[2021] IEHC 79

THE HIGH COURT

[2020 No. 6649 P.]

BETWEEN

CONSTRUGOMES & CARLOS GOMES SA

PLAINTIFF

AND

DRAGADOS IRELAND LIMITED, BAM CIVIL ENGINEERING AND BANCO BPI SA

DEFENDANTS

JUDGMENT of Ms. Justice Nuala Butler delivered on the 4th day of February, 2021

Introduction

1. In this application, the plaintiff seeks an interlocutory injunction under O. 50, r. 6 of the Rules of the Superior Courts or interim protection in respect of an intended arbitration under O. 56, r. 3(1)(a) to restrain payment by the third named defendant ("the Bank") on foot of a performance bond (also referred to as a letter of credit) provided by the plaintiff for the benefit of the first and second defendants. It is well established that the courts will not lightly grant interlocutory relief to restrain payment of a letter of credit even in circumstances where there is an unresolved dispute between the person who issued the letter of credit and the beneficiary thereof, save in cases of fraud. Whilst acknowledging that the threshold for obtaining the relief sought is necessarily high, the plaintiff contends that the legal principles regarding the test to be met in respect of fraud have not been definitively settled in Ireland. Further, the plaintiff contends that this case is exceptional and gives rise to new considerations because of the existence of an adjudicator's decision in the plaintiff's favour under s. 6 of the Construction Contracts Act, 2013. Under s. 6(10) of the 2013 Act, this decision is final until the payment dispute underlying the decision is finally settled by the parties or resolved by arbitration or litigation.

2. On being notified of the making of an interim order, the Bank agreed to abide by any order made by the court and did not participate in the interlocutory hearing in which the issues were canvased by the plaintiff and the first and second named defendants. There was not, in fact, any significant disagreement between the parties as to the relevant law: rather, as to how that should be applied to the facts of this case. Consequently, it may be useful to set out the background to the case at the outset.

Factual Background

3. The first named defendant is an Irish company which is part of a large Spanish based multinational group specialising in major infrastructural projects. Similarly, the second named defendant is an Irish company which is part of a Dutch based multinational construction company. The first and second named defendants combined to form a joint venture and tendered for the award of a contract to construct and operate the New Ross Bypass. They were successful in this regard and a public private partnership contract worth some €230 million was awarded to the joint venture in January, 2016. The project consisted of 15 kilometres of motorway and 29 structures including a 900 metre cable-stayed bridge over the River Barrow.

4. As commonly occurs, the joint venture then subcontracted certain aspects of the work to subcontractors of which the plaintiff was one. The plaintiff is a Portuguese based civil engineering company, specialising in bridgework and acted through its Irish branch in respect of this project. The subcontract entered into between the plaintiff and the joint venture was worth just under €2.7 million and required the plaintiff to *"execute and complete the subcontract works and remedy any defects therein".* The subcontract works were specified in detail and, in particular, required the construction of a deck on the falsework of the bridge over the River Barrow together with related ancillary work in accordance with designs provided by the joint venture. The subcontract was subsequently amended on two occasions to provide, inter alia, for the extension of the completion date. These amendments are otherwise not material to the issues before the court. Clause 25 of the subcontract provided for the determination of disputes between the parties by reference to arbitration in accordance with ICC rules and that the arbitrator's award would be final and binding on the parties.

5. As part of the contractual arrangements between the parties, the plaintiff was required to provide a performance security bond, equivalent to 10% of the value of the subcontract. The agreement provided for the phased release of the bond such that only half of its original value, namely, €134,713.45 remains.

6. The performance security bond was provided through an agreement between the plaintiff and the Bank dated 23rd March, 2017. The terms of the agreement are reflected in a notification sent by the Bank to the joint venture on the 27th April, 2017 which recites:-

> *"The Bank's obligations are direct primary obligations and shall be fulfilled without any proof or conditions and receipt of request of payment from the contractor shall be conclusive evidence of the Bank's liability to pay to the contractor the amount demanded up to the "maximum guaranteed amount"."*

The Bank then provided an undertaking in the following terms:-

> *"…herewith irrevocably undertake to pay you, without any deduction, set off, any amount up to €134,713.45 ("guaranteed amount") upon receipt by us at our mail address of a request for payment with your declaration that the contractor violated the terms of the contract and, notwithstanding being requested to pay the above requested amount, has failed to do so."*

It is evident from this that the only pre-condition to payment on foot of the bond is that the joint venture declare that the plaintiff is in breach of the subcontract and, having been requested to make payment, has failed to do so. Hence, the description as an "*on demand"* bond. There is no provision for independent verification of the joint venture's view that the plaintiff is in breach of contract before the Bank is obliged to pay. The usual adjudicative mechanisms remain available to the parties in respect of any dispute as regards the breach of contract alleged but, if invoked, those mechanisms operate entirely separately from the Bank's liability to pay the joint venture once a call has been validly made in accordance with the terms of the bond. The joint venture was advised that its

claim could be submitted to the Bank through confirmation from its own bank that the original claim had been sent by registered mail. The expiry date of the bond was stated to be the 30th September, 2020. Finally, the bond was stated to be subject to ICC Uniform Rules for Demand Guarantees (URDG 758).

