:

In February 2015, the applicant was advised of the appointment of an arbitrator. The applicant contested the arbitrator's jurisdiction to deal with the dispute. This was dealt with as a preliminary issue on written submissions and in May 2015 the arbitrator ruled that he did have jurisdiction to arbitrate the dispute.

The applicant applied to the High Court for a declaration under O. 56 r. 1(3) (f) RSC, 1986 and Article 16(3) of the UNCITRAL Model Law that the arbitrator had no jurisdiction pursuant to the agreement to adjudicate the dispute between the parties.

The validity of the arbitration clause was not disputed, and it was accepted that the dispute was within the scope of that clause. Notwithstanding authority that an arbitration clause survives repudiation or total breach of contract (*Heyman v Darwins Limited* [1942] A.C. 356 approved in *Parkarran Limited v M. & P. Construction Limited* [1996] 1 I.R.83 and *Doyle v Irish national Insurance Co. Limited* [1998] 1 I.R. 89), the applicant argued that because the respondent had accepted payment in March 2011 without qualification, there was accord and satisfaction which brought into being, a further agreement superseding the earlier contract in its entirety and rendering the arbitration clause inoperative.

Held: The High Court (McGovern J) found that:

- Article 16 (1) provides that the Arbitration Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract giving effect to the competence-competence doctrine.
- The arbitrator was entitled to embark on a preliminary hearing as to whether or not he had jurisdiction to arbitrate the dispute. The issue of accord and satisfaction could be raised as a defence to the claim made by the respondent in the arbitration but did not go to the issue of the arbitrator's jurisdiction under Article 16(3) of the Model law.
- A challenge under Article 16 (3) is a challenge to the arbitrator's jurisdiction and not an appeal against his construction of the agreement. If the arbitrator has jurisdiction it is a matter for him as to how he construes the agreement.
- In an application brought under Article 16 (3), the court may consider such evidence as it sees fit and is not bound by the submissions made to the arbitrator: *John G Byrnes Ltd v Grange Construction and Roofing Co Limited* [2013] 1 I.R. 707 per Laffoy J, considered.
- Where the existence of an arbitration clause is not in dispute the courts would be slow to interfere with an arbitrator's ruling on his own jurisdiction having regard to the competence-competence principle.

Accordingly the Court refused the relief sought by the applicant.

Pauline Smith B.L.

Delmere Holdings Pty Ltd v Green [2015] WASC 148 (Unreported, Supreme Court of Western Australia, Kenneth Martin, J., 24th April 2015)

Judicial Review – Certiorari – Construction Contracts Act 2004 (WA) – Adjudication – Scope for challenge against an adjudicator's decision– Jurisdictional Error – Payment Claims – Payment Disputes – Unjust enrichment 'in equity' – Quantum Meruit – Principles Applicable.

Facts: These proceedings concerned a construction contract entered into on 20th December 2013 between Delmere Holdings Pty Ltd ("Delmere"), as head contractor and Alliance Infrastructure Pty Ltd ("Alliance") as subcontractor, to carry out fabrication, supply, delivery to site and installation of piping, as part of plant piping and general infrastructure works at Cape Lambert, Western Australia. This contract was accepted to be a 'construction contract' for the purposes of the Construction Contracts Act 2004 ("the 2004 Act"), comprising a formal agreement and General Conditions.

The contract contained a thorough regime by which the cost of a direction to vary the scope of work could be added or deducted from the contract price pursuant to General Condition 34 (GC34). On 9th October 2014, Alliance wrote to Delmere and submitted its variation claim (VC17), in accordance with the procedure set out within GC34 (d). On 24th October 2014, Delmere's Engineer rejected VC17 and Alliance subsequently applied for adjudication under the 2004 Act.

Alliance sought to categorise VC17 as a 'payment claim' for the purposes of s. 3 of the 2004 Act and Delmere's rejection of VC17 as giving rise to a 'payment dispute', for the purposes of s. 6 of the 2004 Act. To this effect, Alliance submitted that it was entitled to claim 'reasonable remuneration' for the variation works, in accordance with a term to be implied into the contract.

On 10th November 2014, following service of its adjudication application, Alliance issued an invoice, backdated to 9th October 2014 (INV 024), for the works claimed for in VC17. In Delmere's adjudication response, it furnished a copy of INV 024 and asserted that that invoice was the relevant 'payment claim' and that there was, therefore, no identifiable 'payment dispute' upon which Alliance should have based its adjudication application.

