No Redaction Needed

THE HIGH COURT

JUDICIAL REVIEW [2020] IEHC 623

[Record No. 2020/872 JR]

BETWEEN

KEVIN O'DONOVAN

AND THE CORK COUNTY COMMITTEE OF THE GAA

APPLICANTS

AND

NAEL G. BUNNI AND JAMES BRIDGEMAN

RESPONDENTS

AND

OCS ONE COMPLETE SOLUTION LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered electronically on the 2nd day of December, 2020

Introduction

1. The notice party was engaged by the applicants to carry out electrical works in the redevelopment of Páirc Uí Chaoimh and a centre of excellence at Monaghan

Road, Ballintemple, Cork. The notice party has submitted to adjudication a dispute in respect of payment alleged to be owed to it by the applicants in the sum of just over €1m. The second named respondent was appointed by the first named respondent, who is the chairman of the Construction Contracts Adjudication Panel, to act as adjudicator in respect of the dispute.

2. The applicants challenged his jurisdiction to enter upon the adjudication. When the second respondent, having heard arguments from the applicants and the notice party, expressed in a written expression of *"views"* that he had jurisdiction to deal with the payment dispute by way of adjudication, the applicants withdrew from the adjudication and obtained leave of the High Court on 19th November, 2020 to challenge the jurisdiction of the second respondent to enter upon an adjudication of the payment dispute. They also obtained a stay on the adjudication pending the determination of the judicial review proceedings.

3. In essence, the applicants maintain that as the bulk of the works in respect of which payment is claimed arose under the terms of a Letter of Intent dated 10th June, 2016, which predated the coming into force of the adjudication provisions of the Construction Contracts Act 2013, the second respondent does not have jurisdiction to enter on the adjudication of the dispute.

4. In this application, the notice party seeks an order lifting the stay on the adjudication.

Background

5. In order to understand the issues that arise on this application, it will be helpful to set out a chronology of the relevant events that have transpired in the contractual

relationship between the parties to date. These can be summarised in the following way:-

- 10th June, 2016 – a Letter of Intent was signed by the parties, whereby the notice party was engaged to carry out electrical works on the redevelopment project at Páirc Uí Chaoimh. It was not possible to enter into a formal contract at that time as the applicants were awaiting formal EU clearance for government funding to be released to them.
- 26/06/2016 – EU clearance is given for the funding.
- August 2016 – commencement of works.
- 12th May, 2017 – a formal contract is signed by the parties. Clause 42 thereof, provides that it will replace and supersede the Letter of Intent.
- 19th July, 2017 – applicants take possession of the redeveloped stadium.
- 18th December, 2017 – a final account in the sum of €6.6m was submitted by the notice party.
- July 2017 – May 2018 – notice party seeks agreement of applicants to refer matter to conciliation.
- June 2018 – commencement of conciliation process.
- 8/5/2019 – applicants withdraw from conciliation process.
- 14/7/2020 – applicants seek appointment of arbitrator to determine the final amount payable to the notice party under the contract.
- 25/9/2020 – an arbitrator is appointed by the President of Engineers Ireland.
- 29/9/2020 – the notice party serves notice of intention to refer a payment dispute to adjudication in respect of a claim for containment

works in the sum of approximately €1m pursuant to s.6.2 of the Construction Contracts Act, 2013.

- 20/10/2020 – on the application of the notice party, the first respondent appoints the second respondent to act as adjudicator in respect of the payment dispute.
- 23/10/2020 – arbitrator holds preliminary meeting in respect of the dispute concerning the final account. A timetable is agreed, which involves steps being taken up to September 2021.
- 23/10/2020 – applicants submit written objections to the adjudicator, contesting his jurisdiction to enter upon the adjudication.
- 24/10/2020 – written submissions from the notice party on the jurisdiction issue.
- 2/11/2020 – the adjudicator issues written *"Views of Adjudicator on Jurisdiction"*, wherein he determines that he has jurisdiction to enter upon the adjudication in respect of the payment dispute concerning the containment works.
- 19/11/2020 – applicants obtain an order from the High Court giving them leave to challenge the jurisdiction of the adjudicator to enter upon the adjudication and a stay is placed on the continuance of the adjudication pending the determination of the judicial review proceedings.
- 25/11/2020 – the present application is made by the notice party to lift the stay.