7. Work proceeded on the project, albeit more slowly than anticipated. By February, 2019, issues had arisen between the parties and the joint venture withheld payment of certain monies due on the subcontract. On 16th April, 2019, the plaintiff submitted its final account which, by formal letter dated 12th June, 2019, the joint venture refused to pay. As this entailed a "*payment dispute*" under a "*construction contract*" within the meaning of the Construction Contracts Act, 2013, the plaintiff referred the dispute to adjudication under that Act seeking payment of €1,157,919.30. By way of defence to that claim, the joint venture sought to crossclaim in the adjudication process under headings which included liquidated damages and the cost of repairs to defective works carried out by the plaintiff. The amount of the counterclaim was €1,482,744.88. The adjudication process was admirably prompt and the adjudicator delivered his decision on 20th November, 2019. That decision found substantially in favour of the plaintiff and awarded the plaintiff the sum of €388,274. Only €1,275 of the joint venture's crossclaim was allowed. However, it is apparent that although the plaintiff was broadly speaking the victor in the adjudication, it succeeded only to the extent of approximately one-third of its original claim. The joint venture has since paid that amount to the plaintiff.

8. Meanwhile, works on the ground were reaching a conclusion. On 8th March, 2019, the plaintiff emailed the joint venture advising that it would be leaving the site a week later and acknowledging that there were some tasks left for it to complete. On 15th March, 2019, the plaintiff left the site. The joint venture subsequently requested that the plaintiff return to site to repair defects in the works carried out by it but for various reasons that did not occur.

9. On the same day as the adjudicator's decision, 20th November, 2019, the joint venture formally notified the plaintiff of its opinion that the plaintiff was in violation of the terms of the subcontract by reason of a persistent failure to carry out the subcontract works in accordance with the agreement, as a result of which the joint venture requested payment of the guaranteed amount (i.e. €134,713.45). In the event that such amount was not paid, the joint venture advised the plaintiff that it intended to demand payment on foot of the guarantee/letter of credit. The plaintiff places considerable importance on the fact that the first indication of the joint venture's claim against the performance bond came on the same day as the adjudicator's decision in the plaintiff's favour.

10. Three reports were sent to the plaintiff allegedly identifying the problems and defects in issue. The plaintiff immediately disputed liability for the defects and contended that those problems/defects had already been raised by the joint venture during the adjudication process, the adjudicator had not awarded any sums to the joint venture in respect of those matters and that the joint venture could not now claim separately for matters which had been dealt with in the adjudication process. The plaintiff's solicitor described the

demand for payment as a collateral attack on the adjudicator's decision and, in a letter dated 22nd November, 2019, contended that this was "*tantamount to fraud in respect of the performance bond*". As is evident from this summary of the correspondence, central to the current dispute between the parties is the question of whether the problems and defects identified by the joint venture in November, 2019 and subsequently are the same as the defects which were included in the joint venture's crossclaim in the adjudication process. The plaintiff contends that they are and, consequently, that the assertion by the joint venture of a claim to ground its call on the performance bond, which has already been refused by the adjudicator, is fraudulent. The joint venture, on the other hand, contends that the claim now made is materially different to that raised in the crossclaim in the adjudication and, thus, cannot be characterised as fraudulent.

11. In fact, the joint venture goes somewhat further in two respects. It contends firstly that the affidavit sworn on behalf of the plaintiff which grounded the application for interim relief was misleading in a material respect. That affidavit detailed the exchange of correspondence between the parties and their respective solicitors focusing on two issues. The first issue was a suggestion made by the joint venture at the outset that the amount of the performance bond should be deducted from the amount awarded to the plaintiff in the adjudication. This was strongly resisted by the plaintiff's solicitors and the full amount of the adjudicator's award was paid to the plaintiff in December, 2019. The second, was the plaintiff's contention that the defects identified by the joint venture in the work done by the plaintiff had been considered in the adjudication and the adjudicator had refused to award any compensation in respect of them. However, in a replying affidavit Mr. Jonathan Evans of the first named defendant on behalf of the joint venture points out that the claim now made by the joint venture includes a sum of €538,854 (which exceeds the amount of the bond) in respect of liquidated damages in addition to the compensation claimed in respect of defects. Mr. Evans contends that this element of the claim is simply ignored by the plaintiff because it would be impossible to argue for reasons set out in his affidavit that this claim for liquidated damages had been the subject of the adjudicator's decision such as to prevent the joint venture pursuing the claim now.

