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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **22/12/09**

2009 No. 20986

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

_____

BETWEEN:

AJM ELECTRICAL LIMITED

Plaintiff

-and-

BLACKBOURNE ELECTRICAL COMPANY LIMITED

Defendant

_____

McCLOSKEY J

I INTRODUCTION

[1] The Plaintiff claims some £68,000 from the Defendant, said to be due and owing on a contractual basis for works and services rendered. By this application, the Defendant seeks an order pursuant to Section 9 of the Arbitration Act 1996 staying the proceedings, on the ground that the subcontract which governed the relationship between the parties is said to include, in the language of the Notice of Motion, "*a valid arbitration agreement whereby the parties have agreed to refer disputes and/or differences arising under or in connection with the contract to arbitration*". The Plaintiff contests the Defendant's application.

[2] In summary, the Plaintiff's claim for some £68,000 has two components. The first is alleged additional works, generated by asserted variations of the subcontract.

The second is prolongation, based on the assertion that the duration of the works proved to be some seven months longer than originally agreed.

II THE ARBITRATION ACT 1996

[3] Section 5 of the Arbitration Act 1996 ("*the 1996 Act*") provides, in material part:

> "*(1) The provisions of this Part apply only where the arbitration agreement is in writing and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing …*
>
> *(2) There is an agreement in writing –*
>
> *(a) if the agreement is made in writing (whether or not it is signed by the parties),*
> *(b) if the agreement is made by exchange of communications in writing, or*
> *(c) if the agreement is evidenced in writing*".

Section 6 continues:

> "*(1) In this Part an 'arbitration agreement' means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).*
>
> *(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes and arbitration agreement if the reference is such as to make that clause part of the agreement*".

The subject matter of Section 9 is "Stay of Legal Proceedings" and this provides:

> "*(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter …*
>
> *(4) On an application under this Section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed*".

III THE DISPUTED ARBITRATION ISSUE

[4] Certain basic facts appear undisputed. Both parties have been engaged in a major construction project at "The Braid", Bridge Street, Ballymena entailing the creation of a new town hall and museum complex ("*the project*"). In contractual terms, the employer is Ballymena Borough Council and it engaged Patton Construction Limited ("*Patton*") as the main contractor. The latter, in turn, engaged the Defendant in the capacity of main electrical sub-contractor. The Defendant executed a further subcontract (technically, a sub-sub-contract) with the Plaintiff, which is documented in a "*Subcontract Order*", dated 17th March 2006, addressed by the Defendant to the Plaintiff. By the terms of this agreement, the Plaintiff was required to "*provide all labour to carry out the works as detailed in the specification and drawings for the project*". This agreement contains the following clause of significance:

> "*Terms and conditions for the subcontract will be the same as Blackbourne Electrical Company Limited/Client Terms and Conditions a copy of which is available to view in our Head Office*".

[Hereinafter "*the material clause*"].

[5] Accordingly, the subject agreement was expressly linked with another instrument of a contractual nature. The evidence establishes that pursuant to the latter, the Defendant, as subcontractor, was to provide the necessary electrical services for the project (hereinafter "*the parent subcontract*"). The evidence *initially* indicated that the parent subcontract was constituted by a partly completed attachment to a letter dated 22nd December 2005 from Patton to the Defendant, described as the "*NSC/T Part 3 Document*". As exhibited, this consists of seven pages. It specifies, *inter alia*, the particulars of the project and the parties to the parent subcontract (viz. Patton and the Defendant). It also provides that the financial consideration is £1.142 million. By its terms, the parent subcontract purports to incorporate certain other instruments per Article 1. Article 5A of this parent subcontract is in the following terms:

> "***Dispute or difference – arbitration ...***
>
> *If any dispute or difference as to any matter or thing of whatsoever nature arising under this sub-contract or in connection therewith … shall arise between the parties either during the progress or after the completion or abandonment of the subcontract works or after the determination of the*

employment of the subcontractor … it shall be referred to arbitration in accordance with clause 9B".