The adjudicator determined that Delmere should pay to Alliance the sum of $873,011.87. In reaching this decision, the adjudicator concluded that VC17, rather than INV 024 was the relevant 'payment claim' which, gave rise to a 'payment dispute'. The adjudicator also determined that he was not entitled to consider INV 024 because that document had not been included in Alliance's adjudication submissions. Furthermore, it was held that the term sought to be implied into the construction contract by Alliance ought to be so implied, as Alliance was entitled to 'reasonable remuneration' for changes made by Delmere to the construction methodology. The adjudicator maintained that the change to the construction methodology caused unjust enrichment and thus, a right in equity to be paid for such an act or circumstance.

Alliance applied for leave to enforce the adjudicator's Determination under s. 43(2) of the 2004 Act and at the same time, Delmere applied for an Order of *Certiorari* to quash the adjudicator's Determination. The two proceedings were heard together but it was accepted that it was first necessary to evaluate Delmere's challenges before proceeding to consider enforcement of the Adjudicator's Determination.

Delmere's fundamental argument was that the arbitrator was '*never jurisdictionally enabled to proceed with the adjudication*' in circumstances where there was no relevant 'payment claim' issued by Alliance at the time that Alliance applied for adjudication.

Furthermore, it was contended that at the time when Alliance commenced its application under the 2004 Act to have a payment dispute adjudicated upon, Alliance had not at that date, articulated to Delmere any relevant payment claim, seeking an amount of money to be paid to Alliance under the contract. Thus, Delmere argued that the adjudicator ought to have summarily dismissed Alliance's application under section 31(2)(a) of the 2004 Act.

Delmere further argued that the adjudicator fell into jurisdictional error by misconstruing the words 'payment claim' in the 2004 Act as including a claim for unjust enrichment or a claim in equity.

Alliance contended, in response, that the four criteria expressed under s. 31(2)(a) of the 2004 Act were jurisdictional facts, but in a 'broad', as opposed to the 'narrow' sense of that term and furthermore, the existence of a 'payment claim' or of a 'payment dispute' were also to be approached as being 'broad' jurisdictional facts. Alliance submitted that the Court could not assess for itself whether a 'payment claim' or 'payment dispute' had existed but, rather, the Court's review could *'only be directed to scrutinising the 'process of reasoning' adopted by an adjudicator.'*

Held: The Supreme Court of Western Australia (Kenneth Martin, J.) found that:

- The adjudicator was in jurisdictional error, as identified by Delmere. There was no payment claim and thus, no payment dispute in existence at the moment the adjudication application was commenced.
- VC17 was on its face, drafted and submitted to Delmere's Engineer in compliance with the regime outlined in GC34. Alliance's attempt in its adjudication application, to rebadge VC17 as no longer a submitted variation claim under GC34 (d), but instead a claim seeking payment under an implied term allowing reasonable remuneration, '*was something akin to an exercise in applying 'lipstick to a pig*.''
- The adjudicator failed to observe the objective fact that no payment dispute existed at the moment the adjudication application was served. That failure was strengthened by the adjudicator's failure to review INV 024, which would have confirmed that there was no payment dispute in existence when the application was made.
- The adjudicator '*misconstrued his function under s.26 of the 2004 Act*' and accordingly, wrongly proceeded on to a determination of the application on a wholly incorrect and misconceived basis that a payment claim then existed, and thereby that a payment dispute then existed.
- The Court was not required to enter into the debate in the authorities about whether the jurisdictional facts identified were broad or narrow. The underlying challenge concerning the absence of any underlying 'payment dispute' under a construction contract is objective, factual and fundamental, irrespective of the chosen jurisdictional fact nomenclature.
- The Court assessed the terms of s.25 of the 2004 Act and maintained the following facts must be in existence for jurisdiction to be established:
  i. The existence of a 'construction contract';
  ii. The existence of a 'payment dispute';
  iii. The existence of a 'payment claim' by a party to a construction contract; and
  iv. The payment dispute being as between the parties to the construction contract, which arises under the construction contract.
- The fundamental requirement for there to be an underlying 'payment dispute' is central to the 2004 Act's operation. Moreover, the payment dispute needs to *'arise under a construction contract'*, in order for a party to the construction contract to hold the standing to properly apply to have that payment dispute adjudicated by an adjudicator.
- The phrase 'under a construction contract' as contained in the long title to the 2004 Act is relatively narrow in ambit. The dispute must be under the parties' construction contract. Thus, *'a claim in quasi contract, such as a quantum meruit claim seeking only a reasonable remuneration, such as where the underlying contract was uncertain, or had failed for some reason, would not present a dispute arising 'under' the construction contract for the purposes of the Act*.'
- An unduly technical or legalistic approach should not be taken towards '*picking apart the reasons of an adjudicator, who frequently is a person without legal training and acting under a pressing time deadline*.' Where a clear jurisdictional error is shown in an adjudicator's decision however, the court cannot turn a blind eye.
- Whilst it was not necessary for the Court to determine whether the adjudicator fell into jurisdictional error by misconstruing the words 'payment claim' in the 2004 Act as including a claim for unjust enrichment or a claim in equity, nevertheless the following should be noted:
  i. The decision cited by the adjudicator did not provide support for the implication of an implied term in the contract; rather, it was an orthodox example of the application of well-accepted principles regarding *quantum meruit* claims. *ASIC v Edwards* [2005] NSWSC 81, considered.
  ii. The concept of unjust enrichment does not provide any stand-alone cause of action capable of being independently sued upon under Australian law. *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd [2014] HCA 14* and *Equuscorp Pty Ltd v Haxton* [2012] HCA 7, considered.
  iii. A quantum meruit claim by Alliance for a reasonable amount would only arise, if it arose, outside of these parties' construction contract, and not under it, as is required under part 3 of the 2004 Act.
  iv. A claim in quasi contract seeking a quantum meruit is not a claim to a right in equity as such causes of action are wholly common law claims.
  v. The Court as unable to reconcile the arbitrator's reasoning with the current state of Australian law and in effect, it was held that the decision would have been quashed on this ground alone.