12. The second significant complaint the joint venture makes in respect of the way in which the *ex parte* application was presented is that, although the grounding affidavit exhibited correspondence from the joint venture's solicitor dated 24th and 25th September, 2020 which attached details of the defects the subject matter of the claim on the bond, the attached documents were not themselves exhibited. The plaintiff contends the defects now claimed are the same as the defects claimed by the joint venture in the adjudication. However, the joint venture contends that when the details of the claim made in response to the adjudication are compared with the details of the claim now made and evidenced in the documentation attached to that correspondence, the difference is readily apparent. That comparison could not be carried out without sight of the latter material which was not exhibited for the purposes of the *ex parte* application.

13. In addition to complaints made in respect of the manner in which the interim application was presented to court, the joint venture relies on what it contends is a concession made

in the replying affidavit of Mr. Antonio Lima of the plaintiff sworn in response to Mr. Evans' affidavit. Mr. Lima accepts that the grounding affidavit did not specifically deal with liquidated damages but disputes the joint venture's entitlement to such damages contending that the adjudicator had refused to award liquidated damages. However, he acknowledges at para. 15 of his affidavit that:-

> *"I understand that the joint venture is now claiming liquidated damages for the period from 15 March 2019 until 24 January 2020. This does, admittedly, fall outside the Decision. However, the joint venture's response to the plaintiff's claim in adjudication was delivered on 25 October 2019. If the joint venture had wished to pursue a claim for liquidated damages for the period post-15 March 2019, then it was free to do so. I believe it is striking that the joint venture chose not to do so and has instead only advanced this claim by solicitor's letter on 28 September 2019, a mere two days before the performance bond was due to expire…"*

There is a separate issue as to the outer limit of the period in respect of which liquidated damages might be claimed by reference to the date of substantial completion of the subcontract works and the adjudicator's findings on this issue. If the plaintiff is correct on this point, it could limit the period in respect of which liquidated damages could be claimed but, as the joint venture points out, this would not render the claim fraudulent.

14. Against this factual background, the plaintiff issued proceedings on 28th September, 2020 and applied *ex parte* for interim relief which was granted by Reynolds J. on 29th September, 2020. The interim order against the first and second named defendants was vacated on the return date and an order made against the Bank restraining payment out of the monies pending the determination of the interlocutory application. As noted, the Bank has indicated its preparedness to be bound by whatever order the court makes and has not participated in the interlocutory hearing.

Submissions of the Parties

15. The plaintiff's case is based on the contention that the joint venture's call on the performance bond is fraudulent and queries the extent to which fraud has to be established in order for the plaintiff to be entitled to an interlocutory injunction to restrain payment. The allegation of fraud in turn depends on the scope and status of the adjudicator's decision and whether there is an obligation on the joint venture as the responding party to bring forward all potential crossclaims in the adjudication process. The plaintiff also raises issues as to whether the balance of convenience has to be considered if the claim of fraud is sufficiently established and, if so, where that lies. As regards damages, the plaintiff has offered to replace the existing on demand bond with a new conditional bond pending the outcome of an arbitration. The plaintiff considers that this would provide the joint venture with appropriate security in the event that its claim is valid.

16. There is no dispute between the parties as to the principles generally applicable to the grant of interlocutory injunctions which, in this jurisdiction are set out by the Supreme Court in *Campus Oil v. Minister for Industry* [1983] 1 IR 88 and, more recently, refined in

Merck Sharp and Dohme v. Clonmel Healthcare [2019] IESC 65. It is accepted by both sides that the latter case acknowledges that there may be different and more stringent tests required in certain categories of cases and that applications for interlocutory relief to restrain payment on foot of a letter of credit forms one such category. The plaintiff accepts that in this application it is required to show more than just a fair question to be tried and it must establish that the fraud upon which it relies is "*seriously arguable*". Notwithstanding that the concept of fraud is to be found in both criminal and civil law, as this is a civil case the standard of proof in the substantive proceedings will be "*on the balance of probabilities*" (i.e. 51%) and the plaintiff contends that the standard of proof for the interlocutory proceedings must necessarily be lower. It might be observed that if the plaintiff is suggesting that some sort of mathematical formula can be applied so as to reduce the standard of proof in an application such as this to somewhere between 25% and 50%, this would not be consistent with the stringent way in which the courts have interpreted and applied the seriously arguable test. The plaintiff also points to a series of UK judgments which applied the seriously arguable test in cases of fraud resulting in the grant of injunctions to restrain payment on foot of letters of credit.

17. Finally, the plaintiff contends that there is a difference between UK and Irish law as regards the application of the balance of convenience test to cases of this type. The plaintiff argues that the Irish cases have taken the position that if fraud is established, the balance of convenience could never not favour the grant of an injunction whereas the UK cases conduct the balancing exercise in light of the facts of each case. It is contended on facts of this case, that the balance of convenience would necessarily favour the grant of an injunction as the plaintiff has averred to its inability to secure further bonding if the bond is called, whereas the joint venture has done no more than point to general principles.

