Neutral Citation No. [2013] NIQB 117

Ref:	**WEA9015**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**09/10/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN

FERMANAGH DISTRICT COUNCIL

Applicant

and

GIBSON (BANBRIDGE) LIMITED

Respondent

WEATHERUP J

[1] This is an application under section 12 of the Arbitration Act 1996 to extend time to 6 February 2013 for the applicant to take a step to begin arbitration of a construction dispute. Mr Humphreys QC appeared on behalf of the applicant (Fermanagh) and Mr Simpson QC on behalf of the respondent (Gibson).

[2] Fermanagh applied for an extension of time 'to refer the dispute to arbitration'. At the hearing Fermanagh applied for leave to amend the application to one that sought an extension of time 'to issue the notice of intention to refer the dispute to arbitration'. Mr Simpson objected to the amendment. I granted leave to amend so that consideration might be given to the substance of the matter.

[3] The background appears in the decision of 4 February 2013 in Gibson (Banbridge) Ltd v Fermanagh District Council [2013] NIQB 16. Gibson was the contractor and Fermanagh the employer in a contract of March 2005 for the construction of a waste management facility. The form of contract was the NEC2 Engineering and Construction Contract, Option C, Target Contract with Activity Schedule. The work was substantially completed in 2008. Various applications for

payment were made by Gibson and application 14, submitted in October 2011, resulted in a referral to adjudication. In a decision dated 27 October 2012 the Adjudicator decided that Fermanagh should pay Gibson the sum of £2,126,390.29 plus VAT and £442,424 in respect of interest. Fermanagh proceeded to make a determination of the amount that they contended was properly due to Gibson under the contract and in December 2012 paid Gibson the sum of £302,156.61 plus VAT, representing the amount Fermanagh considered to be due, rather than paying the amount found by the Adjudicator to be due.

[4] The amount of the Adjudicator's award not having been paid, Gibson issued proceedings in the High Court to enforce the Adjudicator's award and on an application for summary judgment Fermanagh resisted on two grounds. First, that the Adjudicator had no jurisdiction since it was said that no dispute had crystallised and secondly that the Adjudicator had failed to comply with the rules of natural justice in not affording Fermanagh sufficient time to respond. Both grounds were rejected for the reasons set out in the decision of 4 February 2013. Accordingly judgment was entered against Fermanagh in the sums awarded by the Adjudicator together with further interest in the sum of £13,301.90 and Adjudicator's expenses of £40,057.50 and costs.

[5] The contract provided for a reference of the dispute to arbitration within 4 weeks of the Adjudicator's decision. Fermanagh did not serve any notice within 4 weeks of the Adjudicator's decision. However on 5 February 2013, outside the 4 week period, Fermanagh served a notice described as a 'Notice of Arbitration' and an Arbitrator was appointed. On 15 March 2013 the arbitration was stayed by the Arbitrator pending an application to the Court to extend time. On 22 April 2013 Fermanagh made this application to extend time.

The contractual time limit.

[6] The relevant contract clause is clause 93 under the side note 'Review by the tribunal' and clause 93.1 provides -

> "If after the *Adjudicator*
>
> - notifies his decision or
> - fails to do so
>
> within the time provided by this contract a Party is dissatisfied, that Party notifies the other Party of his intention to refer the matter which he disputes to the *tribunal*. It is not referable to the *tribunal* unless the dissatisfied Party notifies his intention within 4 weeks of

- notification of the *Adjudicator's* decision or
- the time provided by this contract for this notification if the *Adjudicator* fails to notify his decision within that time

whichever is the earlier. The *tribunal* proceedings are not started before Completion of the whole of the works or earlier termination."

[7] The relevant notice to be served is a notice of intention to refer to the tribunal. The tribunal is defined in the contract as arbitration. It is common case that a notice was not served within the period of 4 weeks from the date of the Adjudicator's decision. Clause 93 does not deal with the service of the actual notice of referral to arbitration nor impose a time limit on the service of the notice of referral to arbitration.

The legislative power to extend time.

[8] Section 12 of the Arbitration Act 1996, as relevant for present purposes, provides -

> (1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim should be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step -
>
> (a) to begin arbitral proceedings,
>
> the court may by order extend the time for taking that step.
>
> (3) The court shall make an order only if satisfied -
>
> (a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and it would be just to extend the time.

