[2019] IEHC 630

THE HIGH COURT

2014 No. 2536 P.

BETWEEN

CLARINGTON DEVELOPMENTS LIMITED

PLAINTIFF

AND

HCC INTERNATIONAL INSURANCE COMPANY PLC

DEFENDANT

Judgment of Mr Justice Garrett Simons delivered on 6 September 2019.

Introduction

1. This matter comes before the court by way of an application to dismiss the plaintiff's claim on the grounds that it discloses no reasonable cause of action. An order is sought, in the alternative, staying the proceedings pursuant to the court's inherent jurisdiction on the grounds that the plaintiff's case is bound to fail.

2. The proceedings seek to enforce a bond which has been entered into between

   (i) the plaintiff, (ii) the defendant and (iii) the contractor under a (separate) building contract. The bond has been described variously as a "performance bond" or a "contract guarantee bond". In brief, the bond represents a form of guarantee whereby the defendant, as surety, undertook to satisfy and discharge any damages sustained by the plaintiff, as employer, in the event of default on the part of the contractor in the performance of the building contract. This undertaking is subject to a twelve-month time-limit reckonable by reference to the date of the issuing of a certificate of practical completion.

3. The plaintiff alleges that the construction works under the building contract were carried out defectively by the contractor, and has issued these proceedings seeking to recover damages from the defendant as surety under the bond.

4. The plaintiff and defendant both agree that the damages must be quantified—to use a neutral term—before liability to make payment under the bond arises. There is, however, a fundamental disagreement between the parties as to the mechanism by which damages are to be quantified. The plaintiff contends that damages can be assessed by the High Court in plenary proceedings taken against the surety. Conversely, the defendant insists that it is a condition precedent to the surety's liability under the bond that damages must first have been established and ascertained by way of conciliation or arbitration between the employer and the contractor pursuant to the building contract. No such arbitration has yet taken place. On this interpretation, it is not open to the plaintiff, as employer, to have the damages quantified by the High Court, and the within proceedings are accordingly bound to fail.

5. The resolution of this disagreement between the parties turns on the correct interpretation of the bond. In particular, it turns on the meaning to be attributed to the phrase "the damages sustained […] as established and ascertained pursuant to and in accordance with the provisions of" the building contract. It will be necessary to decide

whether this phrase requires that the damages can only be quantified—to use a neutral term—by way of conciliation or arbitration under the building contract.

6. Before embarking upon any consideration of the correct interpretation of the bond, however, it will be necessary first to address the following jurisdictional issue. The defendant, by issuing a motion to dismiss the proceedings, is asking the court to exercise an exceptional jurisdiction. The court is being invited to dismiss the proceedings *in limine* without a full hearing on oral evidence. This jurisdiction is to be sparingly exercised, and should only be adopted when it is clear that the proceedings are bound to fail, rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law (per Clarke J. in *Keohane v. Hynes* [2014] IESC 66, [6.6]).

7. The application of these principles to the circumstances of the present case is discussed in detail at page 7, paragraphs 22 *et seq*. below. The judgment will then turn to consider the question of whether the proceedings are bound to fail.

Relevant facts

8. There is no factual dispute between the parties as to the events leading up to the institution of these proceedings. The parties have very helpfully prepared an agreed factual chronology which was handed in to the court at the hearing.

9. The plaintiff entered into a building contract with Sammon Contracting Ltd on 9 December 2011 ("*the building contract*"). For ease of exposition, I will refer to the plaintiff as "*the employer*", and to Sammon Contracting Ltd (and its successor in title, Sammon Contracting Ireland Ltd) as "*the contractor*", for the balance of this judgment. The building contract related to the construction of a primary care centre and sports hall in Newbridge, Co. Kildare ("*the development*").

10. The clause of the building contract of most immediate relevance to the dispute which has since arisen in respect of the "performance bond" or "contract guarantee bond" (discussed below) is clause 38. This clause sets out the dispute resolution mechanisms pursuant to the building contract as follows.

> "38.(a) If a dispute arises between the parties with regard to any of the provisions of the Contract such dispute shall be referred to conciliation in accordance with the Conciliation Procedures published by the Royal Institution of the Architects of Ireland in agreement with the Society of Chartered Surveyors and the Construction Industry Federation.
>
> If a settlement of the dispute is not reached under the Conciliation Procedures either party may refer the dispute to arbitration in accordance with Clause 38(b).
>
> (b) Provided always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress of the Works or after the determination of the employment of the Contractor under the Contract or the abandonment or breach of the Contract, as to

the construction of the Contract or as to any matter or thing arising thereunder or as to the withholding by the Architect of any certificate to which the Contractor may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference and such dispute or difference shall be and is hereby referred to the arbitration and final decision of such person as the parties hereunto may agree to appoint as Arbitrator or, failing agreement, as may be nominated on the request of either party by the President for the time being of the Royal Institute of the Architects of Ireland after consultation with the President of the Construction Industry Federation and the award of such Arbitrator shall be final and binding on the parties. Such reference, except on Article 3 or Article 4 of the Articles of Agreement or on the question of certificates, shall not be opened until after the Practical Completion or alleged Practical Completion of the Works or determination or alleged determination of the Contractors employment under this Contract, unless with the written consent of the Employer or of the Architect on his behalf and the Contractor. The Arbitrator shall have power to open up, review and revise any opinion, decision, requisition or notice, and to determine all matters in dispute which shall be submitted to him and of which notice shall have been given as aforesaid in the same manner as if no such opinion, decision, requisition or notice had been given. Every or any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1954 (Number 26 of 1954), or the Arbitration Act (Northern Ireland) 1957 (as the case may be) or any act amending the same or either of them."