18. The joint venture strenuously contests the contention that the claim in respect of which the bond has been called is fraudulent. Counsel conducted a detailed examination of the exhibits to show, as a matter of fact, that the claim is made in respect of different defects and a different period of time to that raised in the adjudication. In particular, the joint venture points to the adjudicator's decision to show that the crossclaim for liquidated damages in the adjudication was made in respect of the plaintiff's alleged failure to comply with one of a number of "*key performance indicators".* The adjudicator found that the subcontract did not provide for liquidated damages in the event of breach of a key performance indicator. The joint venture had not raised and, consequently, the adjudicator did not determine whether the plaintiff was liable for liquidated damages by reference to the completion date of the subcontract which is the claim now made by the joint venture. Further, the joint venture asserts that the plaintiff has not provided any legal basis to establish that a *Henderson v Henderson* (1843) 3 Hare 100 type of obligation applies in the adjudication process requiring it to bring forward all potential crossclaims. In fact, the joint venture's response to the adjudication expressly stated that newer defects could not be vouched in time to be included in the crossclaim and that other defects were arising on an ongoing basis. As clause 21.1 of the subcontract made the plaintiff liable to repair defects arising within 48 months of the completion date of the

subcontract or liable for the cost of the works if the repairs are not carried out by the plaintiff, it could never be a requirement that the joint venture identify all defects in an adjudication process which might conclude some years before the defects correction period expires. The joint venture emphasised that the court did not have to decide whether it would be entitled to damages under any of the headings now claimed. It is sufficient for the court to accept the *bona fides* of the claim now made. Even if the claim is misconceived and ultimately does not succeed, this does not mean that it is a fraudulent claim.

19. In addition to its factual analysis, the joint venture made a number of legal arguments, the most significant of which was to emphasise the legal nature of a letter of credit. It is a fundamental principle that a letter of credit or guaranteed bond is autonomous and, save for the fact that it is put in place pursuant to a contractual requirement, it does not depend on the terms of the underlying contract between the parties. It would be a radical change to allow payment on foot of one contractual obligation (i.e. the letter of credit) to be stayed pending the completion of an arbitration under a different contract (i.e. the subcontract). For this reason, the joint venture rejects the proposition that the conditional bond offered by the payment, payment on foot of which would be dependent on the outcome of arbitration, is equivalent to the "on-demand" performance bond which was a requirement of the subcontract. The latter entitles the joint venture to immediate payment from the bank once the appropriate procedures are followed, whereas, the former is more akin to a lodgement in court requiring the joint venture to prosecute and succeed in proceedings before payment out will be made.

20. Further, the joint venture argues that the plaintiff has misconstrued the nature and effect of adjudication under the Construction Contracts Act, 2013. The purpose of this statute is to provide a speedy adjudicative of process on foot of which the successful party is entitled to prompt payment, thereby ensuring cash flow in respect of this type of contract. The Act does not stipulate that all claims must be referred for adjudication failing which a party will lose the right to make those claims. It is contended that this is especially significant for an entity in the joint venture's position which had only fourteen days to respond to the claim being made against it. It is suggested there may be serious constitutional implications if the legislation were to be construed so as to require a party to make a crossclaim within this very tight timeframe or otherwise lose the entitlement completely.

Performance Bond/Letter of Credit

21. I accept the joint venture's characterisation of the performance bond which, in fairness, was not seriously disputed by the plaintiff. As the legal nature of a letter of credit or performance bond is relevant to the extent to which payment on foot of it can be or, in a given case, should be restrained, it is worth looking at it in some detail. The terms of the performance bond put in place by the plaintiff in this case under which the Bank agreed to pay a certain amount to the joint venture in the event that the joint venture declared the plaintiff to be in breach of contract is set out in the factual analysis above. This is, in effect, an "on demand" bond, the only pre-condition to payment being the unilateral

making of a declaration and request by the beneficiary in whose favour the bond has been lodged.

22. The ICC Uniform Rules for Demand Guarantee Rules (URDGR) to which the bond was expressly subject provide:-

> *"Article 5: Independence of Guarantee and Counter-Guarantee*
>
> *(a) A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary…*
>
> *Article 6: Documents v. Goods, Services or Performance*
>
> *Guarantors deal with documents and not with goods, services or performance to which the documents may relate."*

This accurately reflects the proposition advanced by the joint venture that payment on foot of the bond is autonomous from the resolution of any dispute arising in relation to the underlying contract.