[9] The notice served was in the form of a notice to refer to arbitration. It was headed Notice of Arbitration and the text included reference to a dispute existing between the parties, the arbitrator being asked to consider disputed matters between the parties and Gibson being invited to concur in the appointment of one of the named persons to act as Arbitrator to determine the dispute. Although the notice was in the form of a notice to refer to arbitration Mr Humphreys stated that the notice was, for the purposes of the contract, a notice of intention to refer as well as a

notice of referral. At all events this is the notice in respect of which leave is sought to extend time. The first issue is whether the notice represented a step to begin arbitral proceedings under section 12(1)(a) so as to found the Court's power to extend time. If so, the second issue is whether the Court should extend time under section 12(3)(a).

Whether the notice is a step to begin arbitral proceedings.

[10] Fermanagh contends that the notice of intention to refer is a 'step to begin arbitral proceedings' as required by section 12(1)(a) and that the Court may extend time. Gibson contends that the notice of intention to refer is but a condition precedent to arbitration and not a step to begin arbitral proceedings and therefore section 12 does not apply and the Court does not have power to extend time.

[11] In Babanaft International Co SA v Avant Petroleum Inc [1982] 1 WLR 871 a charterparty provided that the charterers were discharged and released from any liability in respect of any claims the owners might have, unless a claim had been presented to the charterers in writing with all available supporting documents within 90 days from completion of the discharge of the cargo. It was held that section 27 of the Arbitration Act 1950, the predecessor to the 1996 Act, in essence empowered the Court to extend the time fixed for giving notice to appoint an Arbitrator or appointing an Arbitrator or taking "some other steps to commence arbitration proceedings" within a time fixed by the agreement but did not empower the Court to extend any other time limit. Presenting a claim with all available documents was not a "step to commence arbitration proceedings" and accordingly the time for doing so could not be extended under the section. Donaldson LJ at page 884 stated that the clause in the charterparty "had no apparent connection with the commencement of arbitration proceedings within 90 days or any other time. It appears to relate solely to making a claim in a particular form within a fixed period".

[12] In 1950 the relevant wording was a step "to commence" arbitration rather than the 1996 wording of a step "to begin" arbitration. The contractual requirement in Babanaft International to give notice of the claim was clearly not a step to commence arbitration proceedings. The 90 day time limit in respect of giving notice of a claim was quite different to the much later stage reached in the present case where the claim has been notified and not accepted and the dispute considered by an Adjudicator whose decision has not been accepted. Babanaft International is not an answer to the present case.

[13] In Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd [2011] 1All ER 1143 where clause 93.1 applied, as in the present case, the defendant alleged that the claimant had failed to serve a valid notice within 4 weeks of the decision of the Adjudicator. The contract provided that a communication had effect when it was received at the last address notified by the recipient for receiving communications. Instead of sending notice to that address, the claimant's solicitors, within the 4 week

period, sent the relevant notice to the defendant's solicitors. The communication comprised a notice of dissatisfaction with the Adjudicator's decision together with a separate notice to refer the dispute to arbitration. The issue was whether notice had been served on the correct address, although served within time. It was held that the notice had been validly served. Thus the point in issue in Anglian Water Services does not bear on the issue arising in the present case.

[14] However Edwards-Stuart J at paragraph 68 of the judgment in Anglian Water Services stated –

> "Whilst I have concluded that cl 93 did not form part of the adjudication provisions of the contract, it does not follow that a notice of intention to refer to arbitration is not a communication relevant to the adjudication. In my view it is. In the absence of a notice of intention to refer served within the four week period, the adjudicator's decision becomes finally binding on the parties. A valid notice of intention to refer served in time is therefore relevant to the adjudication because it prevents the adjudicator's decision being final. Whilst it is not part of the adjudication process itself, in my judgment it is relevant to the adjudication for this reason."

[15] The issue in the present case is whether the notice served was a "step to begin arbitral proceedings". It is necessary to look to the contract in determining whether it is such a step. The side note to clause 93 refers to "Review by the tribunal" and the text refers to a notice of intention to refer to a tribunal. The contract data states that the tribunal referred to is arbitration and the arbitration procedure is the Institution of Civil Engineers Arbitration Procedure 1997 or any amendment or modification to it in force when the Arbitrator is appointed.

