[2021] IEHC 578

THE HIGH COURT

[2020 No. 199 MCA]

In the Matter of Section 6 (11) of the Construction Contracts Act, 2013

and

In the Matter of an Adjudication on a Payment Dispute Under Section 6 of the Construction Contracts Act, 2013

Between

Principal Construction Limited

Applicant

and

Beneavin Contractors Limited

Respondent

Summary judgment – Adjudication – Construction Contracts Act 2013 s. 6 (11) – Applicant seeking an order for leave of the Court to enforce or to enter judgment in the sum of €643,635.98 arising from a decision of an adjudicator – Whether the adjudicator lacked jurisdiction

Digest

Facts: The applicant, Principal Construction Ltd, applied to the High Court seeking an order for leave of the Court to enforce or to enter judgment in the sum of €643,635.98 arising from a decision of an adjudicator, dated 4 August 2020, pursuant to s. 6 (11) of the Construction Contracts Act 2013 and pursuant to O. 56B, r. 2 of the Rules of the Superior Courts. The applicant submitted that it was entitled to the order sought, essentially relying on the wording and purpose of the 2013 Act. The respondent, Beneavin Contractors Ltd, submitted that the wording "if binding" in s. 6 (11) has the effect of making it easier to resist enforcement in Ireland than in the UK, as these words are not contained in the corresponding provision in the UK legislation. The respondent submitted that, based on the wording of Clause 35 of the 2012 RIAI conditions of contract, since the final certificate was not disputed within the time provided it could not subsequently be referred to an adjudicator. Reliance for that submission was placed on the decision in The Trustees of the Marc Gilbard (2009) Settlement Trust v OD Developments and Projects Ltd [2015] EWHC 70 (TCC). Thus, it was submitted, the adjudicator lacked jurisdiction. The respondent further submitted that the adjudicator's refusal to allow the respondent to prosecute its counterclaim was made in material breach of natural justice. In support of that submission the respondent relied upon the decision in Pilon Ltd v Breyer Group Plc [2010] EWHC 837 (TCC).

Held by Meenan J that the words "if binding" in s. 6 (11) have to be read subject to the provisions of s. 6 (10) which states: "The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties". Meenan J noted that the UK authorities, notwithstanding the absence of such words in the corresponding section, had determined that the decision of an adjudicator may be unenforceable either on grounds of jurisdiction or natural justice. Therefore, it seemed to Meenan J that the words "if binding" ought to be interpreted in that narrow context. It seemed to Meenan J that the respondent had failed to appreciate that there is a distinction between the jurisdiction an adjudicator has to hear a claim and the adjudicator's decision on that claim. Meenan J held that the jurisdiction of the adjudicator derives, not from the contract, but rather from the terms of the 2013 Act, which confers on a party to a construction contract a clear unfettered right to refer a payment dispute for adjudication. Meenan J held that when the payment dispute has been referred, the adjudicator, in determining the dispute, may have regard to the terms of the construction contract itself and that was exactly what the adjudicator did in this case. Meenan J held that it was clear from the decision of the adjudicator that the substance of the counterclaim was considered in some detail. Meenan J was of the view that the adjudicator acted well within the principles set out by Coulson J in Pilon Ltd v Breyer Group Plc. Meenan J was satisfied that the adjudicator acted within jurisdiction and was not in breach of the rules of natural justice.

Meenan J held that the applicant was entitled to the reliefs sought in the notice of motion.

Reliefs granted.

16th 07 2021

JUDGMENT of Mr. Justice Meenan **delivered on the 16th day of July, 2021** .

The application

1.

. In these proceedings, the applicant seeks an order for leave of the Court to enforce or to enter judgment in the sum of €643,635.98 arising from a decision of an adjudicator, dated 4 August 2020, pursuant to s. 6 (11) of the Construction Contracts Act 2013 ("the Act of 2013") and pursuant to O. 56B, r. 2 of the Rules of the Superior Courts.

Background

2.

. In June 2017 the applicant was invited by the respondent, through its contract administrator, OKP, to tender for the construction and the extension of the Beneavin Lodge Nursing Home, Glasnevin, Dublin ("the project"). The applicant was not successful in its tender and the contract was awarded to Sammon Contracting Ireland Ltd. However, in April, 2018 Sammon Contracting Ireland Ltd went into examinership leaving the construction works on the project incomplete with approximately 40% carried out.

3.

. Discussions took place between the applicant and OKP with a view to the applicant taking over the construction work on the project. On 4 May 2018, the applicant submitted a tender. Following this OKP issued a detailed letter of intent. This letter of intent provided, *inter alia*, that the engagement of the applicant would be subject to a contract based on the 2017 RIAI yellow form of contract where quantities form part of the contract, as the 2012 RIAI contract was no longer in print and the only change thereto being references to the Act of 2013. The contract was executed on 14 November 2018. The applicant commenced work on the project.