23. This is significant because on demand bonds of this nature are widely used in a number of economic sectors, including construction, as a form of cash guarantee which facilitates a range of contractual relationships. The courts have recognised that placing any impediment on payment of foot of such bond is potentially disruptive of these contractual relationships which are essential to international commerce. This is described in a passage of the judgment of Sir John Donaldson M.R. in *Bolivinter Oil SA v. Chase Manhattan* [1984] 1 All ER 351 which was cited with approval by Laffoy J. in Fraser v. *Great Gas Petroleum (Ireland) Ltd* [2012] IEHC 523:-

> *"The unique value of such a letter, bond or guarantee is that the beneficiary can be completely satisfied that, whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. In requesting his bank to issue such a letter, bond or guarantee, the customer is seeking to take advantage of this unique characteristic. If, save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking, given be it again noted at his request, by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all*

irrevocable letters of credit and performance bonds and guarantees will be undermined."

Similar views were expressed by Keane J. in *Hibernia Meats Ltd v. Ministere de L'Agriculture* (Unreported, Keane J., 16th February, 1984) relying on statements of Kerr J. in *R.D. Harbottle (Mercantile) Ltd v. National Westminster Bank* [1978] QB 146. Having refused an interlocutory injunction, Keane J. commented:-

"One can readily understand the frustration which the sellers may now feel, since under the terms of the contract it may be necessary for them to pursue whatever remedy is open to them in the Algerian courts. It must be said, however, on the other side of the coin, that business firms who enter into contracts of this nature requiring the provision of unconditional guarantees by banks take the risk that they may have no remedy against their overseas customers other than an action in the foreign tribunal; and no remedy at all against the bank because of the unconditional nature of the guarantee."

Letters of Credit-Test for Interlocutory Injunction

24. It follows from the nature of a letter of credit or an on demand bond that the circumstances in which it will be appropriate for a court to restrain payment on foot of it will be extremely limited and exceptional. From the authorities cited to the court in this case, it would seem that the only basis upon which the courts will even consider restraining payment, especially on an interlocutory basis and even more so on an *ex parte* basis, is where fraud is alleged as against the beneficiary of the bond. To quote Donaldson M.R. in *Bolivinter* again:-

"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge."

25. It appears to have been accepted by the Irish Courts since at least 1984 that the only circumstances in which the court will restrain payment on foot of a letter of credit or an on demand bond is a clear case of fraud of which the bank have notice (see Keane J. in *Hibernia Meats Ltd v. Ministere de L'agriculture* above and in *GPA Group Plc v. Bank of Ireland* [1992] 2 IR 408). As the Bank now has notice of the allegation of fraud in this case, the issue remaining to be determined is extent to which that allegation must be established before the court will grant the relief requested. Keane J. in the two authorities already mentioned refers to a "*clear case of fraud*" *(Hibernia Meats) or "established or obvious fraud" (GPA Group Plc)*. Of course this begs the question as to how something can be said to be "established" at an interlocutory stage when the evidence will be on affidavit, discovery may not yet have taken place and the parties do not have the opportunity of examining and cross examining witnesses.

26. This was addressed by Laffoy J. in *Fraser v. Great Gas Petroleum (Ireland) Ltd* (above) where she had to consider in some detail the level of proof required for the grant of an

interim or an interlocutory injunction in a letter of credit case. She cited with approval the then-recent decision of the UK Court of Appeal in *Deutsche Ruckversicherung v. Walbrook* [1996] 1 All ER 791 in the following terms:-

> *"Have the plaintiffs established that it is seriously arguable that, on the material available, the only realistic inference is that [the beneficiary] could not honestly have believed in the validity of its demands on the [letter of credit]."*

In the case before her, Laffoy J. noted that although the plaintiffs alleged overcharging, they did not specifically allege that the demand was fraudulent and she was of the view that there was no evidence upon which knowledge of fraud could be imputed to the defendant. In an obvious reference to the "*only realistic inference*" test, she concluded that on the basis of the affidavits filed, there was undoubtedly a very complicated controversy but "*it is not possible to infer that the defendant could not honestly believe at this point in time in the validity of its demand*". The injunction was refused.

27. It seems to me, on the basis of this case law that the legal test applicable to the granting of an injunction to restrain payment on foot of a letter of credit or on demand bond is well settled in Irish law. The initial criteria normally applicable to an interlocutory injunction, namely, whether there is a fair question to be tried, is not the appropriate test as that would undoubtedly lead to the grant of an injunction in many instances in circumstances which would undermine the fundamental character of the bond which has been freely entered into between the parties as part of the terms of the contract between them. Instead, a higher test of "*seriously arguable*" applies. The courts have also expanded upon what is meant by "seriously arguable" and the judgments both in this jurisdiction and in the neighbouring jurisdiction have made it clear that in the particular context this is actually a very high threshold. As the only ground upon which such an injunction might be granted has been identified as fraud, the case law indicates that the fraud relied on must be clear, obvious or established.