It is evident that this version of the parent subcontract incorporates the Standard Form of Nominated Subcontract Tender (1998 Edition) which, in Part 3, contains a series of conditions. Clause 9B, to which reference is made in Article 5A (*supra*), is evidently traceable to this source. Thus there are two contractual "bridges" separating the material clause from, and linking it with, the ultimate arbitration clause. The first is the link to the parent subcontract. The second is the further link between the latter and the standard JCT Contract which it incorporates. At the stage when the Plaintiff's initial replying affidavit was filed, this was the only suggested parent subcontract in play. However, at a later stage, some additional, different parent subcontract documentation was produced: see paragraph [12], *infra*.

[6] The affidavits filed on behalf of the Plaintiff contain the following salient averments:

(a) Between 2001 and 2006, there were frequent subcontract arrangements between the parties. Throughout this period, there was no mention, express or oblique, of referring contractual disputes to arbitration. In particular, this was not specified in any contractual document.

(b) The parent subcontract was at no time provided to the Plaintiff, nor was the Plaintiff aware of its contents. Further, the Plaintiff had no knowledge that the parent subcontract contained an arbitration clause.

(c) In previous dealings between the parties, the terms of their contractual relationship were contained in a document emanating from the Defendant, entitled "Blackbourne Electrical Company Limited" and signed by its Operational Director (Mr. Cairns). This document (which forms part of the evidence considered by the court) contains neither an arbitration clause nor any reference to another contractual instrument in which such clause may be found.

[7] An affidavit sworn on behalf of the Defendant by the same Mr. Cairns deals specifically with this last-mentioned document. I would observe that it is undated. Further, it is plainly a pro-forma subcontract, addressed by the Defendant to its subcontractor. According to Mr. Cairns, this pro-forma subcontract did not come into existence until after September 2007 and it was designed to operate as a generic collection of standard terms and conditions governing the contractual dealings between the Defendant and others thereafter. Thus, according to Mr. Cairns, this document postdates both the making of the relevant agreement between the parties

and the completion of the contractual works. These averments are corroborated in an affidavit sworn by Mr. McAllister, formerly the Defendant's contracts manager.

[8] The evidence establishes that the contractual arrangements between these parties were regulated on occasions and evidenced by a "Subcontract Order" completed by the Defendant and duly issued to the Plaintiff and, further, that this contained the same contentious clause ("*Terms and conditions for this sub-contract will be the same as Blackbourne Electrical Company Limited/Client Terms and Conditions a copy of which is available to view in our head office*" – see paragraph [4], *supra*). This clearly contradicts the Plaintiff's suggestion recorded in paragraph 6(c) above.

[9] The documentary evidence also includes a series of contractual documents bearing sundry dates, belonging to the period 2003 to 2006. They were clearly generated by the Defendant and are addressed to the Plaintiff. Each bears a contract number and a purchase order. Substantively, they consist of a written instruction from the Defendant to the Plaintiff to carry out specified electrical installation works. Common to each of these contractual documents is the terminology "*enclosed with this order is a copy of our subcontract form ref BEC/SC/0194*". The second affidavit of Mr. Campbell on behalf of the Defendant confirms that a search has failed to yield any extant version of this subcontract. It is common case that the Plaintiff at no time took up the express invitation to attend the Defendant's Head Office for the purpose of viewing the "*Blackbourne Electrical Company Limited/Client Terms and Conditions*".

[10] Thus, based on the evidence before the court, the subcontracts executed from time to time between the Plaintiff and the Defendant have, during a period of less than ten years, taken three quite separate forms. The periods to which each of these differing subcontracts have belonged, the succession arrangements, the commencement dates and the degree of overlap, if any, are all distinctly unclear.

[11] The materials exhibited to the affidavit of Mr. Campbell, who describes himself as the Defendant's manager, include the JCT "NSC/T Part 3 Document"and an accompanying letter dated 22nd December 2005 from the main contractor to the Defendant, in these terms:

> "***Re NSC Documentation, Ballymena Museum and Arts Complex ...***
>
> *Please find enclosed NSC/T Part 3 Document for your perusal and completion. Once you have completed by signing the bottom of page 4, return the document to myself at our Head Office. On receipt … we will issue Articles of Agreement and conditions for signing and inclusion with your order.*"

The NSC instrument describes the main contract works, specifies the subcontract works, identifies the parties to the subcontract (Patton and the Defendant) and states the value of the subcontract (some £1.14 million). This is the parent subcontract

which, as appears from the analysis in paragraph [5] above, is one stage removed from the agreement between Plaintiff and Defendant.