11. The employer and the contractor subsequently entered into a bond on 22 December 2011. The surety under the bond is HCC International Insurance Company plc, i.e. the defendant to these proceedings. I propose to use the shorthand "*the surety*" to refer to the defendant.

12. The title page to the bond refers to it as a "*performance bond*", whereas the text refers to it as a "contract guarantee bond". It does not appear that anything turns on this distinction. The rights and obligations of the parties must be determined by reference to the terms of the bond and any label used is not conclusive. I propose to refer to this bond simply as "*the bond*".

13. The opening parts of the bond identify the parties, and recite the building contract. The operative parts of the bond are then set out in numbered clauses. Insofar as relevant to these proceedings, the key clauses are as follows.

    "1. The Contractor and the Surety are hereby jointly and severally bound to the Employer in the sum of €1,200,000.00 (one million two hundred thousand euro) [hereinafter called 'the Bond Amount'] provided that if the Contractor shall subject to Clause 3 hereof duly perform and observe all the terms, conditions, stipulations and provisions contained or referred to in the said Contract which are to be performed or observed by the Contractor or if on default by the Contractor the Surety shall satisfy and discharge the damages sustained by the Employer as

established and ascertained pursuant to and in accordance with the provisions of the said Contract and taking into account all sums due or to become due to the Contractor thereunder and all retention monies held thereby up to the amount of this Bond then this agreement shall be of no effect but otherwise shall remain in full force and effect. The Bond Amount shall automatically reduce by half upon the issue of the Certificate of Practical Completion of the said Works.

[...]

3. The Contractor and the Surety shall be released from their respective liabilities under this bond twelve months after the date of Practical Completion of the said Works as certified by the Architect/Engineer/Supervising Officer appointed under the contract and then this Bond is automatically cancelled whether returned to the Surety or not.

4. If any suits at law or proceedings in equity are brought against the Surety to recover any claim hereunder the same must be instituted not later than Expiry in Clause 3 above.

5. This Bond is executed by the Surety upon the following express conditions, which shall be the conditions precedent to the right of the Employer to recover hereunder:

   A. The Surety shall be notified in writing by registered or hand delivered letter to its registered branch office of any serious breach of or default in any of the terms and conditions contained in the said Contract and on the part of the Contractor to be performed and observed as soon as possible but in any event within three months after such breach or such default shall have come to the knowledge of the Employer or his representative or representatives having supervision of the said Contract and the Employer shall in so far as may be lawful permit the Surety to perform the stipulations and provisions of the said Contract which the Contractor shall have failed to perform and observe.

   B. In the event of the Surety being called upon to satisfy and discharge damages sustained by the Employer, the Employer shall permit the Surety to nominate a completion contractor to perform the stipulations and provisions of the said Contract which the contractor shall have failed to perform and observe provided the proposed completion contractor is acceptable to the Employer; such acceptance shall not be withheld unreasonably.

   C. No liability shall attach to the Surety under this Bond in respect of default by the Contractor or breach of the conditions and terms of the said Contract where such default or breach was directly or indirectly due to or arising out of War, Invasion, Act of Foreign Enemy, Hostilities (whether War be declared or not), Civil War, Rebellion, Revolution, Riot, Civil Commotion or Military or Usurped Power."

14. Works pursuant to the building contract commenced on 4 January 2012. Thereafter, in April 2012, Sammon Contracting Ltd assigned all obligations and interests in the building contract to Sammon Contracting Ireland Ltd. For ease of exposition, the shorthand "the contractor" is intended to refer to both of these companies.

15. The works under the building contract were certified by the employer's architect as practically complete on 2 March 2013. The term "practical completion" is defined as follows at clause 31 of the building contract.

> "When in the opinion of the Architect the Works are Practically Complete he shall forthwith issue a certificate to that effect and Practical Completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in such certificate.
>
> 'Practical Completion' means that the Works have been carried to such a stage that they can be taken over and used by the Employer for their intended purpose and that any items of work or supply then outstanding or any defects then patent are of a trivial nature only and are such that their completion or rectification does not interfere with or interrupted such use."

16. As appears from the final sentence of clause 1 of the bond (see paragraph 13 above), the bond amount automatically reduced by half upon the issue of the certificate of practical completion. The amount of the bond is now €600,000.

17. The employer issued the within proceedings on 18 February 2014. In brief, these proceedings seek to enforce the performance bond as against the surety. Crucially, the proceedings seek to have the High Court quantify the damages payable. One of the reliefs sought is for accounts and inquiries to "establish" the sums due to the employer by the surety. The within proceedings were not served until 12 February 2015, i.e. almost twelve months after the date of the institution of the proceedings.

18. On the same date as the within proceedings were issued (18 February 2014), the employer also issued proceedings against Sammon Contracting Ltd and Sammon Contracting Ireland Ltd ("*the contractor*"). In brief, those proceedings seek an order directing the contractor to refer the "proceedings" to arbitration. Damages for breach of contract and negligence are sought in the alternative.

19. As appears, both sets of proceedings were issued within twelve months of the date of the certificate of practical completion. This may be relevant for the purposes of clause 3 and clause 4 of the bond.

20. SCLAD Construction Ltd (formerly Sammon Contracting Ltd) was placed into liquidation by order of the High Court on 1 December 2017. Sammon Contracting Ireland Ltd was placed into liquidation by order of the High Court on 5 June 2018.

21. Finally, it should be recorded that for the purposes of determining the application to dismiss the proceedings, it will be *assumed* that were these proceedings to go to trial, the

employer would be able to establish that the construction works had been carried out defectively.

Jurisdiction to strike out or dismiss proceedings

22. Before embarking upon any consideration of the correct interpretation of the bond, it is necessary first to identify the *limitations* attendant on the court's jurisdiction to strike out or to dismiss proceedings. The jurisdiction is intended to protect against an abuse of process. The principal question for the court in determining such an application is whether the *institution* of the proceedings represents an abuse of process. It is not enough that the court might be satisfied that the case is a very weak one and is likely to be successfully defended. Rather, the court must be satisfied that the proceedings disclose no cause of action and/or are bound to fail.