28. The plaintiff submitted that the difference between itself and the joint venture on this point was that the plaintiff contended that fraud could be inferred once there was a seriously arguable inference to be drawn from the facts, whereas the joint venture contended that fraud must be proved. I am not certain that the joint venture's argument actually went that far but, in any event, I think the plaintiff understates the legal test by suggesting that a seriously arguable inference of fraud is sufficient. I certainly accept that fraud can be inferred and that it can be difficult for a party to prove fraud as the test for fraud set out by Shanley J. in *Forshall v. Walsh* [1997] IEHC 100 requires a plaintiff to prove that a representation was made by a defendant knowingly, or without belief in its truth or recklessly or careless whether it be true or false. As it can be difficult if not impossible for one party to prove the state of knowledge of the other, it necessarily follows that it must be possible to establish fraud by inference. However, the threshold where interlocutory relief is sought to restrain payment in circumstances such as these, is not merely that there be a seriously arguable inference, but it must be seriously arguable

that the only realistic inference to be drawn is one of fraud. In my view, the latter is a more stringent test than the former.

Construction Contracts Act, 2013

29. The adjudication process provided for under the Construction Contracts Act, 2013, (commenced in July, 2016), is a relatively new feature of Irish construction law. As the plaintiff's case of fraud depends upon the conclusive nature of the adjudicator's decision under the 2013 Act, the plaintiff's counsel spent some time examining the terms of the Act and its effect on the claim the joint venture now makes which have grounded its decision to call on the performance bond.

30. The 2013 Act was designed to improve payment practises between main- and sub-contractors by making timely payment a legal obligation thus ensuring cash flow for entities carrying out construction operations on foot of construction contracts as defined in the act. There is no doubt but that the contract between the plaintiff and the joint venture in this case is a construction contract within the meaning of the 2013 Act, however the main public private partnership contract under which the joint venture was carrying out the overall project was not a construction contract within the meaning of the act. The Act secures its objective firstly by requiring under s. 3 that all construction contracts provide both for the amount of each interim payment and final payment and also for a payment claim date (or a mechanism for determining such date) in respect of each payment. Under the schedule to the 2013 Act which applies automatically unless more favourable terms are agreed by the parties to the contract, a construction contract must provide a payment claim date within 30 days of the commencement of the contract and every 30 days thereafter until the date of substantial completion. The parties are precluded from contracting out of the 2013 Act so that the obligation to provide for and make continuing interim payments as the work progresses becomes a mandatory contractual term in every construction contract.

31. Secondly, where there is a dispute between the parties as to the amount of or liability for any payment, known as a "*payment dispute*", s. 6 of the 2013 Act provides a statutory entitlement to refer that dispute to adjudication. The Minister maintains a statutory panel of adjudicators and if the parties cannot agree their own nominee, an adjudicator will be appointed from that panel under s. 6(4). The timescale within which the adjudication must be carried out is potentially significant in light of the joint venture's argument that it cannot be obliged to make the entirety of its crossclaim in response to the plaintiff's claim in the adjudication process. Once an adjudicator is appointed, the party making the claim has seven days within which to refer the claim to that adjudicator and to provide a copy of the claim to the other party. Thereafter, the adjudicator has 28 days from the date of referral to make their decision. That 28-day period may be extended by up to fourteen days on the consent of the referring party. Any further extension requires the consent of both parties. Presumably, the fourteen-day period allowed to the joint venture to respond to the plaintiff's claim was necessarily short in order to fit within the overall timeframe for the adjudication process.

32. There is no express reference in s. 6 to a crossclaim being made by the respondent to a claim which has been referred for adjudication. This is not really surprising when regard is had to the fact that the purpose of the 2013 Act was to ensure prompt payment for sub-contractors and the scheme of the act envisages that a payment dispute can be resolved speedily through the adjudication mechanism whereas other disputes between parties to a sub-contract remain to be resolved through more traditional means. That of course does not preclude a crossclaim being made, particularly where, as here, it is something that can properly be considered in the context of the claim which has been referred for adjudication. However, as a crossclaim is not expressly part of the statutory process, it is difficult to see how an obligation to make a crossclaim can be said to arise much less how it could be said that a contracting party loses all entitlement to claim in any forum for matters that could have been part of a crossclaim. Therefore, I have considerable difficulty in accepting the proposition that *Henderson v. Henderson* applies to the adjudication process so as to compel the responding party to make the entire of any potential crossclaim in that process or lose the right to make the claim entirely.

33. However, I do not think that this has to – or indeed should be - be definitively determined on this application for an interlocutory injunction What is relevant in this regard is whether by making a claim now which was not advanced in the course of the adjudication process, the joint venture could be said to be acting fraudulently. At its height, if the plaintiff is correct in its contention that *Henderson v. Henderson* applies (and I have considerable doubts on this point), then the most that could be said is that the joint venture has made a legal error in not bringing forward the entire of its crossclaim in the adjudication process and is now at risk of non-recovery in seeking to maintain that claim separately and outside of the statutory process. Thus, even if the plaintiff is ultimately correct in this legal argument, I do not think that it establishes that the joint venture has acted fraudulently in this regard.