[12] There are further documentary exhibits to the affidavit of Mr. McAllister, who describes himself as the Defendant's former manager. He deposes to the parent subcontract and exhibits documents relating thereto. These exhibits consist of, firstly, materials duplicating the parent subcontract documents already exhibited to Mr. Campbell's affidavit: see paragraph [11] above. However, they extend to certain new materials, comprising a letter dated 2nd December 2005 from Patton to the Defendant, purporting to enclose "*our standard subcontract order and conditions for your signature and return*" and two further documents of a contractual nature. These differ from the exhibits to Mr. Campbell's affidavit. Mr. Nash, on behalf of the Defendant, candidly accepted that his client's affidavits offer no explanation of this anomaly and he was unable to develop any in argument.

IV THE PARTIES' COMPETING ARGUMENTS

[13] I would describe the main issue between the parties as one of legal efficacy: was the arbitration clause spread between the first of the suggested "parent" subcontracts and the purportedly incorporated JCT model effectively imported into the agreement between the parties? Were the words of incorporation sufficiently clear and explicit? Or do they fail on account of vagueness and/or opacity? The fundamental question to be determined by the court is whether legally effective incorporation of the arbitration clause/agreement was achieved, having regard to the court's ascertainment of the parties' true intentions.

[14] On behalf of the Defendant, Mr. Nash drew to the attention of the court the following passage in Russell on Arbitration (23rd Edition), paragraph 2-048:

> "*If the document sought to be incorporated is a standard form set of terms and conditions the courts are more likely to accept that general words of incorporation will suffice. This is because the parties can be expected to be more familiar with those standard terms, including their arbitration clause.*"

The Defendant's arguments placed some emphasis on the suggestion that both the arbitration clause in question (viz. clause 9B of the "Standard Form of Nominated Sub-Contract Tender, 1998 Edition") and the collection of contractual terms and conditions in which it is located are long established and well known in the construction industry. It was also submitted that the formulation of the Plaintiff's claim in the Specially Endorsed Writ of Summons is consistent with the Plaintiff being cognizant of the terms of the principal contract viz. the JCT model.

[15] On behalf of the Plaintiff, it was emphasized by Mr. Aiken that this is not a "single contract" case. The import of this submission is that the purported

incorporating words do not refer to only one other contract. Rather, they refer to one further contract which, in turn, refers to a second contract. Thus this is a "double contract" (or "double reference") case, thereby supporting the proposition that the incorporating words in the agreement between these parties must be framed in particularly clear and specific terms, reflecting a more elevated threshold. The Plaintiff's arguments also relied on the averments in the affidavits highlighted above.

V GOVERNING PRINCIPLES AND CONCLUSIONS

[16] In *Russell on Arbitration* (*op cit.*), the following approach is advocated, in paragraph 2-044:

> "*The terms of a contract may have to be ascertained by reference to more than one document …*
>
> *This issue has to be determined by applying the usual principles of construction and attempting to infer the parties' intentions by means of an objective assessment of the evidence …*
>
> [Paragraph 2-045] *The key question is whether the reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement …*
>
> [Paragraph 2-046] *The basic judicial exercise involved in all these cases is the proper construction of general words of incorporation in one contract referring to the terms of another contract or document.*"

[17] In ***Extrudakerb –v- White Mountain Quarries*** [1996] NI 567, Carswell LJ formulated the issue to be determined as "*the manner in which the courts should approach the question of incorporation of an arbitration clause into a construction sub-contract*" (at p. 572f). He considered *in extenso* the differing views which had been expressed by the English Court of Appeal in ***Aughton –v- MF Kent Services*** [1991] 57 BLR 1, where Sir John Megaw stated the following (at p. 32):

> "*Thirdly, the status of a so-called 'arbitration clause' included in a contract of any nature is different from other types of clauses because it constitutes a 'self contained contract collateral or ancillary to' the substantive contract …*
>
> *It appears to me that this consideration (which I believe has not infrequently been overlooked) is another important reason why arbitration clauses are to be treated as being in a category of their own …*

> ***If this self-contained contract is to be incorporated, it must be expressly referred to in the document which is relied on as the incorporating writing. It is not incorporated by a mere reference to the terms and conditions of the contract to which the arbitration clause constitutes a collateral contract"***.