4.

. Practical completion of the works on the project was achieved by the applicant on 23 November 2018, as confirmed by the issue of the certificate of practical completion by OKP on 6 December 2018. The applicant submitted its final account in the sum of €1,013,186.44 on 18 April 2019, which included a claim for variations in the total sum of €913,940.44. OKP did not accept the sum being claimed by the applicant.

5.

. The applicant did not accept OKP's assessment of its claim for variations and subsequently issued an adjusted reduced final account payment on 22 November 2019 in the sum of €989,730.91.

6.

. On 22 November 2019, the applicant commenced an adjudication under the Act of 2013 in respect of its final account. There were a number of adjudication processes which did not reach a conclusion in circumstances where the first adjudicator resigned, a second adjudicator also resigned and a potential third adjudicator was not appointed by reason of certain objections taken by the respondent.

7.

. On 3 December 2019, OKP issued a final certificate notice summary wherein it recommended payment to the applicant in the sum of €31,356.00. Subsequently, on 16 December 2019, OKP issued a final certificate payment recommendation stating that the applicant was not due any sum but, rather, the respondent was due a sum of €116,309.00 from the applicant.

8.

. Also, on 16 December 2019 a *"final certificate"* was issued by GI Martin Architects stating that the applicant owed the respondent the sum of €116,309.00. Apparently, the said architects were neither the architect nor the contract administrator as provided for under the said written contract.

9.

. On 5 June 2020, the applicant issued a notice of adjudication under the Act of 2013. On 4 August 2020, the adjudicator issued his decision awarding the applicant the sum of €643,635.98 against the respondent.

The Act of 2013

10.

. Section 2 (5) (b) of the 2013 Act provides:-

> "(5) This Act applies to a construction contract whether or not—
>
> (a) —-(b) the parties to the construction contract purport to limit or exclude its application."

Section 6 provides:-

> "(1) A party to a construction contract has the right to refer for adjudication in accordance with this section any dispute relating to payment arising under the construction contract (in this Act referred to as a 'payment dispute').
>
> (2) The party may exercise the right by serving on the other person who is party to the construction contract at any time notice of intention to refer the payment dispute for adjudication.
>
> —-
>
> (10) The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision.
>
> (11) The decision of the adjudicator, if binding, shall be enforceable either by action or, by leave of the High Court, in the same manner as a judgment or order of that Court with the same effect and, where leave is given, judgment may be entered in the terms of the decision.
>
> …"

11.

. The Act of 2013 was considered by Simons J. in Gravity Construction Ltd v. Total Highway Maintenance Ltd [2021] IEHC 19, though on an issue different to that in the instant case. Simons J. stated:-

> "… In brief, this legislation allows for the possibility of the making of, and enforcement of, adjudications in construction disputes on an expedited basis. Such adjudications are binding pending the resolution of the dispute between the parties by way of arbitration or legal proceedings. See section 6(10) of the Act as follows —-"

A similar statement was made by McLaughlin J. concerning the provisions of the Housing Grants (Construction and Regeneration) Act, 1996, a UK Act similar to the Act of 2013, in DG Williamson Ltd v. Northern Ireland Prison Service and NIO [2009] NIQB 8, as follows:-

> "…the starting point for a court dealing with a request for enforcement of the award of an Adjudicator is that it should work on the assumption that the award ought to be enforced, … The purpose of the legislation is to ensure speedy payment by dint of a summary process and, even where there is an error, to require the money to be paid and for the matter to be sorted out later when the contract disputes are settled finally by way of agreement, arbitration or litigation. …"

12.

. The purpose and aim of the Act of 2013 is to provide for a summary procedure to enforce the payment of moneys from one party to another in a

building contract, notwithstanding that it may ultimately transpire that such moneys are, in fact, not owed. This ensures that moneys are paid without having to await the outcome of arbitration or litigation, which, more often than not, involves delay. The necessary timelines for payment in the building and construction industry are very different to the timelines in arbitration and litigation. It is clear that the provisions of the Act of 2013 enable a speedy payment of moneys. Firstly, as referred to above, s. 2 (5) (b) makes clear that the Act applies irrespective of the terms of the construction contract agreed between the parties. Thus, there is a statutory right to refer a payment dispute to adjudication. Secondly, the decision of the adjudicator is binding until the payment dispute is finally settled by the parties, or until a decision arises from arbitration or litigation. Thirdly, there is a summary procedure for enforcing a decision of the adjudicator.

Submissions

13.

. The applicant submits that it is entitled to the order sought, essentially relying on the wording and purpose of the Act of 2013, as I have set out above.

14.