[16] In the ICE Arbitration Procedure, Rule 2 bears the title "Commencement of Arbitration" and provides:

> "2.1 Unless otherwise provided in the contract a dispute shall be deemed to arise when a claim or assertion made by one party is rejected by the other party and either that rejection is not accepted or no response thereto is received within a period of 28 days. Subject only to the due observance of any condition precedent in the contract or the arbitration agreement either party may then invoke arbitration by serving a Notice to Refer on the other party.
>
> 2.2 The Notice to Refer shall be in writing and shall list the matters which the issuing party wishes to be referred to arbitration. Nothing stated in the notice

> shall restrict that party as to the manner in which he subsequently presents his case."

[17] The ICE Arbitration Procedure speaks of the "commencement" of arbitration. I treat "commencement" as synonymous with "beginning". Rule 2 contemplates a 'dispute', compliance with any 'condition precedent' and 'invoking' arbitration. The introduction of the verb 'to invoke' is not helpful for present purposes. The relevant action under Rule 2 is to invoke arbitration by serving a Notice to Refer.

[18] The trigger under section 12 of the 1996 Act is not the action that is taken to begin arbitration but it is the taking of some step to begin arbitration. Is there a difference between 'to begin' and 'to take some step to begin'? I proceed on the basis that there is intended to be a difference and that the technical action of beginning the arbitration, in whatever manner that is provided for in the particular contract, need not necessarily be the same as the taking of some step to begin the arbitration. So in the present contract the arbitration is 'invoked' by a Notice to Refer to arbitration whereas the action that is in question is the notice of intention to refer the dispute to arbitration.

[19] Clause 93 contemplates that there will be both the notice of intention to refer to arbitration and the notice to refer to arbitration. As was made clear by Edwards-Stuart J in <u>Anglian Water Services</u> the notice of intention to refer to arbitration prevents finality of the adjudication decision and whilst not part of the adjudication it is relevant to the adjudication. In addition the notice of intention to refer to arbitration opens the Adjudicator's decision to arbitration. The notice is a bridge between the adjudication decision and the arbitration process. It is said by Gibson to be merely a condition precedent to arbitration, as was the case in Bananaft. It is said by Fermanagh to be a step to begin arbitration.

[20] I am satisfied that under the contract applicable in the present case the notice of intention to refer to arbitration is sufficiently embedded in the arbitral process to represent a step to begin the arbitration and not to amount merely to a condition precedent to arbitration. Thus I conclude that section 12 of the 1996 Act applies and the Court has power to extend time for service of a notice of intention to refer to arbitration.

<u>Whether the circumstances were outside reasonable contemplation.</u>

[21] The ground on which the extension of time is sought is under section 12(3)(a). There are two parts. First it must be established that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question. Secondly, it must be established that it would be just to extend the time.

[22] <u>Harbour and General Works Limited v Environment Agency</u> [2000] 1WLR 950 involved ICE Conditions of Contract (6th Edition, 1993 amendment) whereby

certificates were to be issued by the engineer and were binding unless revised by a conciliator or an arbitrator. The contract provided that it was necessary to refer the dispute to a conciliator within one month or to an arbitrator within three months. The applicants were dissatisfied with the decision but they served both the notice of conciliation and the notice of arbitration out of time. The applicants therefore sought an extension of time under section 12(3)(a) of the 1996 Act. The Court dismissed the application for extension of time.

[23] Coleman J at first instance referred to the nature of section 12 as follows -

> "The enactment of section 12 of the Act of 1996 marked a clear change in the law and practice relating to the extension of time for commencement of an arbitration beyond that specified in a contractual time-bar provision. This is clear both from the change in the wording previously applicable and to be found in section 27 of the Arbitration Act 1950 and in the Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration Law (1996) under the chairmanship of Saville L.J….
>
> Paragraphs 69 and 70 of the Departmental Advisory Committee Report explained the change to the wording of section 12 as intended to reflect the underlying philosophy of the Act as being that of 'party autonomy.' By that phrase was meant 'among other things, that any power given to the court to override the bargain that the parties have made must be fully justified.' The idea that the court had 'some general supervisory jurisdiction over arbitrations has been abandoned.' It was for that reason that the court's power of extension was confined to the two cases covered by section 12(3)(a) and (b) of the Act….
>
> Accordingly, the approach to the construction of section 12 has, in my judgment, to start from the assumption that when the parties agreed the time bar, they must be taken to have contemplated that if there were any omission to comply with its provisions in not unusual circumstances arising in the ordinary course of business, the claim would be time-barred unless the conduct of the other party made it unjust that it should."