34. In addition to the complaint that the joint venture should have brought forward the additional elements of its claim in the earlier process, the plaintiff maintains that there is in any event a considerable overlap between the claims made. On the premise that the claims are largely identical, the plaintiff contends that the joint venture cannot simply call on the bond as this would effectively amount to an impermissible set-off against the adjudication award. The joint venture does not seriously contest the proposition that the adjudication award must be paid in full and points to the fact that it has already made that payment. However, it contends that it is not precluded from claiming against the plaintiff nor from calling on the bond in circumstances where it alleges a breach of the sub-contract. All of this raises an issue as to the status of the adjudicator's decision and the extent to which the existence of that decision in the plaintiff's favour precludes the steps now being taken by the joint venture.

35. The status of the adjudicator's decision is evident from ss. 6(10), (11) and (12) of the 2013 Act which provide 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.

(11) The decision of the adjudicator, if binding, shall be enforceable either by action or, by leave of the High Court, in the same manner as a judgment or order of that Court with the same effect and, where leave is given, judgment may be entered in the terms of the decision.

(12) The decision of the adjudicator, if binding, shall, unless otherwise agreed by the parties, be treated as binding on them for all purposes and may accordingly be relied on by any of them, by way of defence, set-off or otherwise, in any legal proceedings."

The effect of these provisions is that the adjudicator's decision is presumptively binding but the parties to a contract may continue to seek to resolve the dispute through whatever other mechanisms are provided for in the contract such as arbitration or litigation. In the interim there is a legally binding obligation to pay on foot of the adjudicator's decision and the decision itself can be enforced unless the payment dispute is finally settled through other means. The plaintiff points out that the joint venture has not taken any steps in this case to have the decision of the adjudicator set aside and, in particular, has not referred the matters which were the subject of the adjudication to arbitration under clause 25 of the subcontract. The initial suggestion on behalf of the joint venture that the amount awarded in the adjudication should be set off against the claim now made by the joint venture was strongly resisted by the solicitors on behalf of the plaintiff, as a result of which payment was duly made on foot of the adjudicator's decision.

36. It is in the context of these provisions that the plaintiff argues that the effect of calling on the bond is tantamount to a set-off of the adjudicator's award which is not permissible for as long as that decision remains binding. The plaintiff relies on the decision of Judge Gilliland in *MJ Gleeson Group Plc v. Devonshire Green Holding Ltd* (Unreported, TCC, 19th March, 2004) which shares certain similarities with the facts of this case. A claimant subcontractor had referred a dispute to an adjudicator and a substantial award was made in its favour. Two days after the date of the adjudicator's decision the contractor served notice of a claim for liquidated damages for delay in meeting completion dates which had not been raised before the adjudicator and proposed withholding the amount of the liquidated damages from the adjudicator's award. The claimant then brought legal proceedings to enforce the award. The judgment focuses on the terms of the contract between the parties, clause 39A.7(1) of which was identical to section 6(10) of the 2013 Act. The other sub-paragraphs of that clause imposed an obligation to comply with the adjudicator's decision and an entitlement to take legal proceedings to ensure compliance. The crucial difference between the two cases is of course that in this case the adjudicator's award has been paid in full. Therefore, the issue is not whether the

contractor can unilaterally set off a claimed contractual entitlement to liquidated damages against such an award but whether, having paid the amount, the contractor can separately maintain a contractual entitlement to liquidated damages and call on the bond in consequence of the alleged breach of contract.

37. I do not think that the judgment is in fact authority for the proposition advanced by the plaintiff. It certainly confirms that payment must be made on foot of an adjudicator's decision unless and until it is set aside. In short, the case establishes that a contractor cannot unilaterally set off against an adjudicator's award but that it remains open to the parties to seek to enforce their contractual rights separately outside the adjudication process. This is evident from the following passages:-

> *"Not to pay in full the amount directed to be paid is simply a non-compliance with the adjudicator's decision which is in terms made binding on the parties until finally determined by arbitration, litigation or by an agreement in writing. It seems to me that the effect of clause 39A.7 and, in particular, 39A.7.3 is to make it clear that the award of the adjudicator is to be enforced as it stands and it is not to be subject to deductions of one sort or another. The language of clause 39A.7 is, in my judgment, clear and unambiguous. If the defendant is entitled to liquidated damages there is nothing to prevent it proceeding to seek to recover the same by action or otherwise or by adjudication if it wishes, but it is not entitled, it seems to me, to refuse to comply with an adjudicator's decision given within his jurisdiction merely because the defendant asserts or claims, possibly rightly, that it is entitled to have monies paid to it by the receiving party. That effectively is simply alleging a set-off."*

