

**No Further Redaction Needed**

**THE HIGH COURT**

[2017 No. 272 S.]

**BETWEEN**

**KELLYS OF FANTANE (CONCRETE) LIMITED  
(IN RECEIVERSHIP)**

**PLAINTIFF**

**AND**

**BOWEN CONSTRUCTION LIMITED (IN RECEIVERSHIP) AND  
SOMAGUE ENGENHARIA SOCIEDAD ANONIMA TOGETHER  
TRADING AS BOWEN SOMAGUE JOINT VENTURE**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 1<sup>st</sup> day of June, 2017.**

1. These proceedings have been commenced by summary summons in which the plaintiff seeks judgment against each of the defendants on a joint and several basis in the sum of €6,364,978.00. The sums are claimed as being the amount of a conciliator's recommendation dated 15<sup>th</sup> December, 2015, in respect of certain disputes which are the subject of a plaintiff's notice to refer to arbitration dated 13<sup>th</sup> March, 2015, arising out of a subcontract agreement dated 19<sup>th</sup> January, 2009, pursuant to which the plaintiff agreed to carry out certain paving and other works for the defendants who had been engaged as contractor to Laois County Council as part of the N7 Castletown to Nenagh Road Scheme.

2. It is a condition of the contract between the defendants and Laois County Council ("LCC") (per subclause 13.1.11) duly incorporated into a subcontract between the plaintiff and the defendants that money recommended to be paid by a conciliator should be paid, even if notice of dissatisfaction with the conciliator's recommendation should be given, provided that the other party first gave the paying

party a bond executed by a surety approved by the paying party. It is also necessary that the other party give notice referring the matter to arbitration.

3. The conciliator made a recommendation in the sum of €6,364,978.00 (“the recommendation”) and the defendants served notice of dissatisfaction pursuant to the subcontract in respect of the said recommendation and the plaintiff has furnished the defendants with a bond executed by Ulster Bank Ireland DAC, a surety approved by the defendants. The plaintiff has also given notice referring the dispute between the parties to arbitration.

4. Clause 13.1.11 as amended reads 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.”

5. The defendants have brought an application to the court for an order staying these proceedings pursuant to Article 8(1) of the UNCITRAL Model Law on International Arbitration, as adopted by s. 6 of the Arbitration Act 2010, on the grounds that the dispute between the parties is the subject of an arbitration agreement.

6. The defendants accept that the plaintiff has complied with the terms of clause 13.1.11(b) of the agreement but not clause 13.1.11(a) on the basis that the plaintiff has submitted some additional heads of claim in the reference to the arbitrator. They also claim that the plaintiff has not brought these proceedings on foot of clause 13(b)(5) of the agreement and that this is not referred to in the summons.

7. So far as the latter point is concerned, I am satisfied that it is of no consequence. The summary summons makes clear the basis on which the claim is made. But in any event in an affidavit sworn to ground an application to enter this matter in the Commercial List, Mr. Brian McEnery averred to the fact 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 reads 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.”

8. The process for resolving disputes agreed between the parties in the agreement (as amended) is that there may be a referral of the dispute to arbitration and this is done by serving a notice to refer which will be deemed to be the commencement of the arbitration proceedings. The agreement also provides that no step will be taken in the arbitration after the notice to refer has been served unless the dispute has first been referred to conciliation. If neither party gives notice of dissatisfaction within 48 days after receiving the conciliator's recommendation, the recommendation shall be conclusive and binding on the parties. However, the agreement also provides that even if a notice of dissatisfaction is given, 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 and the matter proceeds to arbitration. That is what happened in this case.

9. In the course of submissions, Mr. O'Doherty on behalf of the defendants conceded that if the plaintiff complied with the provisions of clause 13.1.11(a) and (b), the defendants would have to pay the amount of the conciliator's recommendation in accordance with the terms of the agreement. There is no dispute that the plaintiff has complied with subclause (b) in providing a suitable bond. Neither is there any dispute that the matter is proceeding to arbitration. The only issue that arises so far as subpara. (a) is concerned is whether or not the plaintiff has sought to introduce additional claims in the notice to refer after the recommendation of the conciliator and the service of a notice of dissatisfaction.

10. The defendants argue that this matter is not justiciable by the courts but must be dealt with by the arbitrator and on that basis they seek to have the proceedings stayed. On the other hand, the plaintiff argues that if a dispute exists about whether the conciliator's recommendation has to be paid, this is a matter for the court. The plaintiff argues that, at the hearing of this motion, it is not necessary for the court to go into the merits as the court is merely asked to decide whether or not to allow these proceedings to continue or whether they should be stayed.