[24] Waller LJ in the Court of Appeal stated in relation to section 12(1)(a) (*itallics added*) –

> "The subsection is concerned with party autonomy. Its aim seems to me to be to allow the court to consider an extension

> in relation to circumstances where the parties would not reasonably have contemplated them as being ones where the time bar would apply, or to put it the other way round, the section is concerned not to allow the court to interfere with the contractual bargain unless *the circumstances are such that if they had been drawn to the attention of the parties when they agreed the provision, the parties would at the very least have contemplated that the time bar might not apply* - it then being for the court finally to rule on whether justice required an extension of time to be given"(at page 960F).

[25] The above interpretation applies the provision where the Court makes the objective assessment that the parties would have considered that in the circumstances that have arisen the time bar might not apply.

[26] This is a decision of the Court of Appeal of England and Wales in respect of a statutory provision that also applies in Northern Ireland. While the courts in Northern Ireland are not bound by the decisions of the courts in England and Wales such decisions are certainly given great respect and generally followed, particularly where it is the interpretation of the same statutory provision. In Starritt and Cartwrights' Applications [2005] NICA 48 Campbell LJ stated that -

> "It has been long established that while this court is not technically bound by decisions of courts of corresponding jurisdiction in the rest of the United Kingdom it is customary for it to follow them to make for uniformity where the same statutory provision or rule of common law is to be applied. This is not to say that the court will follow blindly a decision that it considers to be erroneous."

[27] On applying the approach adopted by the Court of Appeal in England and Wales the question for the Court is whether the circumstances are such that if they had been drawn to the attention of the parties when they agreed the provision, the parties would at the very least have contemplated that the time bar might not apply. Fermanagh viewed the circumstances as involving the argument that the Adjudicator had no jurisdiction as there was no dispute and it was inconsistent with that argument to serve the notice. On the other hand Gibson questioned whether this supposed inconsistency was considered at the time, pointed to the absence of a minute to that effect and further pointed out that the notice could have been served in any event and contended that it must have been in the reasonable contemplation of the parties that there may be a jurisdiction challenge.

[28] However the issue is not whether the parties did contemplate the circumstances at the time nor whether it would have been possible for the notice to have been issued within the required time. It is for the Court to make an objective

assessment as to whether in the circumstances the parties would have contemplated that the time bar might not apply. I am satisfied that in circumstances where the jurisdiction of the Adjudicator was to be in issue and the question of the Adjudicator's jurisdiction was to be considered by the High Court before the substantive dispute was considered by an Arbitrator, the parties would have contemplated that the time bar might not apply.

[29] In respect of the first part of section 12(3)(a) I am satisfied that in the circumstances the parties would reasonably have contemplated that the time limit might not apply.

Whether it is just to extend time.

[30] The second part is whether it is just to extend time. Fermanagh points out that there was no hearing on the merits beyond the adjudication which they say was a paper exercise. By letter of 13 November 2012 Fermanagh stated that they would be taking further action and indicated their intention to invoke the arbitration procedure and have a hearing on the merits.

[31] Gibson contends that there was a delay by Fermanagh in making the extension application. After Fermanagh's notice and a notice of objection to arbitration by Gibson on 4 March and a stay of the arbitration granted on 15 March the application for extension of time was made on 22 April 2013. Delay in applying for extension of time is a factor to take into account. There was such delay from the date of Gibson's objection to arbitration.

[32] There is an issue between the parties about the value of the work completed. Fermanagh assessed the value at £300,000 and the Adjudicator's assessment of the value exceeds £2M. This issue warrants a contested hearing. This is not a criticism of the adjudication which is particularly valuable process in construction disputes. However it is a summary process and intended to be an expeditious process involving a temporary finding. The overall process anticipates that ultimately there will be a substantive assessment of the final value of the contract, whether achieved by arbitration, litigation or agreement. A substantive hearing has not occurred in respect of the disputed value of the final work. It would be just to extend the time to allow the substance of the matter to be considered by arbitration.

[33] I propose to extend the time for the notice of intention to refer to arbitration to 6 February 2013 and to treat the notice served on that date as a notice of intention for the purposes of the contract. The matter may return to the Arbitrator.