APPROVED **[2021] IEHC 19**

THE HIGH COURT

2020 No. 153 MCA

IN THE MATTER OF AN ADJUDICATION PURSUANT TO THE CONSTRUCTION CONTRACTS ACT 2013

BETWEEN

GRAVITY CONSTRUCTION LIMITED

APPLICANT

AND

TOTAL HIGHWAY MAINTENANCE LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered *ex tempore* on 26 January 2021

INTRODUCTION

1. This matter comes before the High Court by way of an application to enforce an adjudication award made pursuant to the Construction Contracts Act 2013. In brief, this legislation allows for the possibility of the making of, and enforcement of, adjudications in construction disputes on an expedited basis. Such adjudications are binding pending the resolution of the dispute between the parties by way of arbitration or legal proceedings. See section 6(10) of the Act as follows.

> (10) The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision.

NO REDACTION REQUIRED

2. The applicant has the benefit of an adjudication award dated 28 April 2020. The adjudicator's decision directed that the sum of €135,458.92 (net of VAT) was payable by the respondent to the applicant within fourteen days of the date of the decision, together with the fees of the adjudicator in the sum of €13,168.75, plus VAT to the extent applicable.

3. In circumstances where the respondent did not comply with the adjudicator's decision, the applicant instituted the within proceedings.

4. The initial response of the respondent to the application to enforce the adjudicator's decision had been to say that the matter should be referred to arbitration, and the payment of the award stayed pending the determination of such arbitration. More recently, however, the respondent has indicated that it is prepared to pay the award (together with the adjudicator's costs and interest). This is without prejudice to the respondent's right to prosecute arbitration proceedings.

5. This change in position on the part of the respondent has had the consequence that there are only two issues remaining for determination by this court, as follows. The first issue is whether this court should make an order against the respondent in circumstances where it has been indicated through counsel that the respondent's solicitor is prepared to give a formal undertaking to the court that the monies will be paid within two weeks of today's date. The second issue concerns the allocation of the costs of the proceedings. In particular, it will be necessary to consider whether the costs order should reflect the fact that the respondent, through its solicitors, made an offer to settle the proceedings on certain terms on 23 December 2020.

(1). FORM OF ORDER

6. Counsel on behalf of the respondent submits that, in circumstances where an undertaking can be provided to the court that the award would be paid within two weeks of today's date, the proceedings should be adjourned to allow this to happen. Counsel submits that it is unnecessary to enter judgment against the respondent. In the alternative, if the court is against him on this first submission, counsel suggests that the most that should be done is to make a form of "unless" order.

7. In response, counsel for the applicant submits that his client is entitled to judgment, and that the court should have regard to the legislative intent underlying the Construction Contracts Act 2013.

8. For the reasons which follow, I have decided that the appropriate form of order is an "unless" order. The order will provide that the applicant has leave to enforce the adjudicator's decision in the same manner as a judgment or order of the High Court, and that judgment is to be entered against the respondent in favour of the applicant in the sum claimed unless the said sum is paid to the solicitors acting on behalf of the applicant within seven days of today's date (26 January 2021). This order is made pursuant to section 6(11) of the Construction Contracts Act 2013.

9. The matter will be listed before me, for mention only, on Wednesday, 3 February 2021. The parties will have liberty to apply.

10. The alternative approach suggested by the respondent, whereby the provision of a solicitor's undertaking would obviate the need for the making of a formal court order, has the benefit of pragmatism. Nevertheless, it seems to me that the applicant is entitled to relief in circumstances where the respondent now offers no opposition to the proceedings. The respondent has indicated in correspondence, which has been opened to the court, that it is prepared to pay the award (together with the adjudicator's costs and

interest). The respondent no longer pursues its objection that payment should be deferred pending the hearing and determination of the arbitration proceedings. Having regard to the legislative intent underlying the Construction Contracts Act 2013, and, in particular, the need for expedition, it seems to me that the applicant is entitled to have the matter ruled upon by the High Court. The applicant has already had to wait some six months for this hearing date, and it is entitled to proceed today.

11. The framing of the order as an "unless" order represents an appropriate compromise in that it respects the statutory entitlement of the applicant to relief, while affording the respondent a very short period of time within which to make the payment without a judgment being formally entered against it (with all the negative implications thereof).