11. It seems clear to me on reading the agreement between the parties that they have worked out among themselves how they should resolve any disputes. The dispute resolution procedure which they have adopted involves the parties submitting to conciliation as the first step. If no notice of dissatisfaction is served after the conciliator makes a recommendation then that is the end of the matter and the recommendation becomes conclusive and binding. But if a notice of dissatisfaction is served, the parties have clearly agreed that, provided a suitable bond is put up and the

dispute is referred to arbitration, that the amount of the recommendation would be paid subject to any refund that might arise if the ultimate award by the arbitrator was less than the recommendation. The defendants are given the comfort of knowing that a bond is in place so that if it turns out that they are entitled to a refund either in whole or in part that there are funds available for that purpose.

12. There is an obvious logic to the terms agreed by the parties which is to encourage the resolution of their disputes by conciliation and without the necessity of further arbitration. By leaving open the possibility of revisiting the conciliator's recommendation at a subsequent arbitration, a dissatisfied party has an opportunity to have the dispute ventilated more fully but the requirement to pay upfront the amount recommended by the conciliator helps to reduce the prospects of another layer of dispute resolution.

13. The agreement at clause 13.1.11(b)(5) ringfenced 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.

14. I accept the submission made on behalf of the plaintiff that once the dispute is one concerning compliance with the conciliator's recommendation it is justiciable by the court.

15. The courts in this jurisdiction are fully supportive of the arbitral process. In doing so they give effect to the parties' agreement as to how to resolve disputes. But if the parties in this case have agreed that a conciliation process should take place

first, and that obligations arising out of that process of conciliation should be determined by the courts without any further conciliation or arbitration process, then the courts will give effect to that agreement. In doing so, the courts are not, in any way, undermining the arbitration process agreed by the parties.

16. Clause 13(b)(5) presupposes a dispute between the parties and gives the court power to deal with it. It is not necessary for the court to go into the merits of the dispute in a motion brought under Article 8 of the Model Law. Questions as to whether the conciliator's recommendation is binding or not and the construction of clause 13(b)(5) are matters for the court. It is important to note that while the court is given jurisdiction to deal with this discrete dispute, it does not in any way interfere with the continuing arbitral process which will ultimately determine what, if any, monies are due to the plaintiff and whether or not the defendants are entitled to a partial or total refund on such sums as are paid on foot of the conciliator's recommendation. That is a distinguishing feature of this case.

17. In the course of this application, some time was taken up with argument as to the standard of proof required in an Article 8 application. I have already expressed my view on this topic in *Sterimed Technologies International Limited & Ors v. Schivo Precision Limited & Ors* [2017] IEHC 35, where I stated:-

“So far as the issues arising in this Article 8 determination are concerned, I accept that the court will have to give more extensive scrutiny to the agreement and to give full judicial consideration to the issue as to whether or not there is an arbitration agreement between the parties. I would adopt the views expressed by Cregan J. in that regard in the case of *Lisheen Mine v. Mullock & Sons (Shipbrokers) Ltd* [2015] IEHC 50 for the reasons set out by the learned judge in that case.”

18. In this application, the issue is not whether or not there was an arbitration agreement or whether the parties to this litigation were parties to that agreement but rather whether the matter sought to be referred to arbitration by the defendants is within the scope of the arbitration agreement. This, in my view, requires full judicial consideration and it is on that basis I have approached the issues on this Article 8 motion.

19. In *Fiona Trust and Holding Corporation & Ors v. Privalov & Ors* [2007] 4 All E.R. 951, Lord Hoffman stated at para. [5]:-

“Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which the parties intended to express by the words which they used will be affected by the commercial background and the reader’s understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.”

20. At para. [7] of his speech, Lord Hoffman discussed the issue as to whether or not one could have part of a dispute dealt with by arbitration and part in another forum. He said:-

“If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the

contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, *one would need to find very clear language before deciding that they must have had such an intention.*” (Emphasis added)

21. In this case, I am satisfied that the parties did intend to divide the issues which might be decided by the arbitrator and those that might be decided by the court. Clause 13(b)(5) is clear in its terms and has a rational purpose, namely, to avoid, if possible, a second layer of dispute resolution for the reasons set out in para. 12 above. 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. Therefore, I am satisfied that the provisions of clause 13(b)(5) meet the test of rationality and business commonsense.

### **Conclusion**

22. 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 must be granted. However, for the reasons which I have outlined above, I am satisfied that the particular dispute between the parties as to whether the conciliator’s recommendation has to be paid following notice of dissatisfaction and pending the outcome of the arbitration is a discrete issue which the parties have agreed should be determined by the courts.



23. Accordingly, I refuse the application to stay these proceedings pursuant to Article 8 of the Model Law.

Approved 1-06-17  
B. J. [Signature]