. The respondent submits that the wording *"if binding"* in s. 6 (11) has the effect of making it easier to resist enforcement in Ireland than in the UK, as these words are not contained in the corresponding provision in the UK legislation.

15.

. The respondent submits that, based on the wording of Clause 35 of the 2012 RIAI conditions of contract, since the final certificate was not disputed within the time provided it could not subsequently be referred to an adjudicator. Reliance for this submission was placed on the decision in The Trustees of the Marc Gilbard (2009) Settlement Trust v. OD Developments and Projects Ltd [2015] EWHC 70 (TCC). Thus, it was submitted, the adjudicator lacked jurisdiction.

16.

. The respondent further submitted that the adjudicator's refusal to allow the respondent to prosecute its counterclaim was made in material breach of natural justice. In support of this submission the respondent relied upon the decision in Pilon Ltd v. Breyer Group PLC [2010] EWHC 837 (TCC).

Consideration of submissions

17.

. The words *"if binding"* in s. 6 (11) have to be read subject to the provisions of s. 6 (10) which states:-

> "(10) The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties —-"

The UK authorities, notwithstanding the absence of such words in the corresponding section, have determined that the decision of an adjudicator may be unenforceable either on grounds of jurisdiction or natural justice. Therefore, it seems to me that the words *"if binding"* ought to be interpreted in that narrow context.

18.

. On the issue of " *lack of jurisdiction*", the respondent maintains that as Clause 35 (i) of the contract provides:-

> "[U]nless the Architect receives notice of arbitration within ten working days or such other period as may be stated in the Appendix from the Employer or Contractor he shall issue the Final Certificate."

Clause 35 (j) provides that:-

> "The Final Certificate shall be conclusive in any proceedings arising out of this Contract (whether by arbitration under Clause 38 of these Conditions or otherwise) that the Works have been properly carried out and completed in accordance with the terms of this Contract and that any necessary effect has been given to all terms of this Contract which require an adjustment to be made to the Contract Sum."

The respondent states that the applicant declined to commence an arbitration to challenge the notice of intention to issue within the requisite ten-day period. The final certificate was issued on 16 December 2019, the notice of adjudication that led to the decision was not issued until 5 June 2020 and, so, the respondent maintains that the applicant ought to have been barred from referring the matter to adjudication once the final certificate was issued.

19.

. The respondent relied on the decision in Marc Gilbard (referred to above). In that case the contractor was required by the construction contract in question to challenge the validity of the final certificate within 28 days and did so by commencing court proceedings. Those proceedings were not actively prosecuted. After a year the contractor then sought a declaration as part of those proceedings that he could commence adjudication proceedings. Coulson J. declined to grant the declaration sought. However, under the heading *"Fettering the Right to Adjudicate 'At Any Time'"* Coulson J. stated:-

> "(35) Ms Slow raised a further point which ought to be addressed separately. She said that if I concluded, for whatever reason, that the defendant could not issue subsequent adjudication proceedings, then I was fettering their right to adjudicate 'at any time'.
>
> (36) It is certainly correct that, in general terms, a party to a construction contract has a right to adjudicate at any time: see Herschel Engineering Ltd v Breen Property Ltd (No. 1) [2000] 70 Con LR1, [2000] BLR 272 and Connex South Eastern Ltd v MJ Building Services Group PLC [2004] BLR 333. Those cases also say that this general right co-exists with the right to arbitrate or go to court, so that at least the possibility of concurrent proceedings is not prohibited.
>
> (37) However, on analysis, there is no fetter or prohibition here. There are a number of reasons for that. First, there is nothing to prevent either party from commencing adjudication proceedings tomorrow. The defendant is not fettered or prohibited from commencing adjudication proceedings. Of course, because such proceedings were not commenced within 28 days of the Final Certificate, the Final Certificate would be conclusive evidence on the subjects identified under clause 1.9. But nothing is preventing the defendant from issuing adjudication proceedings, so there is no fetter."

20.

. Following this decision, it seems to me that the respondent has failed to appreciate that there is a distinction between the jurisdiction an adjudicator has to hear a claim and the adjudicator's decision on that claim. The jurisdiction of the adjudicator derives, not from the contract, but rather from the terms of the Act of 2013, which I have set out above. This Act confers on a party to a construction contract a clear unfettered right to refer a payment dispute for adjudication. When the payment dispute has been referred, the adjudicator, in determining the dispute, may have regard to the terms of the construction contract itself. That is exactly what the adjudicator did in this case where he concluded, having considered the matter in detail:-

> "20. As a result, it appears to me on this basis alone, if not for other breaches of the provisions of the 2012 RIAI Contract as amended by the Special Conditions, that the Final Certificate for Payment as issued on 16th December 2019 may be invalid."

21.