- 30/11/2020 – the judicial review proceedings were admitted to the commercial list and are allocated a hearing date of 25th and 26th February 2021.

Submissions on Behalf of the Notice Party

6. Counsel for the notice party, Mr. Trainor SC, began by stating that the burden of proof lay on the applicants to establish that it was appropriate that the stay should be granted and continued: see *O'Brien v. An Bord Pleanála* [2017] IEHC 510. He stated that the test which the court should apply in deciding whether to grant a stay in judicial review proceedings, was set out by Clarke J. (as he then was) in *Okunade v. Minister for Justice* [2012] 3 I.R. 152 at para. 104.

7. Counsel submitted that there were compelling reasons why the court should lift the stay on the adjudication process in the circumstances of this case. It was submitted that the object of the adjudication provisions in the Construction Contracts Act 2013, was to enable a fair and expeditious determination of payment disputes which arose under construction contracts. To that end, s.6 of the Act, imposed very tight timelines on the adjudicator. He had to deliver his decision on the dispute within 28 days, which could be extended by him to 42 days with the consent of the referring party, or within such further time as may be agreed by both parties to the dispute. A dispute could be referred to adjudication at any time by either of the parties to the construction contract. A dispute could even be referred while works were being carried out under the contract. The essential point was that the statute provided for a fast and efficient method of determining such disputes.

8. Once a particular period had been decided upon, and in this case the period was 42 days, which was due to expire on 6th December, 2020, the adjudicator had to

issue his determination within that period. In the present case, the stay which had been imposed by virtue of the order of Meenan J. made on 19th November, 2020, prevented the adjudicator from considering the matter. However, the fact that a stay had been put in place, did not mean that the time allowed under the Act for the determination of the dispute ceased to run. Thus, if the stay remained in place until the determination of the substantive judicial review proceedings in February 2021, or later if appealed, the net effect of the stay would be that the notice party would be deprived of his statutory right to seek adjudication of the payment dispute, because the adjudicator simply could not issue a determination after 6th December, 2020.

9. It was submitted that in these circumstances, it would be grossly unfair on the notice party for the court not to lift the stay, as its continued imposition would effectively deprive him of his rights under the 2013 Act.

10. Counsel further submitted that there would be no effective prejudice to the applicants by lifting the stay. That would merely permit the adjudication process to proceed to a determination, but would have no practical adverse effect on the applicants, because an adjudicator's award could only be enforced by an application to court, at which stage the applicants would be entitled to raise the jurisdiction issue. Thus, there was no question that they would be locked out of their right to have that issue determined, prior to the enforcement of any award that may be made against them in the adjudication process. Whereas, for the reasons set out above, it was submitted that the converse was the case if the stay was left in place.

11. It was submitted that the applicants were guilty of delay in seeking the stay on the adjudication process. It was submitted that they could have sought injunctive relief prior to the commencement of the adjudication process. That would have avoided the notice party incurring the expense of preparing a detailed submission to

adjudication and incurring liability for the costs of the adjudicator. Instead, the applicants had waited until a ruling was made against them by the adjudicator on the jurisdiction issue, at which stage they withdrew from the adjudication and made their *ex parte* application to the court on 19th November, 2020. It was submitted that the court was entitled to have regard to the unreasonableness of that conduct on the part of the applicants.

12. It was further submitted that the conduct of the applicants in seeking and obtaining a stay on the adjudication pending the determination of their challenge to jurisdiction by way of judicial review proceedings, constituted an attack on the dispute resolution process that had been put in place by the Oireachtas in the 2013 Act. It was submitted that having regard to the decision in the *Okunade* case, that when considering whether to grant a stay in public law disputes, the court was entitled to have regard to the public interest in the orderly operation of statutory schemes that were put in place by legislation. It was submitted that it was not in the public interest to allow parties to an adjudication to avoid that process by simply challenging the jurisdiction of the adjudicator and then going to court and obtaining a stay preventing the continuance of the adjudication process while that issue was determined in judicial review proceedings. It was further submitted that if the applicants were allowed to adopt that course of action, others would be tempted to do likewise, thereby undermining the adjudication process established in the 2013 Act.