Accordingly, the Court issued orders absolute for *Certiorari* quashing the adjudicator's Determination and dismissed Alliance's application to register the adjudicator's Determination for the purposes of enforcement, as being inappropriate in the circumstances of the case.

Claire Cummins B.L.

Caterpillar Motoren GMBH & Co K.G. v Mutual Benefits Assurance Company [2015] EWHC 2304 (Comm)

Guarantee - Construction – Nature Of Guarantor's Obligation – Claimant Having Sub-Contracted Construction Works To Third Party Company – Defendant Insurance Company Issuing Advance Payment Bond And Performance Bond In Favour Of Claimant In Respect Of Liabilities Of Third Party Company – Claimant Terminating Contract With Third Party And Seeking Payment Under Bonds – Defendant Refusing Payment And Claimant Issuing Proceedings – Claimant Applying For Summary Judgment On Basis Defendant's Liability To Pay Having Been Established As Bonds Being 'On Demand' – Whether Bonds Being 'On Demand' – Whether Claimant's Application Should Be Allowed.

Facts: These proceedings concerned an application for summary judgment by the Claimant against the Defendant for US$3,176,397 arising out of two Advance Payment Bonds and for US$1,623,711 arising out of two Performance Bonds. The application related to the question of construction in relation to the forms of bonds i.e. whether they were "on demand" bonds or whether they were bonds in the nature of a true guarantee.

The Claimant ("Caterpillar") was a German company and a subsidiary of an American company, which manufactures and provides industrial equipment and services. The Defendant ("MBAC") was a Liberian insurance company and a subsidiary of a Nigerian company.

In 2013 Caterpillar entered into contracts to deliver two power plants in Liberia: one at

Buchanan and the other at Tokadeh. Caterpillar also entered into two sub-contracts with International Construction & Engineering Inc. ("ICE") for the provision of construction services at Buchanan and Tokadeh. Both sub-contracts were in identical form: sub-clause 7.1 stated that ICE was required to procure an Advance Payment Bond ("APB") and a Performance Bond ("PB") in favour of Caterpillar. The APBs were intended to provide security to Caterpillar in the event that activities intended to be financed by an advanced payment were not carried out by ICE and the PBs were intended to provide security to Caterpillar in the event that the further obligations of ICE were not performed.

The general manager/CEO of MBAC stated he was unaware of the company selling "*on demand*" bonds. Whether the bonds were considered "*on demand*" bonds was a question of construction.

Disputes arose between Caterpillar and ICE after the payment had been made. Caterpillar subsequently purported to terminate the sub-contracts and demanded from ICE the return of the advance payment and a further sum by way of liquidated damages. ICE disputed the claims. Subsequently, Caterpillar demanded payment from MBAC under the bonds. MBAC refused to pay the sums demanded and as a consequence, legal proceedings issued. Caterpillar maintained that the bonds were "*on demand*" bonds, while MBAC maintained that its liability only arose to pay Caterpillar if it could be established (by admission by ICE, concession by MBAC or by an arbitration award) that ICE was liable to Caterpillar for the sums claimed.

Three issues were raised in the case for the Court's determination. The first issue was the true construction of the Bonds. The second issue was the construction of the Advance Performance Bonds and the third, the construction of the Performance Bonds.