23. As discussed presently, the case law suggests that a more exacting approach may be appropriate in proceedings the outcome of which turns on the correct interpretation of contractual documentation and where there is no dispute but that the documentation sets out the entire of the agreement between the parties. Before turning to consider that case law, it might be helpful to recall the general principles governing the jurisdiction to strike out or to dismiss proceedings.

24. For the reasons explained by the Supreme Court in *Lopes v. Minister for Justice Equality and Law Reform* [2014] IESC 21; [2014] 2 I.R. 301, [16] to [18], it is important to distinguish between the jurisdiction to strike out and/or to dismiss proceedings pursuant to (i) Order 19 of the Rules of the Superior Courts, and

    (ii) the court's inherent jurisdiction. An application under the Rules of the Superior Courts is designed to deal with circumstances where the case as pleaded does not disclose any cause of action. For this exercise, the court must assume that the facts—however unlikely that they might appear—are as asserted in the pleadings.

25. By contrast, in an application pursuant to the court's inherent jurisdiction, the court may to a very limited extent consider the underlying merits of the case. If it can be established that there is no credible basis for suggesting that the facts are as asserted, and that the proceedings are bound to fail on the merits, then the proceedings can be dismissed as an abuse of process. In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings.

26. Whereas it is correct to say that—in the context of an application made pursuant to the court's inherent jurisdiction—it is open to the court to consider the credibility of the plaintiff's case to a limited extent, the court is not entitled to determine disputed questions of fact. The limitation on the assessment of credibility has been explained as follows by the Supreme Court in *Lopes v. Minister for Justice Equality and Law Reform* [2014] IESC 21; [2014] 2 I.R. 301.

"[19] It is also important to remember that a plaintiff does not necessarily have to prove by evidence all of the facts asserted in resisting an application to dismiss as being bound to fail. It must be recalled that a plaintiff, like any other party, has available the range of procedures provided for in the RSC to assist in establishing the facts at trial. Documents can be discovered both from opposing parties and, indeed, third parties. Interrogatories can be delivered. Witnesses can be subpoenaed and can, if appropriate, be required to bring their documents with them. Other devices may be available in particular types of cases. In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in *Sun Fat Chan v. Osseous Ltd*. [1992] I.R. 425, at p. 428, that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance."

27. The judgment in *Lopes* went on then to address the position of what might be described as "document cases" as follows.

"[20] At the same time, it is clear that certain types of cases are more amenable to an assessment of the facts at an early stage than others. *Where the case is wholly, or significantly, dependent on documents, then it may be much easier for a court to reach an assessment as to whether the proceedings are bound to fail within the confines of a motion to dismiss.** In that context, it is important to keep in mind the distinction, which I sought to analyse in *Salthill Properties Ltd. v. Royal Bank of Scotland plc* [2009] IEHC 207, (Unreported, High Court, Clarke J., 30th April, 2009), between cases which are dependent in themselves on documents and cases where documents may form an important part of the evidence but where there is likely to be significant and potentially influential other evidence as well."

*Emphasis (italics) added.

28. The relevant passages from the judgment in *Salthill Properties Ltd v. Royal Bank of Scotland plc* [2009] IEHC 207, cited in *Lopes*, include the following.

"3.9 So far as the general question of whether proceedings are, on their merits, bound to fail it seems to me that it is necessary to address the question which arose for debate between the parties as to the approach which the court should take to the evidence as presented on an application to dismiss such as that with which I am involved. It has often been noted that an application to dismiss as being bound to fail may be of particular relevance to cases involving the existence or construction of documents. For example, in claims based on written agreements it may be possible for a party to persuade the court that no reasonable construction of the document concerned could give rise to a claim on the part of the plaintiff, even if all of the facts alleged by the plaintiff were established.* Likewise, a defendant in a

specific performance action may be able to persuade the court that the only document put forward as being a note or memorandum to satisfy the Statute of Frauds, could not possibly meet the established criteria for such a document. More difficult issues are likely to arise in an application to dismiss when there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence. At this end of the spectrum, it is difficult to envisage circumstances where an application to dismiss as bound to fail could succeed. In between are a range of cases which may be supported to a greater or lesser extent by documentation.

3.10 However, it is important to emphasise the different role which documents may play in proceedings. In cases, such as the examples which I have given earlier, involving contracts and the like, the document itself may govern the legal relations between the parties so that the court can consider the terms of the document on its face and may be able to come to a clear view as to the legal consequences flowing from the parties having governed their relations by the document concerned.* "

*Emphasis (italics) added.

29. The Supreme Court, per Clarke J., subsequently elaborated upon this theme *in Keohane v. Hynes* [2014] IESC 66 as follows.

"6.8 In summary, it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred.

6.10 *It is an abuse of process to bring a claim based on a breach of rights or failure to observe obligations where those rights and obligations are defined by documents and where there is no reasonable basis for suggesting that the relevant documents could establish the rights and obligations asserted.** Likewise, it is an abuse of process to maintain a claim based on facts which can only be established by a

documentary record and where that record could not sustain any necessary part of the factual assertions which underlie the case. Finally, it is an abuse of process to maintain a claim based on a factual assertion in circumstances where there is no evidence available for that assertion and, importantly, where there is no reasonable basis for believing that evidence could become available at the trial to substantiate the relevant assertion. However, the bringing of a claim based on a factual assertion for which there is or may be evidence (even if the defendant can point to many reasons why it might be argued that a successful challenge could be mounted to the credibility of the evidence concerned) is not an abuse of process. It is for that reason that a court cannot properly engage with the credibility of evidence on a motion to dismiss as being bound to fail and it is for that reason that the very significant limitations which I have sought to identify exist in relation to the extent to which a court can properly engage with the facts on such an application."