. The respondent submitted that the adjudicator was in breach of the rules of natural justice in that he refused to allow the respondent prosecute its counterclaim. Reliance was placed on the decision in Pilon Ltd v. Breyer Group Plc, in that case the claimant carried out construction work for the defendant in two batches and referred a dispute over payment for the second batch to adjudication. The defendant relied on an alleged overpayment in respect of the first batch of work as a defence to the application. The adjudicator held he had no jurisdiction to consider this defence. The Court

had to consider whether the adjudicator took an erroneously restrictive view of his own jurisdiction, and whether the defendant was entitled to raise a defence or cross claim based on an alleged overpayment. On the issue of jurisdiction, Coulson J. stated:-

> "(17) An adjudicator can make an inadvertent mistake when answering the question put to him, and that mistake will not ordinarily affect the enforcement of his decision: see Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] BLR 49. If, on the other hand, he considers and purports to decide an issue which is outside his jurisdiction, then his decision will not be enforced: see the discussion in Sindall Ltd v Solland [2001] 3 TCLR 712. But there is a third category, which is where the adjudicator takes an erroneously restrictive view of his own jurisdiction, with the result that he decides not to consider an important element of the dispute that has been referred to him. This failure is usually categorised as a breach of natural justice. …"

22.

. Having reviewed a number of authorities, Coulson J. stated:-

> "(22) As a matter of principle, therefore, it seems to me that the law on this topic can be summarised as follows:

22.1 The adjudicator must attempt to answer the questions referred to him. The question may consist of a number of sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable: see Carillion v Devonport.22.2. If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed to even consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see Ballast, Broadwell, and Thermal Energy.22.3. However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see Bouygues and Amec v TWUL.22.4. It goes without saying that any such failure must also be material: see Cantillon v Urvasco and CJP Builders Ltd v William Verry Ltd [2008] EWHC 2025 (TCC), [2008] BLR 545. In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication: see Keir Regional Ltd v City and General (Holborn) Ltd [2006] EWHC 848 (TCC), [2006] BLR 315.22.5. A factor which *may* be relevant to the court's consideration of this topic in any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to seek a tactical advantage. This was plainly a factor, which in my view rightly, Judge Davies took into account in *Quartzelec* when finding against the claiming party."

23.

. In the instant case, the *"counterclaim"* was set out somewhat briefly at section 9 of the respondent's response to the adjudicator. The respondent referred to clause 29 (a) of the RIAI standard conditions where the contractor (the applicant) fails to complete the works by the date for completion or any extended time. It provides that the contractor (the applicant) shall pay or allow the employer (the respondent) *"the sum named and at the rate stated in the Appendix as 'Liquidated and Ascertained Damages' …"*. The respondent maintained this equated to the sum of €134,000.00. The respondent sought this from the adjudicator.

24.

. In considering the counterclaim, the adjudicator stated as follows:-

> "25. —- This jurisdiction is to adjudicate on a single dispute unless the parties clearly and expressly consent otherwise. While BCL [the respondent] is entitled to plead a full defence in the Response to Referral including abatement, set-off etc., it cannot mount a counterclaim which in law is a separate action. I therefore have no jurisdiction to consider BCL's counterclaim."

In holding this, the decision of the adjudicator was supported by decision of the UK Supreme Court in Bresco Electrical Services Ltd (In Liquidation) v. Michael J. Lonsdale (Electrical) Ltd [2020] UKSC 25 where Lord Briggs in giving the judgment of the Court stated:-

"… The set-off may be advanced by way of defence to the exclusion of the claim referred to adjudication, but not as an independent claim for a monetary award in favour of the respondent to the reference. …"

25.

. In any event, it is clear from the decision of the adjudicator that the substance of the counterclaim was considered in some detail. The basis of the counterclaim was that the respondent was entitled to a sum of €134,000.00 arising from delays on the part of the applicant. The adjudicator considered the matter of delay and concluded that, in fact, the applicant was delayed by reason of delays caused by the respondent, " *OKP and the design team by their instructed variations amounting to an assessed amount of €568,198.00 or some 19.88% of the agreed Contract Sum of €2,858,037.00. ...*". The adjudicator further held that the applicant was entitled to an award arising from such delay.

26.

. Having regard to the foregoing, I am of the view that the adjudicator acted well within the principles set out by Coulson J. in Pilon Ltd v. Breyer Group Plc, set out above.

Conclusion

27.

. By reason of the foregoing, I am satisfied that the adjudicator acted within jurisdiction and was not in breach of the rules of natural justice. The applicant is therefore entitled to the reliefs sought in the notice of motion herein.

28.

. I will hear the parties as to the appropriate orders to make. As this judgment is being delivered electronically, the parties have fourteen days within which to make short written submissions (no more than 1,000 words) on any consequential orders.