[Emphasis added].

In ***Extrudakerb,*** the question for Carswell LJ was whether to adopt this approach.

[18] In the judgment of Carswell LJ, one finds due emphasis on the knowledge possessed by the parties to the litigation. This appears particularly in the following passage (at p. 577h – 578a):

> *"I am nevertheless unwilling to hold that the parties in the case before me did not succeed in incorporating the arbitration clause into the sub-sub-contract. They agreed that the work would be done on the terms of the FCEC form of sub-contract, which were familiar to the parties, both of whom, as counsel accepted, knew perfectly well that they contained an arbitration clause. If the officious bystander had been importunate enough to ask them if they considered that the arbitration clause should apply in the event of a dispute, I feel little doubt that the answer would have been clear that it would. It was not a case of contracting by reference to contractual terms agreed between other persons, which would require modification to apply appositely between the parties to this contract. Such cases may raise questions about the parties' intention which do not arise in this instance. In my judgment it would negate the parties' intention to refuse to hold that the arbitration clause had been incorporated into the contract, purely in order to uphold a rule of convenience which has to be applied rigidly and without exceptions."*

The reasoning of Carswell LJ is set out in the following passage (at p. 578b – 579a):

> *"(1) The quest on which the court has to engage is the ascertainment of the intention of the parties. If it is satisfied that one conclusion truly represents the intention of the parties, it should be slow to decline to reach that conclusion in order to follow a rule designed to promote certainty, unless so compelled by authority or a long-established course of commercial practice.*

(2) In the case of an arbitration clause, which may preclude the parties from resort to the courts of law, the court should be fully satisfied of the intention of the parties, and normally that will require very clear language. In that I respectfully agree with the view expressed by Sir John Megaw.

(3) The requirement that arbitration agreements have to be in writing and their nature as self-contained contracts tend in my opinion to support proposition (2) above, that clear language is required for them to be incorporated into a contract. It does not seem to follow that they must be specifically referred to in the contractual documents, and in that I have with great respect to part company from the reasoning of Sir John Megaw.

(4) What the House of Lords decided in Thomas v Portsea was that, where a bill of lading incorporates conditions 'as per charter party', that is insufficient to incorporate the arbitration clause from the charterparty. The courts have consistently followed this decision in subsequent cases such as The Njegos [1936] P 90, The Annefield and The Federal Bulker, and have held that the use of this or similar phrases will not incorporate an arbitration clause from a charterparty. It may be seen from such cases as The Merak, TB & S Batchelor & Co Ltd v Merak (owners) [1965] P 223, however, that some forms of general words will suffice to incorporate an arbitration clause.

(5) This is the foundation of the second principle enunciated by Brandon J in The Annefield [1971] P 168 at 173, which is in my opinion of considerable importance. For convenience I would set out that principle again:

'Secondly, it is not necessary, in order to effect incorporation, that the incorporating clause should refer expressly to the arbitration clause. General words may suffice, depending on the terms of the latter clause.'

It was not doubted or qualified in any of the judgments of the Court of Appeal in that case, and Cairns LJ impliedly approved it when he said (at 187) that the rule in Hamilton v Mackie must be applied intelligently and not mechanically.