*Emphasis (italics) added.

30. An example of the practical application of these principles to a case involving a claim pursuant to a bond—on the facts, a "HomeBond" guarantee issued in respect of a new dwelling house—is provided by *Wilkinson v. Ardbrook Homes Ltd* [2016] IEHC 434. The High Court (Baker J.) dismissed the proceedings pursuant to the court's inherent jurisdiction in circumstances where a claim in respect of any negligence in inspecting or failing to inspect a dwelling the subject matter of the warranty had been expressly excluded under the bond.

> "46. For all of the reasons stated above, because this is a claim which is founded in a contract of warranty contained in a written document, and because that contract expressly excluded liability for the claim as pleaded, and because no special relationship is claimed to have come into existence, either as a result of a representation or the assumption of additional liabilities by the third defendant, I propose in the exercise of my inherent jurisdiction to strike out the claim of the plaintiffs against HomeBond, the third named defendant in the proceedings, on the grounds that the claim is bound to fail."

Findings of the court on jurisdictional issue

31. It appears from the case law discussed above that the approach to be taken to an application to strike out or to dismiss proceedings will differ slightly in circumstances where the underlying proceedings turn on the interpretation of (agreed) contractual documents. More specifically, the court may be able to resolve straightforward issues of contractual interpretation on a summary application without the risk of injustice to the parties. This is subject to a number of provisos as follows. First, there must be no factual dispute as to the validity of the contractual documents. Secondly, it must be accepted that the contractual documents represent the *entire* agreement between the parties. If, for example, one of the parties alleges that the interpretation of the contract must be informed by oral representations or that a collateral contract exists between the parties, then these are issues which can normally only be properly resolved by a plenary hearing on oral evidence. Thirdly, the contractual documentation must be capable of

interpretation on its own terms, i.e. without resort to extrinsic evidence. Finally, the legal issues must be straightforward.

32. In cases where these provisos are fulfilled, it may be legitimate for the court to consider the terms of the contractual documentation. If the court concludes that no reasonable interpretation of the contractual documentation could give rise to a claim on the part of a plaintiff—even assuming that all of the facts alleged by the plaintiff would be established at trial—then the proceedings can be dismissed as an abuse of process.

33. Counsel on behalf of the employer in the present case does not demur from the proposition that this case can, in principle, be approached for the purposes of the application to strike out or to dismiss the proceedings as one involving primarily the interpretation of a contract. (See paragraph 10 of the employer's written legal submissions). Counsel goes on, however, to stress that the issue of contractual interpretation in the present case is not necessarily simple and straightforward. In particular, it is submitted that the arguments advanced on behalf of the surety are, of necessity, of "considerable intricacy" and fall well short of the standard of conviction required to have an action dismissed on a summary basis.

34. In this regard, counsel has placed emphasis on the very recent judgment of the Supreme Court in *Jeffrey v. Minister for Justice Equality and Defence* [2019] IESC 27. The Supreme Court held that proceedings should not be dismissed pursuant to the court's inherent jurisdiction in circumstances where the legal issues were complex.

> "7.4 It is now well settled that, in the context of a summary judgment motion in which a plaintiff seeks judgment in summary proceedings, a court can resolve straightforward issues of law or the interpretation of documents, where there is no real risk that attempting to resolve those issues within the limited confines of a summary judgment motion might lead to an injustice. By analogy, I would not rule out the possibility, without so deciding, that it may be possible to resolve a simple and straightforward issue of law within the confines of a Barry v. Buckley application. However, even if that should be possible, it could only be appropriate where the issue was very straightforward and where there was no risk of injustice by adopting that course of action. […] However, a *Barry v. Buckley* application cannot be used to dismiss a case simply because it might be said that there is a strong defence. Rather, such applications can only be used in cases where it is clear that the claim is bound to fail. In my view, this case is not such a case. […]"

35. The facts of the case were unusual. Mr Jeffrey had been prosecuted in the District Court for a road traffic offence. The presenting guard had erroneously informed the District Court judge that the accused had a series of previous convictions, and purported to outline these offences to the judge. This was then reported in the local media. In fact, the offences outlined were referable to an entirely different person who happened to have the same surname as Mr Jeffrey. Mr Jeffrey subsequently instituted High Court proceedings against the State seeking damages for negligence, breach of duty and negligent

statement. (An action for defamation could not have succeeded in circumstances where absolute privilege attaches to court proceedings under the Defamation Act 2009).

36. The State respondents sought to have the proceedings dismissed on the basis

    (i) that a person cannot bring an action for damage to reputation other than through an action for defamation; (ii) that the presenting guard did not owe a duty of care to the accused; and (iii) that the conduct of court proceedings attracts immunity. The Supreme Court refused to dismiss the proceedings in circumstances where the legal issues were complex and it was not clear that Mr Jeffrey's claim was bound to fail.

37. Having carefully considered the terms of the Supreme Court judgment in Jeffrey, I am satisfied that the circumstances of the present case are distinguishable. The legal issues raised in the within proceedings can properly be characterised as simple and straightforward. The case largely turns on the interpretation of a single provision of a contract. As explained at paragraphs 53 et seq., I am satisfied that the interpretation of the bond in the present case is obvious. By contrast, the issues arising in *Jeffrey* presented difficult questions of law and public policy. Such issues could not properly be determined on an application to strike out proceedings *in limine*.