(2). COSTS

12. It only remains, therefore, to consider the appropriate allocation of the costs of the proceedings. The default position under Part 11 of the Legal Services Regulation Act 2015 ("***the LSRA 2015***") is that a party who has been "entirely successful" in proceedings has a *prima facie* entitlement to its costs. (See, generally, *Higgins v. Irish Aviation Authority (No. 2)* [2020] IECA 277).

13. The court has, of course, a discretion to make a different form of costs order. The factors to be taken into account in this regard are those set out at section 169(1) of the LSRA 2015. Relevantly, these include the terms of any settlement offer made. See subparagraph (f) as follows:

> (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer.

14. Order 99, rule 3 of the Rules of the Superior Courts (2019 version) provides as follows.

> 3.(1) The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or

> step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.
>
> (2) For the purposes of section 169(1)(f) of the 2015 Act, an offer to settle includes any offer in writing made without prejudice save as to the issue of costs.

15. On the facts of the present case, the respondent, through its solicitor, made an offer to settle the case by letter dated 23 December 2020. This letter was headed up "without prejudice save as to costs". There is significant disagreement between the parties as to the effect of this letter. In particular, the applicant maintains the position that the letter was too uncertain to meet the criteria of a *Calderbank* letter.

16. In order to understand this disagreement, it is necessary to consider the precise wording of the letter.

> "Please note that strictly without prejudice save as to costs, we are instructed to offer to your client on behalf of our client the sum of €135,458.92, being the subject of the adjudication of Mr Gerard P. Monaghan dated 28 April 2020 in satisfaction of these proceedings, the sum of €6,168.75 plus V.A.T. in respect of the re-imbursement of advance fees paid by Gravity to Mr Monaghan, interest thereon at the prevailing statutory rate, and furthermore a reasonable contribution to your client's legal fees in these proceedings, to be taxed in default of agreement.
>
> Please note that this offer is made strictly without prejudice to our client's right to have the correct valuation of the interim payment certificate application dated 19 December 2019 determined by way of arbitration.
>
> We propose to write to you under separate cover in regard to the issue of costs incurred to date."

17. As appears the letter is confined to an offer to make a "reasonable contribution" to the applicant's legal fees. The letter goes on to state that the legal fees are to be "taxed" in default of agreement. This should be understood as a reference to what is now described as the "adjudication" of costs under the Legal Services Regulation Act 2015.

18. In a subsequent letter dated 7 January 2021, the respondent's solicitors identified three cost items which it was said should not be recovered on taxation (*recte*, adjudication). I will return to address these presently.

19. The proceedings, potentially at least, present an important issue of principle as to how a party who wishes to compromise proceedings can protect themselves from having to pay *excessive* legal costs. The general position is that an offer of settlement should be certain, and that the recipient of the offer should know precisely the position it would be in were the proceedings to be compromised on the basis of that offer. It is to be expected, therefore, that an offer of settlement will expressly address the issue of legal costs. Of course, in almost all cases, the quantum of the costs will not have been ascertained at that stage. The party offering to settle the proceedings may seek to protect themselves by indicating that they will pay costs on a party and party basis, such costs to be adjudicated by the office of the legal costs adjudicator in default of agreement.

20. The position becomes more difficult where, as in this case, the party offering to settle the proceedings wishes to dispute specific fee items. This difficulty arises because of a division of function as between the trial judge and the legal costs adjudicator. Whereas the latter is charged with examining the nature and extent of the work done on behalf of the party claiming costs, the broad parameters of the costs allowed are a matter for the trial judge. For example, the question of whether the costs of written legal submissions should be allowed on a party and party basis is something which should be expressly addressed in the costs order itself. (Such an order is not necessary in judicial review proceedings).

21. There is some risk, therefore, that if the party wishing to settle proceedings simply agrees to pay the costs as adjudicated, they may be precluded from challenging specific fee items

before the legal costs adjudicator, i.e. on the basis that those items are matters for the trial judge.

22. It seems to me that the appropriate approach to be taken in such circumstances is to indicate in the settlement offer that, in principle, the settling party is prepared to pay the other side's costs but reserves the right to challenge specific fee items, either before the trial judge (if necessary) or before the legal costs adjudicator. By adopting this approach, the settling party is putting the other side in as good a position in costs terms as it would have been had the matter proceeded to full hearing and it received an award of costs in its favour. The fact that an award of costs has been made does not preclude the paying party objecting to specific items thereafter.