(6) There are compelling reasons of commercial convenience for the perpetuation of the rule in Thomas v Portsea *in relation to bills of lading. I do not consider that those reasons apply with the same degree of force in relation to building sub-contracts. In my opinion it is open to the courts to adopt an approach to the construction of such contracts which will put into effect the intention of the parties, while demanding that the intention to incorporate arbitration clauses be established with sufficient clarity."*

That the court's fundamental task is to ascertain the intention of the parties is duly highlighted in the final paragraph of the judgment (at p. 579a/b):

> *"For the reasons which I have given it has been established to my satisfaction that the parties intended that the arbitration clause in the FCEC form of sub-contract should be incorporated into the contract between the parties."*

[19] In the reported cases, it is apparent that the issue of incorporation of arbitration clauses has arisen in the specific context of charter party and bills of lading. In ***The Federal Bulker,*** [1989] 1 Lloyds Reports 103, the bills of lading provided that "*… all terms … as per Charter party … to be considered as fully incorporated herein as if fully written*". This was a "double contract" case and the issue was whether this clause was sufficient to incorporate an arbitration clause in the charter party. The Court of Appeal held that effective incorporation had not been achieved. Bingham LJ stated, at p. 105:

> *"Generally speaking, the English law of contract has taken a benevolent view of the use of general words to incorporate by reference standard terms to be found elsewhere. But in the present field a different, and stricter, rule has developed, especially where the incorporation of arbitration clauses is concerned. The reason no doubt is that a bill of lading is a negotiable commercial instrument and may come into the hands of a foreign party with no knowledge and no ready means of knowledge of the terms of the charterparty. The cases show that a strict test of incorporation having, for better or worse, been laid down, the Courts have in general defended this rule with some tenacity in the interests of commercial certainty. If commercial parties do not like the English rule, they can meet the difficulty by spelling out the arbitration provision in the bill of lading and not relying on general words to achieve incorporation.*
>
> *The importance of certainty in this field was emphasised by Lord Denning, M.R. in The Annefield … by Sir John Donaldson, M.R. in The Varenna… and by Lord Justice Oliver in the same case … This is indeed a field in which it is perhaps preferable that the law should be clear, certain and well understood than that it should be perfect. Like others, I doubt whether the line drawn by the authorities is drawn where a modern commercial lawyer would be inclined to draw it. But it would, I think, be a source of mischief if we were to do anything other than try to give effect to settled authority as best we can."*

This decision, of course, belongs to the particular context described at the beginning of this paragraph. The present context is not the same and the decision serves to highlight the more benevolent approach to cases of the instant *genre*, where the

importance of commercial certainty in the dealings between the contracting parties does not appear to have attracted the same degree of emphasis.

[20] The distinction between "a single contract" reference and a "double contract" reference is illustrated in ***Sea Trade Maritime Corporation –v- Hellenic Mutual War Risks Association*** [2006] EWHC 2580 (Comm), where Langley J, having considered the decision in ***The Federal Bulker***, said the following:

> *"65. In my judgment, this dictum expresses both the principle and (with some reluctance) the justification for an exception to it. In principle, English law accepts incorporation of standard terms by the use of general words and, I would add, particularly so when the terms are readily available and the question arises in the context of dealings between established players in a well-known market. The principle, as the dictum makes clear, does not distinguish between a term which is an arbitration clause and one which addresses other issues. In contrast, and for the very reason that it concerns other parties, a "stricter rule" is applied in charterparty/bills of lading cases. The reason given is that the other party may have no knowledge nor ready means of knowledge of the relevant terms. Further, as the authorities illustrate, the terms of an arbitration clause may require adjustment if they are to be made to apply to the parties to a different contract. The language of Bingham LJ would not encourage any extension of the stricter rule, a sentiment with which I would respectfully agree.*
>
> *66. I can see little or no reason for a rule which incorporates some but not all of the terms of a referenced document, provided, at least, that as a matter of construction the incorporated terms can readily apply to the relevant contract without violence to the principles on which contracts are to be construed. Indeed, I think the authorities justify an approach to the issue as one of construction, albeit certain recognised principles of construction have been established by authority in two-contract cases. Terms that are incorporated, as the law stands, are just as (if not more) likely to be unknown to the parties as an arbitration clause. This case is a case in point. On their evidence, Sea Trade and Trans-Ocean were wholly unaware of any of the terms of the insurance although it is not in dispute that a contract of insurance was made in late 1992. Yet they accept that all the other terms in the Rules were incorporated in that contract, or perhaps all other terms "germane to the insurance"(hardly a recipe for certainty) but not the arbitration clause. I can see little logic in that. Mr Brenton submits that logic requires the stricter rule to be*