38. In summary, therefore, I am satisfied that the present case gives rise to a straightforward issue of contractual interpretation which admits of an obvious answer. This issue can safely be resolved on an application to dismiss the proceedings without any risk of injustice to the parties. There is no factual dispute which requires to be determined. The parties are both agreed that the bond represents the *entire* agreement between the parties. The outcome of the proceedings is not contingent on oral evidence, cross-examination or the discovery of documents.

Submissions on interpretation of bond

39. The employer and the surety both agree that the bond is a "conditional" bond as opposed to an "on demand" bond. Both parties also agree that the damages must be quantified—to use a neutral term—before liability to make payment under the bond arises. There is, however, a fundamental disagreement between the parties as to the *mechanism* by which damages are to be quantified. The resolution of this dispute turns primarily on the interpretation of clause 1 of the performance bond.

40. The rival interpretations of the parties can be summarised as follows. The surety contends that the quantum of damages sustained must be established and ascertained pursuant to the dispute resolution mechanisms provided for under the building contract. On this interpretation, the damages can only be quantified in accordance with clause 38 of the building contract. This clause has been set out in full at paragraph 10 above. As appears, any dispute between the employer and the contractor is to be referred to conciliation, and, if this is unsuccessful, to arbitration. It is submitted that the dispute resolution mechanisms are exhaustive, and that it is not open to an employer to by-pass these

procedures, and, instead, to invite the High Court to quantify the damages in plenary proceedings against the surety.

41. Conversely, the employer contends that clause 1 of the performance bond simply requires that the quantum of damages be established and ascertained in accordance with what counsel characterises as the "substantive provisions" of the building contract. The High Court can quantify the damages but in doing so must apply the "substantive provisions" of the building contract. The liability of the surety is to be ascertained by reference to the rights and obligations of the employer and the contractor under the "substantive provisions" of their contract, i.e. the building contract. It is submitted that one practical effect of this is that the surety can avail of any defence under the building contract upon which the contractor could have relied. Similarly, it is said that the provisions of the building contract in respect of any claim for set-off could also be relied upon.

42. Counsel cites certain passages from O'Donovan and Philips, *The Modern Contract of Guarantee* (3rd edition, English edition, 2016, Courtney and Philips) in support of an argument that the liability of a surety can be determined in separate proceedings and that a surety is not bound by an arbitration award made pursuant to a building contract. I will return to consider this submission at paragraph 64 below.

43. Counsel on behalf of the employer also argued that to interpret clause 1 as requiring damages to be established pursuant to conciliation or arbitration under the building contract would result in an unrealistic timeframe. The combined effect of clause 3 and clause 4 of the bond appears to be that any proceedings against the surety must be instituted within twelve months of the date of certification of practical completion. This would mean that in order to avail of the bond (as interpreted by the surety), any defects in the building works would have had to emerge in sufficient time to allow for a conciliation or arbitration to be completed within twelve months of certification.

44. Counsel placed some reliance on clause 5 of the bond. This clause has been set out in full at paragraph 13 above. As appears, same sets out a number of conditions which are stated to be conditions precedent to the right of the employer to recover under the bond. Counsel observes that there is no express requirement under clause 5 that damages be established and ascertained by way of conciliation or arbitration, and seeks to infer from this that same is not a condition precedent to recovery under the bond. I will return to this argument at paragraph 71 below.

45. Despite extensive research by both Mr O'Doherty and Mr Cole, neither side was able to identify any case law directly of assistance on the interpretation of the phrase "established and ascertained pursuant to and in accordance with the provisions of" the contract. The judgment closest in point is that in *Paddington Churches Housing Association v. Technical and General Guarantee Co Ltd* (1999) 65 Con L.R. 132. The case concerned a performance bond entered into between a main contractor, a sub-contractor and a surety. The wording of the performance bond required the surety, in the event of a valid determination of the building contract, to satisfy and discharge the net established and ascertained damages sustained by the main contractor. The phrase "net established

and ascertained damages" has some limited resonance with the wording at issue in the present case. Of course, the additional wording to the effect that the damages must be established and ascertained "pursuant to and in accordance with the provisions of" the building contract was absent.

46. It appears from the reported judgment in *Paddington Churches Housing Association* that the main contractor was under the mistaken impression that the bond would have allowed for an interim payment to help the main contractor to finance the contract as it progressed. The court observed that if this is what had been intended, then the main contractor should have obtained a specific insolvency bond or an "on demand" bond.

47. The High Court of England and Wales held that, on its correct interpretation, the performance bond imposed no liability to make a payment on account. Rather, the liability of the surety did not arise until the net liability had been ascertained. The High Court indicated that the damages were to be calculated by reference to the code of the contract. In particular, the employer's statement envisaged under the contract was required before the damages could be said to be ascertained.

> "The defendants are liable as surety only, and it seems to me to be plain on the face of the bond that the defendants are liable to pay the amount (if any) shown to be due to the plaintiffs on a statement made by the employer in accordance with the terms of the contract. That contract was imported into the bond by the recitals. Clause 27 of that contract is referred to specifically in the conditions. Both in case of default and in case of determination on insolvency (or indeed in any case where it were relevant, for corruption) the damages are calculated by reference to the code of the contract, which are in any event unlikely to be different from the damages at general common law. *The accuracy of the employer's statement might be challenged in the courts, but the employer's statement is required before the damages can be said to be ascertained and there is no liability on the defendants until those damages are ascertained.** The plaintiffs submit that the employer's statement is only a mechanism and not a condition precedent to payment, but no other mechanism for ascertaining the net damages is put forward or relied on by the plaintiffs."

*Emphasis (italics) added.

48. The judgment does not address the precise issue in dispute in the present case.

It is, however, suggestive of the fact that liability must be ascertained by reference to the mechanism provided for under the building contract. To this extent, it lends some support to the surety's arguments.