13. In this regard, counsel referred to the judgment in the *Okunade* case, where Clarke J. stated as follows at para. 92:-

> *"However, there is a further feature of judicial review proceedings which is rarely present in ordinary injunctive proceedings. The entitlement of those who are given statutory or other power and authority so as to conduct*

specified types of legally binding decision making or action taking is an important part of the structure of a legal order based on the rule of law. Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise. It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way. Regulators are entitled to regulate. Lower courts are entitled to decide. Ministers are entitled to exercise powers lawfully conferred by the Oireachtas . The list can go on. All due weight needs to be accorded to allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion. It seems to me that significant weight needs to be attached to that factor in all cases."

14. Counsel further submitted that similar dicta were to be found in the Supreme Court decision in *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42, where O'Donnell J. stated at para. 10:-

> *"A related problem arises in the field of public law where application of a Campus Oil type of approach can tend to give too much weight to the asserted impact on an individual or business unless it is recognised that the enforcement of the law is itself an important factor and that even temporary disapplication of the law gives rise to a damage that cannot be remedied in the event that the claim does not succeed. The real insight of Okunade v. Minister for Justice [2012] IEHC 49, [2012] 3 I.R. 152, was to require that weight be given to this factor in any application for an interlocutory injunction. C.C. showed that this factor was also to be taken into account in any application for a stay pending appeal."*

15. It was further submitted on behalf of the notice party that the making of a determination by the adjudicator would have a beneficial effect, in that the making of such determinations in favour of a party, often had the effect of resolving the payment dispute at an early stage.

16. It was further submitted that the court was entitled to take into account the relative strengths of the cases made by each of the parties. It was submitted that in this case there was a very net issue in relation to the jurisdiction of the adjudicator. The applicants argued that the contract between the parties was based on the Letter of Intent dated 10th June, 2016, which predated the coming into force of the adjudication provisions of the 2013 Act on 25th July, 2016. The notice party relied on the contract executed between the parties on 12th May, 2017. It was submitted that this contract put the matter of jurisdiction beyond doubt, because clause 42 thereof, which dealt with interpretation and administration of the contract, provided as follows:-

> *"These Conditions of Contract represent the entire agreement between the Parties in connection with the subject matter hereof and it shall supersede and replace any and all prior agreements or understandings, representations or communications (including any Letter of Intent) relating to the same subject matter. The Contractor declares that it has not relied on any representations except as expressly set out herein."*

17. It was submitted that having regard to the provisions of clause 42, the notice party had a strong case that its payment dispute, which post-dated the completion of the works in July 2017, was governed by the formal written contract of 12th May, 2017, and therefore came within the ambit of the adjudication provisions in the 2013 Act.

18. In support of this submission, counsel referred to the judgment of Briggs L.J. in the Supreme Court of the United Kingdom in *Bresco Electrical Services Limited (In Liquidation) v. Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, where the court refused to grant an injunction restraining the adjudication pending the determination of legal proceedings concerning the jurisdiction of the adjudicator to enter on the dispute. At para. 70 of his judgment, Briggs L.J. stated as follows:-

> *"[70] In my view, consideration of costs and burdens on the court militate against, rather than in favour, of admitting applications for injunctions to restrain adjudications before they have run their course. The tight time limits and documents-based investigatory nature of construction adjudication means that, if left to proceed, it will probably be completed before any opposed injunction application will be determined by the court, and at a fraction of the likely costs. The outcome of the adjudication may mean that no risks of the respondent losing the benefit of insolvency set-off arise, for example if the respondent is successful. Opposition to such attempts to enforce as there may be can then, if necessary, be dealt with on their merits, when the outcome of the adjudication is known, rather than having to be guessed at."*

19. Finally, it was submitted that having regard to all of these matters, the balance of justice lay in favour of lifting the stay, as the injustice that would be suffered by the notice party if the stay were not lifted, whereby it would effectively be deprived of its right to adjudication of the dispute as provided for under the 2013 Act, outweighed any injustice that could be suffered by the applicants due to the lifting of the stay, as they could still challenge the jurisdiction of the adjudicator at the enforcement stage of any award that may be made by the adjudicator. Accordingly, it was submitted that the court should lift the stay and permit the adjudication to continue.

Submissions on Behalf of the Applicants

20. Mr. Lucey SC on behalf of the applicants began by stating that he accepted that the applicants bore the burden of proof of establishing that it was appropriate to impose a stay on the adjudication proceedings at the outset and also that the stay should be continued until the determination of the judicial review proceedings. He also accepted that the test which the court should apply in determining whether it was appropriate to grant a stay, was that set out in the *Okunade* decision.