23. The position adopted by the respondent in the present case, however, fell short of that. As appears from the terms of the letter of 23 December 2020 (cited above), what was being offered was to make a "reasonable contribution" to costs. A "reasonable contribution" is a term of art, and would ordinarily be understood as falling short of full costs. Counsel for the respondent points out, correctly insofar as it goes, that the phrase was immediately followed up by a reference to the taxation of costs. Nevertheless, it seems to me that there was, at the very least, ambiguity as to the terms upon which settlement was being offered. This is a factor which is to be taken into account in deciding the weight to be attached to the offer, and, in particular, as to whether the court in the exercise of its discretion should modify the default position.

24. Having carefully considered the matter, I have decided in the exercise of my discretion under Section 169 of the LSRA 2015 and Order 99 of the Rules of the Superior Courts (as amended in 2019) that the appropriate order in this case is that the applicant should recover from the respondent its costs on a party and party basis, such costs to be adjudicated upon by the legal costs adjudicator pursuant to the LSRA 2015. Put

otherwise, I am not making any adjustment to the default costs order. The applicant, having been entirely successful in the proceedings, is entitled to its costs in the ordinary way. The reasons for which I have reached this conclusion are as follows.

25. The first consideration—and this is a consideration which is expressly referenced in Section 169(1)(f)—is the *timing* of the offer of settlement. The offer in this case was made at the eleventh hour, a matter of weeks before the scheduled hearing date. This has to be seen in the context of a hearing date which had been fixed as long ago as July of last year ,i.e. some six months earlier.

26. The offer of settlement had been sent out at lunchtime on 23 December 2020, at a time when it would be reasonable to expect that most offices and businesses would be closing up for the Christmas and New Year holiday period. Accordingly, I propose to treat the effective date of receipt of the letter as being the first normal working day following the holiday period, i.e. 4 January 2021. The offer of settlement was, in effect, made some three weeks prior to the longstanding hearing date of 26 January 2021.

27. The timing of the offer of settlement tells against any modification of the default position that costs should be awarded to the party who is entirely successful in the proceedings. The reality is that most of the costs will already have been incurred well in advance of these events in January 2021. Counsel will have been briefed and have been preparing for the full hearing; written legal submissions had been prepared and filed by both parties; and the parties were ready for the hearing.

28. The second reason for deciding not to adjust the default costs order is the wording of the letter of 23 December 2020. It seems to me that the letter was, at best, ambiguous. As I have already indicated, the term "reasonable contribution" is a term of art which indicates something less than the full of the costs which would be recovered on a party and party

basis. It was not unreasonable, therefore, for the applicant to decline to accept the offer on those terms.

29. The offer is not saved by the reference to the taxation of costs. The wording of the letter lacked certainty, and certainty was not, in fact, brought to bear until the day before the hearing (25 January 2021), when the respondent's solicitor sent a letter which appear to disavow the reference to "reasonable contribution" and explained that what was intended is that the costs be taxed (*recte*, adjudicated) in default of agreement. That was simply too late to affect in any meaningful way the costs of these proceedings.

30. The third consideration informing my decision on costs is the legislative backdrop to the proceedings. It seems to me that this court has to have some regard to the legislative intent underlying the Construction Contracts Act 2013, and, in particular, the need for expedition. The simple fact of the matter is that by raising grounds of opposition which it ultimately did not pursue, the respondent successfully delayed these proceedings for a period of some six months. (It also successfully objected to the fixing of an earlier hearing date on 17 September 2020). In allocating costs, I am entitled to have some regard to the conduct of the respondent. The conduct of the proceedings is a matter specifically referenced in section 169 of the LSRA 2015.

31. Having regard to this conduct, and the two other factors already identified, i.e. the timing and the ambiguity of the offer of settlement, it seems to me that the proper exercise of my discretion is not to move from the default position, which is that the applicant is entitled to its costs having been entirely successful in obtaining the relief sought.