49. Both sides also referred to the judgment of the House of Lords in *Trafalgar House Construction (Regions) Ltd v. General Surety and Guarantee Co Ltd* [1995] 3 All E.R. 737. This judgment is of little assistance in that the principal issue in dispute there turned on the distinction between an "on demand" bond and a performance bond. It seems that the

Court of Appeal had—mistakenly— held that a mere demand in good faith was sufficient to obtain payment under the bond. The House of Lords held that proof of damage and not mere assertion thereof was required before liability under such a bond arises. It was not necessary for the purpose of that finding for the House of Lords to consider the separate question as to the precise basis on which damages are to be proved (or established). The parties in the present case are both agreed that the bond is a "conditional" as opposed to an "on demand" bond.

50. Finally, Mr Cole did turn up one case from England and Wales, *Russell v. Stone* [2019] EWHC 831 (TCC) which concerned contractual language similar to that in issue in the present case. The proceedings involved a claim for negligence against a firm of quantity surveyors. One of the complaints made was that the quantity surveyors had been negligent in failing to obtain a performance bond. The draft form of bond included the following wording.

> "[The Guarantor] … shall in the event of a proven breach of the Contract by the Contractor (which definition shall include insolvency or other events listed in Contract Clauses) … satisfy and discharge the damages costs and expenses sustained by the Employer as established and ascertained pursuant to and in accordance with the provisions of the Contract."

51. The High Court of England and Wales indicated (at paragraph 203) that the effect of the bond, had it been procured, would have been that the beneficiary would have to prove a default on the underlying contract and prove the loss and damage suffered as a result of that default.

52. Reference to this judgment does not greatly advance matters in that it leaves open the very issue which is in dispute in these proceedings, namely the identification of the *mechanism* by which damages must be established and ascertained.

Findings of the court on interpretation of the bond

53. The compass of the dispute in the present case is very narrow. It turns on the interpretation of clause 1 of the bond. More specifically, the dispute turns on whether the use of the phrase "established and ascertained pursuant to and in accordance with the provisions of the" building contract (i) requires that the quantification of damages be carried out pursuant to the dispute resolution mechanisms provided under the building contract, or (ii) merely requires that the rules for reckoning damages provided under the building contract are to be applied but that the quantification can be carried out by the High Court.

54. The surety, by having elected to apply to dismiss the proceedings *in limine*, has undertaken the heavy burden of persuading this court that its (the surety's) interpretation of the bond is so obviously the correct one that the employer cannot succeed at full hearing. For the reasons which follow, I am satisfied that the correct interpretation of the bond is obvious, and is capable of being fairly and properly determined on an application to dismiss the proceedings.

55. It may be useful to commence this analysis by recalling the precise terms of clause 1 of the bond.

> "1. The Contractor and the Surety are hereby jointly and severally bound to the Employer in the sum of €1,200,000.00 (one million two hundred thousand euro) [hereinafter called 'the Bond Amount'] provided that if the Contractor shall subject to Clause 3 hereof duly perform and observe all the terms, conditions, stipulations and provisions contained or referred to in the said Contract which are to be performed or observed by the Contractor or if on default by the Contractor the Surety shall satisfy and discharge the damages sustained by the Employer as established and ascertained pursuant to and in accordance with the provisions of the said Contract and taking into account all sums due or to become due to the Contractor thereunder and all retention monies held thereby up to the amount of this Bond then this agreement shall be of no effect but otherwise shall remain in full force and effect. The Bond Amount shall automatically reduce by half upon the issue of the Certificate of Practical Completion of the said Works."

56. As appears, the contractor and the surety have undertaken a joint and several liability to the employer in what is now an amount of €600,000. This liability remains in full force and effect unless and until one of three contingencies is fulfilled. These can be summarised as follows. First, the contractor duly performs its obligations under the building contract. Secondly, the surety satisfies and discharges the damages sustained by the employer as a result of the default of the contractor. Thirdly, the twelve-month time-limit under clause 3 of the bond expires without proceedings having been issued in accordance with clause 4.

57. The bond follows the archaic grammatical structure often employed in drafting bonds, and is phrased in the negative. The legal effect of the bond can be restated in positive terms as imposing an obligation on the surety to satisfy and discharge the damages sustained by the employer as a result of the default of the contractor. For the purposes of the application to dismiss the proceedings, it must be assumed that—were the case to go to full hearing—the employer would be able to establish that the building works are defective and that it has sustained damage as a consequence.

58. Clause 1 of the bond expressly states that the damages sustained must "be established and ascertained pursuant to and in accordance with the provisions of" the building contract. The language used is significant. The dictionary definition of "establish" includes, relevantly, the meaning "show (something) to be true or certain by determining the facts" (Oxford Dictionary of English, third edition). The word is ultimately derived from the Latin verb *stabilire*, i.e. "to make firm". The phrase "in accordance with" means "in a manner conforming with".

59. All of this indicates that the quantification of damages is to be determined in a manner conforming with the building contract. This imports the requirement to comply with the dispute resolution mechanisms provided for under clause 38 of the building contract, i.e. conciliation or arbitration. The employer's interpretation, which would allow for damages

to be determined in *parallel proceedings* before the High Court, simply cannot be reconciled with the contractual language. The surety's liability to pay damages is to be determined once and once only, i.e. pursuant to and in accordance with clause 38 of the building contract. The bond does not allow for the possibility of different figures for damages being produced by way of arbitration under the building contract and by way of proceedings before the High Court, respectively.

60. The rival interpretation advanced on behalf of the employer necessitates making a distinction between (i) what counsel characterises as "substantive provisions" of the bond, and (ii) the dispute resolution mechanisms under clause 38. With respect, there is nothing in the contractual language which supports the employer's argument that the bond makes this distinction. Rather, the bond refers to "the provisions of" the building contract *simpliciter*. This captures all of the provisions without distinction.