21. In response to the notice party's core objection to the stay, which was to the effect that they would be deprived of their statutory right under the 2013 Act to have the payment dispute submitted to adjudication in the event that a stay was granted, because the stay would not prevent time running and therefore once the stay existed beyond 6th December, 2020, the adjudicator would not have jurisdiction to issue any determination; counsel stated that the applicants were not seeking to deprive the notice party of its statutory rights. To that end, the court should have regard to a letter which was sent on behalf of the applicants on 20th November, 2020 making an open offer to consent to the adjudication before the second respondent resuming in the event that the judicial review proceedings were determined against them. It was submitted that the existence of that offer, meant that the notice party's right to have the dispute determined on adjudication, would be protected in the event that the jurisdiction issue was determined in favour of the notice party.

22. It was submitted that the court should also have regard to the fact that the notice party accepted that the applicants were entitled to institute the judicial review proceedings to challenge the jurisdiction of the adjudicator. Those proceedings would be determined within a relatively short period of time. It was submitted that in

circumstances where the offer outlined above, had been made by the applicants, then at worst, if the judicial review proceedings were decided in favour of the notice party's contention, the adjudication would continue in a number of months' time. Thus, the notice party was not being deprived of its right to adjudication by the stay, it was merely being postponed, in the event that the jurisdiction issue was determined in its favour.

23. Mr. Lucey SC further submitted that the court should consider this application within the overall circumstances of the case. Thus, it was necessary to be aware of the fact that the notice party had already been paid approximately €7.1m under the contract. Their final claim in the sum of approximately €6.6m had been referred to arbitration. The arbitrator had been appointed and had already held a preliminary meeting, wherein a timetable had been set out, in which certain steps had to be taken. Those steps were scheduled to be completed by September 2021, so it was reasonable to assume that the arbitration hearing would take place at some time in Q4 of 2021. It was also noteworthy that the claim which had been sent to arbitration, included the claim the subject matter of the adjudication.

24. The court was also urged to have regard to the fact that there had been inordinate delay on the part of the notice party in seeking adjudication of this aspect of its claim. The notice party had completed its works in the redevelopment project in August 2017. They had initially sought conciliation in relation to the entire of the final claim made by them. It was not until over three years after completion of the contract works, that they sought adjudication of a relatively small part of their overall final claim. Thus, while the adjudication process was a fast track method of resolving payment disputes, it could not be said that the notice party had acted swiftly in instigating that process. Indeed, they had only done so after the matter had been

referred to arbitration and at a time when they had participated in the preliminary meeting with the arbitrator. It was submitted that the delay on the part of the notice party was a factor to which the court should have particular regard.

25. It was further submitted that the notice party's application was futile, in that if the stay was lifted and if a decision was given by the adjudicator, the applicants could challenge that decision on grounds of jurisdiction at the enforcement stage. If that happened to be in advance of the time when the judicial review proceedings herein where determined, it was almost inevitable that the High Court would defer a decision on enforcement of the adjudication award, until the court had delivered its decision on the jurisdiction issue. Thus, it was submitted that lifting the stay at this stage, would be of no practical benefit to the notice party in the long run. It was submitted that where a party genuinely contested the jurisdiction of a body to decide a particular dispute before it, it made sense to have the jurisdiction issue decided prior to embarking on the substantive determination.

26. It was submitted that while the notice party had urged the court to have regard to the general public interest in promoting the adjudication process as established under the 2013 Act, the present application was not an attack on the provisions of the 2013 Act; nor did it set a precedent that would have any consequences for other parties. It was simply a challenge to the jurisdiction of the adjudicator in the particular circumstances of this case, where it was alleged by the applicants that the contract in question predated the coming into force of the 2013 Act. As the Act applies to all construction contracts entered into after 25th July, 2016, it was very unlikely that a similar jurisdiction point would arise in other cases. Thus it was submitted that the public interest in the granting or lifting of a stay was not a relevant factor in this case.