32. It is next necessary to deal with the specific items which the respondent submits should be disallowed. The first item concerns the costs of the various sets of written legal submissions. I am satisfied that the applicant is entitled to the costs of two sets of written legal submissions, i.e. those filed on 15 September 2020. This was undoubtedly an

important case, which gave rise to a large number of legal issues. The extent to which certain of those legal issues were properly brought into the proceedings by the respondent is a matter which may have been up for debate had the matter proceeded to full hearing. In particular, the propriety of the attempt to stay the enforcement of the adjudicator's award under the Construction Contracts Act 2013 pending the determination of arbitration proceedings is something that is open for debate given the express wording of section 6(10) of the Act (cited earlier). For costs purposes, however, what is significant is that the applicant was put to the trouble of preparing detailed written legal submissions to address all those issues. What could have been a straightforward application for enforcement under the Construction Contracts Act 2013 was complicated by the introduction of the issue of a stay pending arbitration. That required consideration of the UNCITRAL model law on international commercial arbitration, and the Arbitration Act 2010. It also required consideration of the legislative policy underlying the Construction Contracts Act 2013 which was based, as I understand from reading the written submissions, on equivalent but not identical legislation in the United Kingdom. It was necessary to explore all of those issues in the applicant's written legal submissions. Having raised the hare in respect of all of these issues, the respondent cannot now be heard to complain that the applicant had to incur the costs of preparing two sets of written legal submissions. I will not, however, allow the costs of the third set of written legal submissions (25 January 2021) on account of the timing of same and on account of the fact that the first two sets of submissions are so comprehensive.

33. The second disputed fee item relates to the directions hearing on 17 September 2020. It seems to me that the applicant is entitled to these costs also. This is a case which was being case managed. It had been given a hearing date of 26 January 2021, and had been listed on 17 September 2020 to confirm that the directions had been complied with and

that the case would, indeed, be ready to proceed on today's date. As it happens, counsel on behalf of the applicant took advantage of the listing on 17 September 2020 to attempt to secure an earlier hearing date but was unsuccessful. It seems to me that counsel for the applicant is correct when he submits that the parties had to attend in court for the directions hearing on 17 September 2020 in any event, and the fact of his applying for an earlier date for the substantive hearing did not add materially to the costs incurred.

34. The third and final fee item relates to the filing of two versions of an affidavit by one of the applicant's deponents. It has since been explained that, as a result of inadvertence, the person who had identified the deponent of the affidavit to the solicitor who witnessed the swearing of the affidavit had omitted to sign the affidavit himself. A second affidavit in proper form was subsequently filed. The solicitor acting on behalf of the respondent's raised an objection in this regard by letter dated 7 January 2021.

35. Counsel on behalf of the applicant has accepted that the respondent is entitled to recover the costs occasioned by this episode. Whereas it will ultimately be a matter for the legal costs adjudicator to determine the measure of the costs incurred, same will be minimal. I direct that such costs are to be set-off against the much more substantial order of costs made in favour of the applicant.

36. Finally, I should also record that I fully accept the explanation for the error in the swearing of the earlier affidavit (as set out in the affidavit filed on behalf of the applicant's side on 25 January 2021). Whereas it is unfortunate that an error occurred, same was the result of nothing more than inadvertence. None of us is immune from making mistakes. There is no suggestion whatsoever of any impropriety.

CONCLUSION AND FORM OF ORDER

37. For the reasons set out above, the order of the court is as follows. An order that the applicant has leave to enforce the adjudicator's decision in the same manner as a judgment or order of the High Court, and that judgment is to be entered against the respondent in favour of the applicant in the sum claimed unless the said sum is paid to the solicitors acting on behalf of the applicant within seven days of today's date (26 January 2021). This order is made pursuant to section 6(11) of the Construction Contracts Act 2013.

38. The applicant should recover from the respondent its costs of these proceedings (to include all reserved costs) on a party and party basis. In default of agreement, such costs to be adjudicated upon by the legal costs adjudicator pursuant to the LSRA 2015. The costs are to include the costs of two sets of written legal submissions and the costs of the directions hearing on 17 September 2020. For the avoidance of any doubt, the costs are to include the costs of both senior and junior counsel. The respondent is entitled to set off the costs identified at paragraphs 34 to 35 above.

39. The matter will be listed before me, for mention only, on Wednesday, 3 February 2021. The parties will have liberty to apply.

Appearances

John Trainor, SC and Deirdre Ni Fhloinn for the applicant instructed by Byrne Wallace Solicitors
James O'Callaghan, SC and David O'Brien for the respondent instructed by H. G. Carpendale & Co. Solicitors

Approved
Garrett Simons