61. Clause 1 requires, therefore, more than simply that the rules governing matters such as set-off under the building contract be applied to the calculation of the damages sustained by the employer. Had this been the sole intention, then it would have been sufficient to rely on the words which follow under clause 1 to achieve this intention, i.e. "taking into account all sums due or to become due to the contractor thereunder and all retention monies held thereby". The actual contractual language cannot be ignored: the words "established" and "pursuant to and in accordance with" cannot be treated as mere surplusage.

62. In summary, the language used under clause 1 has the effect of ensuring that all of the provisions of the building contract, including the dispute resolution mechanisms, must be complied with. The contractual requirement that the quantum of the damages sustained be "established" pursuant to and in accordance with the provisions of the building contract can only properly be understood as having this effect. Both the procedural and substantive provisions of the building contract must be complied with.

63. Not only does the rival interpretation of clause 1 advanced on behalf of the employer drain the phrase "established and ascertained pursuant to and in accordance with" of its ordinary and natural meaning, it also necessitates imputing to the parties an intention that there be two parallel mechanisms by which the quantum of the damages sustained could be established and ascertained. On the employer's interpretation, the quantification of the damages sustained can legitimately be carried out by way of legal proceedings before the High Court and/or by way of arbitration pursuant to clause 38 of the building contract. Indeed, the logic of the employer having issued two sets of proceedings on 18 February 2014 is that both mechanisms can be invoked simultaneously. (See paragraphs 17 and 18 above). No sensible explanation has been offered as to what should happen in the event that the two procedures produce different figures.

64. Counsel for the employer had opened certain passages from O'Donovan and Philips, *The Modern Contract of Guarantee* (3rd edition, English edition, 2016, Courtney and Philips) in support of his argument that the liability of a surety can be determined in separate

proceedings and that a surety is not bound by an arbitration award made pursuant to the principal contract. In particular, the following passage at §5.140 had been relied upon.

> "If the guarantee in general secures the due performance of the obligations of the principal debtor, the guarantor will not be bound by a judgment or arbitration award obtained by the creditor against the principal. The award will not be evidence against the guarantor and the extent of the guarantor's liability must be strictly proved. The reason for this is that the guarantor might otherwise be bound by an admission of the principal debtor in the course of an arbitration without the authority of the guarantor, or by the principal failing to contest properly the arbitration proceedings. The rule applies even where the arbitration award arises out of an arbitration clause contained in the principal contract. This was the case in *Bruns v Colocotronis*, where the guarantee was also expressed in these general terms: 'the guarantor guarantees and undertakes to procure the due performance and payment of all liabilities and obligations of the Owners arising under or out of the agreements.'"

*Footnotes omitted.

65. The main authority cited by the authors for these propositions is the judgment in *Bruns v. Colocotronis, The Vasso* [1979] 2 Lloyd's Rep. 412 (which, in turn, cites *Re Kitchin, Ex parte Young* (1881) 17 Ch.D. 668).

66. The rationale underlying these judgments is that for a surety to agree to be bound by an arbitration award made pursuant to the principal contract would involve certain risks. In particular, the surety would be bound by the outcome of arbitration proceedings in respect of which it would not be a party. The judgments are clear, however, that it is ultimately a matter of contractual interpretation as to whether a surety has undertaken this risk.

67. On the facts of *The Vasso*, the guarantor had guaranteed and undertaken to procure the due performance and payment of all liabilities and obligations of the ship owners. Robert Goff J. held that this form of wording did not extend to an obligation to honour an arbitration award.

> "The short answer is that, as a matter of construction, a guarantee containing general words, as in the case of the guarantee of the defendant, although applicable generally to obligations of the principal debtor arising under the relevant agreement, does not apply to an obligation to honour an arbitration award."

68. By contrast in the present case, it is not being suggested that an arbitration award would be binding on the surety as a secondary obligation assumed by the surety under the bond. Rather, the surety's argument is that an arbitration award would be binding because the bond expressly states that the damages sustained are to be established and ascertained pursuant to and in accordance with the building contract. The bond itself has identified the mechanism by which damages are to be established and ascertained, and

has done so by incorporating by reference the dispute resolution mechanisms under the building contract.

69. There is an obvious tension between (i) ensuring that a bond provides an effective remedy for the employer in the case of default by the contractor, and (ii)ensuring that a surety is entitled to fully contest the making of any payment. Ultimately, it is a matter for the parties to decide how to resolve this tension. The role of the courts is to interpret the contractual documentation which records the agreement of the parties. It is not the function of the court to substitute its view as to what the appropriate allocation of risk should have been. See, by analogy, *Dunnes Stores v. Holtglen Ltd* [2012] IEHC 93 which has been cited by the surety ("where parties have used unambiguous language, irrespective of the question of commercial sense, the unambiguous language must be applied").

70. For the reasons outlined earlier, I am satisfied that the bond in this case has the effect of precluding a parallel action to quantify the sustained damages by way of plenary proceedings before the High Court. There is no inconsistency between this finding and the passages relied upon from *The Modern Contract of Guarantee*.

71. The employer's argument based on clause 5 of the bond can be disposed of shortly. Clause 5 identifies a number of conditions precedent to the right of the employer to recover under the bond. The wording does not indicate that the list is intended to be exhaustive nor that these are the only conditions precedent. Crucially, none of the subclauses under clause 5 are directed to a scenario, such as in the present case, where a claim to recover damages in respect of defective works is made subsequent to a certificate of practical completion having been issued. Clauses 5 (A) and 5 (B) are directed to circumstances where a serious breach or default has been notified during the course of the carrying out of the contract, and where the surety wishes to nominate a completion contractor. Neither of the subclauses are directed to the quantification of damages post- completion. Given that these subclauses are directed to a different scenario, same cannot reasonably be interpreted as overriding the requirements of clause 1. Clause 5 (C) is what might be described as a force majeure clause and is not relevant.