With respect to the true construction of the Bonds, Caterpillar relied on the case of *Wuhan Guoyu v Emporiki Bank* [2012] EWCA Civ 1629 [2013] 1 AER (Comm) 1191. In that case Longmore LJ referred to "*Paget's presumption*", namely, that where an instrument:-

i. relates to an underlying transaction between parties in different jurisdictions;
ii. is issued by a bank;
iii. contains an undertaking to pay "on demand", and;
iv. does not contain clauses excluding or limiting the defences available to a guarantor, there will be a presumption that it will be considered an "on demand" bond or guarantee.

Counsel for Caterpillar submitted that the court should construe the bonds in the present case by application of Paget's presumption and Counsel for MBAC submitted that the court should follow the general principles governing the construction of contracts and should, therefore, seek to identify the meaning which the document would convey to a reasonable person.

With respect to the construction of the Advance Performance Bonds, the Court examined clauses 1 and 2, which described the nature of the obligation undertaken by MBAC, and it was noted that the undertaking is to "*pay forthwith on demand*" and "*without reference to the Contractor*". That which was to be paid is that which was "*claimed by the Beneficiary to be due from the Contractor.*" This strongly suggested to the Court that MBAC's liability was to pay that which was demanded by Caterpillar rather than that which was proved or admitted to be due from ICE to Caterpillar; however, the use of the word "*guarantee*" and the reference to a failure by ICE to perform its obligations was said to suggest that the parties intended that MBAC would only pay where ICE had actually failed to perform its obligations.

However, in the Court's opinion, Clause 2 put the matter beyond doubt. MBAC agreed that the decision of Caterpillar "*as to whether any money is payable by the Contractor to the Beneficiary or whether the Contractor has made any such default or defaults as aforesaid and the amount or amounts to which the Beneficiary is entitled by reason thereof will be binding*" on MBAC.

Furthermore, in accordance with the terms of Clause 2, MBAC was not entitled to "*ask the Beneficiary to establish its claims*" and was instead to "*pay the same to the Beneficiary forthwith on demand.*" Further, it was agreed that "*any such demand…shall be conclusive and binding notwithstanding any difference*" between Caterpillar and ICE.

With respect to the construction of the Performance Bonds, the Court formed the view that Clause 3 was suggestive of a true guarantee in that it provided that MBAC was liable to pay when ICE failed to pay lawful claims against it. However, the Court also found that that suggestion was inconsistent with Clause 4 which provided that MBAC was to pay Caterpillar once Caterpillar had "*declared*" that ICE was in default. MBAC was to pay "*unconditionally*" and without objection to the "*amount of damages claimed by*" Caterpillar. A declaration such as this was referred to in the following sentence as a "*demand*". Clause 4 went on to state that any such demand shall be "conclusive" as regards the amount due and payment to MBAC.

Clause 5 then provided that if MBAC did not pay with reasonable promptness, MBAC would be deemed to be in default 15 days after an additional notice demanding performance of MBAC's obligations. The Court stated that this Clause was consistent with MBAC's liability being derived from Caterpillar's demand rather than from proof that ICE was in fact liable to Caterpillar.

Held: The High Court (Teare J) found that:

Principles of Construction

- There was no conflict between the general principles governing the construction of contracts and the guidance of the Court in *Wuhan Guoyu v Emporiki Bank* [2012] EWCA Civ 1629 [2013] 1 AER (Comm) 1191.
- Where the four factors in "*Paget's presumption*" exist, then there is a presumption that the reasonable man would understand the instrument to be an "*on demand*" Bond.
- It was necessary in the circumstances to examine the background and the language of the instrument to see whether the reasonable man would consider the presumption to have been rebutted.

Construction of the Advance Performance Bond

- It was clear beyond doubt that MBAC was obliged to pay on demand by Caterpillar;
- If one were to construe the Advance Performance Bond by reference to "Paget's *presumption*", one would have reached the same conclusion. It should be noted that while the fourth condition required by "Paget's presumption", namely the absence of clauses excluding or limiting the defences available to a guarantor, was not satisfied, this was not fatal. *Wuhan Guoyu v Emporiki Bank* [2012] EWCA Civ 1629 [2013] 1 AER (Comm) 1191 considered.
- The instrument was undoubtedly intended to be an "*on-demand*" Bond.

Construction of the Performance Bond

- The Performance Bond was an "*on demand*" Bond.
- The conclusion would have been the same had the Court construed the bond by considering whether "*Paget's presumption*" applied. *Wuhan Guoyu v Emporiki Bank* [2012] EWCA Civ 1629 [2013] 1 AER (Comm) 1191 considered.
- Clause 4 demonstrated that the instrument was undoubtedly intended to be an "*on demand*" Bond.

Accordingly, having determined that both the Advance Performance Bonds and the Performance Bonds were "*on demand*" Bonds, MBAC had no real prospect of a defence and as such the Court granted Caterpillar Summary Judgment on its claims.

Ciara Davin B.L.