27. Counsel referred to *Hines Greit II Ireland Fund ICAV v. Bunni & Others* (High Court record no.: 2020/314 JR), which was the only other Irish case on the point. In that case, an order had been made by the High Court on 8th May, 2020 granting leave to the applicant to challenge the adjudication on grounds of lack of jurisdiction and a stay had been granted on the adjudication. The granting of the stay had not been challenged in that case.

28. Counsel submitted that the court was also entitled to have regard to the fact that the applicants' case was a strong one in relation to the jurisdiction issue. The High Court had already found that the applicants had an arguable case when granting leave to seek relief by way of judicial review. However, counsel stated that there was ample legal authority for the proposition that a Letter of Intent could give rise to binding contractual relations between the parties: see generally Contract Law (2nd ed.) by McDermott & McDermott, paras. 4.73 – 4.78, and Hudson's Building and Engineering Contracts (14th ed.), para 3-021, and cases therein mentioned.

29. It was submitted that on the facts of this case, it was clear that the Letter of Intent was detailed and the appendices thereto were substantial. It established a contract between the parties. The reason that a Letter of Intent had been used was solely due to the fact that the applicants were not in a position to enter into a formal contract until EU clearance had been given for the grant of funding to them by the Government and until the funding itself had been made available to them. It was submitted that having regard to the terms of the Letter of Intent and the documentation which accompanied it, there was a strong case to be made that it constituted a contract between the parties.

30. This was further supported by the fact that 90% of the contract works had in fact been carried out by the notice party prior to signing the formal contract on 12th

May, 2017. While clause 42 of that contract stated that it superseded all previous agreements, including the Letter of Intent, it was submitted that that merely had prospective effect in relation to the contractual relationship between the parties from that date onwards. Thus, it was submitted that the contract on which the claim arose, was one which predated the coming into force of the 2013 Act. The court was entitled to have regard to the fact that the applicants had a strong case to make on the jurisdiction issue the subject matter of the judicial review proceedings.

31. Finally, it was submitted that the key question that the court had to determine in relation to granting or lifting the stay was whether there would be more injustice to the applicants by lifting the stay, if it should turn out that the judicial review was ultimately determined in its favour on the jurisdiction point; than by leaving the stay in place and the judicial review was ultimately determined in favour of the notice party. It was submitted that because the applicants were willing to agree to the resumption of the adjudication in the event that the judicial review proceedings were determined against them, which proceedings were going to be determined within a relatively short period of time, the balance of justice lay in favour of leaving the stay in place. Otherwise, there could be a binding decision, albeit one that was unenforceable, in existence against the applicants pending the determination of the judicial review proceedings.

32. It was submitted that having regard to all the matters set out above, the court should leave the stay which had been imposed by order of the High Court on 19th November, 2020 in place pending the determination of the judicial review proceedings.

Conclusions

33. There is no dispute between the parties that the burden of proof in relation to the appropriateness of continuing the stay, rests on the applicants.

34. The parties were also agreed that the test which the court should apply when deciding whether it is appropriate to continue the stay, is that set down by Clarke J. (as he then was) in the *Okunade* case, which is in the following terms:-

> *"[104] As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:-*
>
> > *(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;*
> >
> > *(b) the court should consider where the greatest risk of injustice would lie. But in doing so the court should:-*
> >
> > > *(i) give all appropriate weight to the orderly implementation of measures which are prima facie valid;*
> > >
> > > *(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,*
> > >
> > > *(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;*
> > >
> > > *but also,*

(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) in addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,

(d) in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

35. The court also accepts that in considering this matter, the court has to have regard to the fact that there is the public interest to be considered in the preservation and support of statutory schemes, such as the adjudication process, that have been put in place by the Oireachtas. The purpose of the adjudication process provided for in the Construction Contracts Act 2013, is to provide a fast, fair and efficient method of determining payment disputes which arise in connection with construction contracts. To that end, the adjudication process has been put in place, whereby such disputes are determined within a tight timeframe, as provided for under s.6 of the Act. Such dispute is adjudicated upon by an independent person, who has expertise in the area of construction contracts. The timeframes provided for in the Act are very tight, so as to ensure that such disputes are adjudicated upon quickly. This is seen as being beneficial to both parties to the construction contract. The court is obliged to have regard to these objectives and the public interest in the promotion of same, when

coming to its decision on this application. In this regard, the court has borne in mind the dicta of Clarke J. in the *Okunade* case and the dicta of O'Donnell and O'Malley JJ. in the *Krikke* case, referred to earlier in the judgment.