72. Counsel on behalf of the employer had also argued that to interpret clause 1 as requiring damages to be established pursuant to conciliation or arbitration would result in an unrealistic timeframe. In order to avail of the bond, any defects in the building works would have had to emerge in sufficient time (i) to allow for a conciliation or arbitration to be completed, and (ii) to allow for proceedings then to be instituted against the surety, within twelve months of the certification of practical completion.

73. With respect, there is nothing in the language of the bond to support an argument that the bond was intended to remain in place for an extended period of time, still less that the requirement that damages be established pursuant to the dispute resolution mechanisms under the building contract would defeat any such intention. The issue of the certificate of practical completion is treated as an event of significance under the bond. It

results in an immediate and automatic reduction in the bond amount by one half, i.e. to €600,000. It also sets the clock ticking for the purposes of a twelve-month limitation period. The introduction of a limitation period will, by definition, always run the risk of "hard cases" occurring. For example, even on the employer's interpretation, the benefit of the bond might not be available in the case of defects which only became apparent twelve months after the certification of practical completion. The risk of such "hard cases" does not allow the court to depart from the clear and unambiguous language of the bond. If an employer wishes to have the benefit of a longer indemnity period, then they are free to negotiate that with a potential surety but it may have a greater financial cost.

74. For the avoidance of any doubt, it should be noted that in reaching my conclusions on the correct interpretation of the bond it has not been necessary to make any finding in respect of the separate and distinct argument advanced on behalf of the surety to the effect that the proceedings cannot succeed now that the bond has been cancelled in accordance with the time-limit provided under clause 3. My findings are based solely on the requirement under clause 1 that the damages be established and ascertained pursuant to and in accordance with the dispute resolution mechanisms under the building contract. This is sufficient to dispose of the case.

75. The combined effect of clauses 3 and 4 would appear to be that any proceedings against the surety must be instituted within twelve months of the date of the certification of practical completion. It seems that if proceedings, which otherwise meet the requirements of the bond, are instituted within that timeframe, then same can be pursued to conclusion notwithstanding the cancellation of the bond. I reiterate, however, that it has not been necessary for me to make a finding in relation to this issue in circumstances where I am satisfied that whilst the within proceedings were issued within the twelve-month time-limit, the proceedings cannot succeed in circumstances where the surety has no liability under the bond in the absence of damages having been established and ascertained.

Conclusion

76. The present case gives rise to a straightforward issue of contractual interpretation which admits of an obvious answer. This issue can safely be resolved on an application to dismiss the proceedings without any risk of injustice to the parties. The length of this judgment is testament to the ingenuity and industry of counsel for the employer rather than as a result of any actual complexity in the interpretation of the bond. It has been necessary to address each of counsel's arguments in this judgment. As appears, however, the extensive case law referred to is largely irrelevant to the precise issue of interpretation which falls to be resolved in these proceedings.

77. For the reasons set out above, I am satisfied that, on its correct interpretation, clause 1 of the bond makes it a condition precedent to any claim against the surety that the quantum of damages sustained have first been established and ascertained pursuant to the dispute resolution mechanisms provided for under the building contract.

78. Put shortly, the damages sustained by the contractor's default must be established and ascertained by way of conciliation or arbitration between the employer and the contractor.

The surety is not party to this process. This is unsurprising: the quantification of damages will require consideration of the detail of the performance of the building contract. The surety is a stranger to these matters, and the contractor is the obvious *legitimus contradictor*. Once a net sum for the damages sustained has been established and ascertained pursuant to and in accordance with the dispute resolution mechanisms under the building contract, the bond can then be called upon and the surety would be obliged to pay out up to the amount of the bond (€600,000).

79. The employer has sought to by-pass these contractual arrangements, and to seek instead to establish and ascertain the quantum of the damages sustained by way of High Court proceedings taken against the surety. It is clear from the statement of claim that the employer envisages that the High Court would embark upon a detailed consideration and assessment of the defects alleged in the construction work carried out pursuant to the building contract by the contractor. The reliefs sought include a prayer for accounts to be taken and for inquiries to be entered upon so as to "establish" the sums due to the employer by the surety.

80. This has the practical consequence that the surety is now supposedly to be subject to lengthy and costly High Court litigation in respect of the performance of the building contract notwithstanding that it is obvious from the terms of the bond that any dispute in this regard was to have been resolved by way of conciliation or arbitration between the employer and the contractor.

81. I am satisfied that the institution of the within proceedings represents an abuse of process in circumstances where the claim against the surety cannot succeed for the reasons explained under the previous heading. The claim has been brought in the teeth of the terms of the bond. The claim is also wholly inconsistent with the separate proceedings instituted against the contractors on the same date as these proceedings were instituted (18 February 2014). Those latter proceedings seek to refer the quantification of the damages sustained to arbitration.

82. It is essential that the courts protect their process from abuse. The institution of proceedings which are bound to fail represents such an abuse. It is unjust to put defendants to the time and expense of a full hearing in circumstances where the claim cannot succeed. To do otherwise creates a risk that defendants may be forced, for commercial reasons, to make a windfall payment to a plaintiff in order to compromise unmeritorious litigation. A defendant might be presented with a Hobson's choice of defending protracted litigation in circumstances where its legal costs might not be recovered, or seeking instead to compromise the litigation for a lesser sum than that which would be incurred in legal costs.

Proposed order

83. I propose to make an order dismissing these proceedings pursuant to the court's inherent jurisdiction.

Appearances

Eoghan Cole, BL, instructed by Giles J. Kennedy & Co. Solicitors for the Plaintiff.

Graham O’Doherty of Maples and Calder Solicitors for the Defendant.