> *applied in all cases. But it is that rule, if any, which I think to be illogical. In the case of a single contract, the ordinary rules of construction work perfectly well. Those rules, of course, include rules which justify a different approach to "unusual" or "onerous" terms sought to be incorporated and are subject to statutory modification in consumer contracts, but such considerations are of no relevance in this case.*"

Notably, in paragraphs [75] – [79], one can identify what I consider to be His Lordship's rejection, in suitably deferential terms, of the approach espoused by Sir John Megaw in ***Aughton.*** As noted by Langley J, in paragraph [78], the context of the decision in ***Aughton*** was shaped by a "first" contract constituting a building sub-contract between P and A, together with a "second" sub-subcontract between K and A. In summary, the tide of authority favours the approach that general words can, in principle, be effective to achieve incorporation of an arbitration clause into a construction contract. Of course, whether they are thus effective will invariably be a fact sensitive question, dependent upon the matrix of the individual case.

[21] Ultimately, the quest for the court is to determine, on the basis of all the available evidence, the intention of the parties to the agreement. Plainly, the requisite intention must be mutual: a unilateral intention will not suffice. The evidential matrix in the present case is constituted by the parties' competing averments of their respective subjective intentions, understandings and knowledge, together with the various documentary materials outlined in Chapter III above. I consider that the fundamental question to be confronted, and determined, can be formulated in the following terms: were the Plaintiff and the Defendant *ad idem* that their sub-sub-contract relationship was governed by, *inter alia*, the arbitration clause contained in a combination of Article 5A of the parent subcontract and Clause 9B of the standard JCT contract which the parent subcontract purported to incorporate?

[22] In my view, the answer to this question must be in the negative, for the following reasons. Firstly, assuming the first of the proffered parent subcontracts to be the operative one, I find that the purported words of incorporation in the sub-sub-contract are, intrinsically, too vague. They suffer from a singular lack of basic detail, particularity, elaboration and explanation. Secondly, they provide no clue whatsoever about the existence of an arbitration clause lurking in some other contractual instrument. Thirdly, they suffer from the further frailty of the demonstrable uncertainty relating to the question of whether they are linked to the documents which truly formed the parent subcontract between the Plaintiff and Patton, having regard to the competing parent subcontract documentation which emerged in the exchange of the final series of affidavits (see paragraph [12] above). This issue does not fall directly to be determined in the present appeal and it is unnecessary to do so. It suffices, rather, to highlight the obvious uncertainty thus created. Fourthly, there is a quite different type of uncertainty emerging from the evidence relating to the contractual arrangements between the Plaintiff and the Defendant during a period of almost a decade. The Defendant was quite unable to make any positive case in this respect. This is exemplified by the Defendant's

inability to produce a copy of its own "*subcontract form ref BEC/S/0194"* and, its further inability to produce clear and compelling evidence of the date when the contractual document considered in paragraphs [6] and [7] above was generated and came into operation. Finally, it is common case that the Plaintiff's representatives at no time attended the Defendant's offices for the purpose of viewing the "*Blackbourne Electrical Company Limited Client Terms and Conditions*".

[23] I consider that these various factors, in combination, are inimical to the clarity and cogency which must characterise the kind of evidence necessary to establish the mutual intention required in this type of case. In particular, in contrast with the factual matrix in ***Extrudakerb,*** the evidence in the present case fails to establish that the Plaintiff was familiar with the terms of either of the "second" contracts disclosed by the Defendant's evidence or that he knew that they contained an arbitration clause. As noted by Carswell LJ, "double contract" cases may raise different questions concerning the parties' intentions. In the present circumstances, for the reasons given, I consider that the inference which the Defendant urges on the court cannot properly be made and I decline to do so. The "*very clear language*" which, per Carswell LJ, is required in order to establish an arbitration agreement between the parties is lacking.

[24] It follows that the Defendant's application to stay the Plaintiff's proceedings must be dismissed. Having considered the parties' submissions, I rule that the Plaintiff , as the successful party in this discrete battle, is entitled to its costs of this application.