36. However, I am satisfied that the court must also have regard to the overall circumstances of the case. In other words, one cannot look at this particular payment dispute in isolation from the history of the particular construction contract, or from the surrounding facts, which are of relevance to the contractual relationship between the parties.

37. In this regard, the court has to take account a number of matters: firstly, that the notice party has already been paid a very substantial sum under the contract in question; secondly, that its substantial final claim has been referred to arbitration, which has commenced by the holding of a preliminary meeting and the issuance of directions by the arbitrator of a schedule, which requires that certain steps are taken by the parties within the next ten months and that in the circumstances, it is reasonable to assume that the arbitration hearing itself will take place in Q4 of 2021.

38. The court is also satisfied that the applicants are correct when they state that the court must have regard to the delay on the part of the notice party in invoking the adjudication process in respect of its containment claim. The court has to have regard to the fact that the works were completed in August 2017, and it was not until September 2020 that the matter was referred to adjudication. Thus, while adjudication is an extremely fast dispute resolution process, the notice party delayed for an inordinate period in invoking such process.

39. The central core of the notice party's argument, is to the effect that if the stay is left in place, the time for completion of the adjudication would continue to run and therefore, the stay would effectively mean that the adjudicator could not issue his

decision on or before 6th December, 2020 and once that date passed, he could not issue a decision at all; meaning that the existence of the stay would effectively deprive the notice party of its statutory right to have its payment dispute submitted to adjudication. The court does not regard this argument as being well founded, in light of the fact that by letter dated 20th November, 2020 the applicants offered to consent to the resumption of the adjudication in the event that the jurisdiction issue is found against them in the judicial review proceedings.

40. Mr. Trainor SC on behalf of the notice party, countered that submission, by submitting that while it is possible under s.6 of the 2013 Act for the parties to agree a longer period than 42 days, that clearly meant that the adjudication process would start on a particular date and continue uninterrupted for such longer period as may be agreed by the parties. It did not envisage that the adjudication process would be suspended for an indefinite period, while other proceedings were determined and then resumed at some indeterminate time in the future when those proceedings had concluded. Furthermore, he submitted that there was no guarantee that the adjudicator would be in a position to deal with the matter at the time when it was ready to be resumed and it would prolong the adjudication, as he would have to be allowed some time to read back into the documentation. Thus, it was submitted that the offer, while superficially attractive, was not something that was envisaged or permitted by the statute.

41. I do not think that this contention is well founded. The Act clearly envisages an adjudication continuing beyond the 42-day period by agreement of the parties. The court is of the view that once that is possible under the Act, it is possible for the parties to agree to a period that is long enough to allow for the determination of the judicial review proceedings, both in the High Court and if necessary, on appeal.

42. In this regard, the court is satisfied that the substantive judicial review proceedings, which involve a net issue of law, concerning the construction of two documents and in essence boils down to the true construction of clause 42 of the contract executed on 12th May, 2017. Those proceedings will be heard in February 2021. Given that it is a net point; a decision will probably issue shortly thereafter. Even if it is appealed to the Court of Appeal, such appeal would be determined as an interlocutory appeal and therefore will also be determined within a short period of time. Accordingly, the court is satisfied that the judicial review proceedings will be finally determined within a short number of months from the present time.

43. That being the case, the court is satisfied that in light of the offer made by the applicants, the continuance of the stay herein would effectively mean that the notice party's right to an adjudication of its payment dispute would be deferred for a number of months, in the event that the judicial review proceedings were determined in its favour. The court is further satisfied that the granting of a stay would not deprive the notice party of its statutory right to have its payment dispute submitted to adjudication, nor would it cause undue prejudice to the notice party by the delay in obtaining an adjudication award in its favour.

44. There is also substance to the argument that even if the stay is lifted, that would be somewhat futile as a remedy for the notice party, due to the fact that in order for any adjudication award to be enforceable, it has to be enforced by order of the High Court made pursuant to O.56B of the RSC, at which stage the applicants would be entitled to raise the jurisdiction issue as a bar to enforcement. The court accepts the submission of counsel for the applicants, that if a court on the consideration of an application to enforce the adjudication award, were faced with such an objection, the court would undoubtedly await the determination of the judicial review proceedings

on the jurisdiction issue. Thus, there is no reality to the adjudication award being enforced prior to the determination of the substantive judicial review proceedings.