38. Although I cannot find reference in the judgment to the applicable statutory provisions, Gilliland J went on to describe the intention of Parliament as being: *"that the decisions of adjudicators are meant to give a speedy and effective remedy on an interim basis, and if the parties wish to challenge the decision of the adjudicator that should be done by arbitration or by litigation or by agreement*". The plaintiff also relies on this decision as authority for the application of *Henderson v Henderson* (discussed above) to the adjudication process. The court did comment that, on the facts of the case, it would have been open to the contractor to raise its claim for liquidated damages "*long before the adjudication started*". However, the argument does not appear to have been made that the contractor's failure to make the claim in the adjudication process precluded it from ever seeking to recover liquidated damages under the contract. The case was one taken to enforce the adjudicator's award and the fact that such a claim could have been advanced by the contractor in the adjudication process was relevant to whether the existence of the claim could be now relied on to defer enforcement of the adjudicator's decision. Gilliland J held that it would not be in the public interest nor consistent with the policy underlying adjudication that *"a party who has been ordered by an adjudicator to pay a sum of money should be able, not having sought to raise it before the adjudicator or previously, to turn around and seek to defeat the adjudicator's decision by reference to a claim which, on any view, it seems to me, ought to have been raised long beforehand*".

This seems to me to be something materially different to saying that the entitlement to make the claim is lost if it is not brought forward in the adjudication process.

Application to the Facts of this Case

39. In order for the plaintiff's claim of fraud to be seriously arguable it must be the only realistic inference open to the court on the facts of the case, or at least it must be seriously arguable that this is so. While the facts of the case cannot be finally determined until the substantive hearing, the court can look at the affidavit evidence to ascertain the extent to which it can be said that the claim now made by the joint venture and upon which it has grounded its call on the bond is one which is made *bona fide* (regardless of whether it ultimately succeeds) or, on the contrary, whether on the basis of this evidence the only realistic inference is that the claim is fraudulent. It is in that sense that the allegation of fraud must be clear, obvious or established. It does not have to be proven in the sense which will be required at the trial of the action.

40. On the basis of the exhibited documentation it does seem that the joint venture has attempted to differentiate between the crossclaim which it made unsuccessfully in the adjudication process and the claim which it now makes. Clearly the claim for liquidated damages is a different claim covering a different period relating as it does to the substantial completion of the subcontract and not to the key performance indicators. It may be that the plaintiff is correct in saying that the adjudicator's decision precludes any further claim for liquidated damages being maintained by the joint venture. Even so, I do not think that this is so manifestly evident from the decision that it can be readily inferred that the claim must be fraudulent. Further, insofar as I understand the documents, the joint venture appears to have expressly excluded defects which were previously the subject of the adjudication. This point is somewhat more difficult as, in circumstances where the plaintiff did not return to site to repair defects when called upon to do so, it is not entirely clear that the claim for the cost of repair work carried out by the joint venture excludes the cost of any repairs which had been identified, vouched and included in the crossclaim. I expect that oral evidence and possibly expert evidence will be required at trial in this regard. However, the claim certainly includes defects which were not included in the crossclaim and, indeed, defects which have only materialised and become apparent subsequent to the adjudication and therefore which could not have been included in the crossclaim. Therefore whilst acknowledging that elements of the claim for the cost of repairing alleged defects in the work carried out by the plaintiff might not succeed, I do not think it seriously arguable that the only inference to be drawn is one of fraud.

41. Thus when the facts of this case are examined in the light of this test, it is apparent that the plaintiff has not established a clear or obvious case of fraud. The plaintiff's case is dependent on the assertion that the claim now made by the joint venture is the same as that made to and rejected by the adjudicator. However, the joint venture has put evidence before the court of the basis on which it is making its claim and evidence that this is not the same claim which was rejected by the adjudicator. That evidence may or may not ultimately be sufficient to defend the claim of fraud made by the plaintiff in these proceedings. However, it is certainly sufficient to enable the court to say that fraud has

not been clearly or obviously established by the plaintiff such as to entitle the plaintiff to restrain payment on foot of an on demand bond into which it entered as part of its contractual agreement with the joint venture.

42. In light of the conclusions which I have reached to the effect that an inference of fraud cannot be readily drawn in the circumstances, the plaintiff has not made out the seriously arguable case of fraud that is required for the purposes of considering whether interlocutory relief should be granted to restrain payment on foot of the bond. In those circumstances I do not propose proceeding to consider the balance of convenience and indeed the anterior issue of whether the court should proceed to consider the balance of convenience. I am conscious of the potential divergence between the jurisprudence on this issue in Ireland and in the neighbouring jurisdiction and take the view that the teasing out and resolution of any such differences would be better suited to a case in which the court had found that the basic test for the grant of an injunction of this type had been met so that consideration of the balance of convenience issue was required.