45. It was also submitted on behalf of the applicants that if the court lifted the stay in respect of the adjudication of this payment dispute, notwithstanding the existence of the challenged jurisdiction in the judicial review proceedings, there would be nothing to prevent the notice party submitting other aspects of its claim to adjudication, notwithstanding the existence of the arbitration proceedings and notwithstanding the challenge to jurisdiction that would be made by the applicants in respect of such payment dispute going to adjudication. Therefore, the court is satisfied that it is in the interest of all parties to have the jurisdiction issue determined at the earliest possible time.

46. Furthermore, the court is satisfied that once the applicants have challenged the jurisdiction of the adjudicator to enter upon the dispute, they cannot participate further in the adjudication process, because to do so, would open them to the charge that by so doing, they were estopped from alleging that he had no jurisdiction in the matter. Thus, the applicants would be effectively deprived of their right to participate in the adjudication process, while the jurisdiction issue was being determined in the judicial review proceedings. Having regard to the powers of the adjudicator to hold joint conferences, including teleconferences, with the parties and to hold oral hearings, the applicants would be greatly prejudiced by their absence from the adjudication.

47. It is also appropriate in an application to lift a stay in circumstances such as those before the court, to have regard to the relative strengths of the cases put forward on behalf of the parties to the substantive dispute on jurisdiction. It has already been accepted by the High Court that the applicants have an arguable case that the adjudicator does not have jurisdiction to enter upon the dispute. That was the

threshold which had to be crossed in order for the applicants to obtain leave to proceed by way of judicial review, which leave was granted by order of the court on 19th November, 2020. However, I am satisfied that the applicants have a strong case in relation to their challenge to the jurisdiction of the adjudicator. It is not necessary, nor would it be appropriate for this court to embark on a scrutiny of the legal issues and authorities that were set out in the submissions of both parties that were submitted to the adjudicator in advance of his ruling on the jurisdiction issue.

48. It will suffice for the purposes of the consideration of this application, for the court to note that the Letter of Intent was a detailed document in its own right and it had appended to it a substantial amount of documentation, which governed the relationship between the parties and the works that would be undertaken by the notice party. The court is also entitled to have regard to the fact that approximately 90% of the work that was claimed in the final account by the notice party, had been completed prior to execution of the formal contract on 12th May, 2017. It is common case that all of the works carried out by the notice party had been completed by August 2017.

49. The court has also had regard to the fact that the contract, which was executed on 12th May, 2017, was not just a reiteration of the previous terms, as set out in the Letter of Intent, but there were material alterations to the terms which were set out in the subsequent contract. In these circumstances, while not in any way prejudging the jurisdiction issue, the court is satisfied that the applicants challenge to jurisdiction in the judicial review proceedings is a *bona fide* and substantial challenge. While the case being made on behalf of the notice party is not without merit, it may be seen as resting on a nuanced interpretation of clause 42 of the contract dated 12th May, 2017, which will depend for success on the court ultimately coming to a determination that

that contract had retrospective effect. As that issue remains live in the substantive proceedings, it is not appropriate to comment further on it at this stage. The court will simply say that it is satisfied that the applicants have demonstrated that they have a strong case in the substantive judicial review proceedings.

50. Having regard to all of these matters, the court is satisfied that when determining which course best serves the interest of justice, as required by the test set down in the *Okunade* decision, the interests of justice are best served by continuing the stay which had been put in place by the order of Meenan J. on 19th November, 2020, until the final determination of the judicial review proceedings herein.

51. At the hearing on 25th November, 2020, the court made an order varying the stay to permit the second respondent to continue working on the papers that had been submitted to him, but directed that he should not publish his decision pending further order of this Court. In light of the findings in this judgment, the court now varies the stay further, so that it reverts to the terms of the stay imposed by the order of Meenan J. made on 19th November, 2020. Thus, the stay is re-imposed with immediate effect and will continue until the determination of the judicial review proceedings. The formal order will record that the court refuses the application of the notice party to lift the stay that had been imposed by Order of the High Court on 19th November, 2020.

52. The parties may furnish written submissions in relation to the issue of the costs of this application, and on any other matter that may arise, within 14 days from receipt of the judgment herein.