Neutral Citation No. [2015] NICA 68

Ref:	**GIL9764**

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

Delivered:	**11/11/2015**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

TRUNK FLOORING LIMITED

Plaintiff/Respondent;

-and-

HSBC ASSET FINANCE (UK) LIMITED

First named defendant;

-and-

COSTI RIGHI SPA

Second named defendant /appellant.

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Before: Gillen LJ, Weir LJ and Deeny J

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GILLEN LJ (giving the judgment of the court)

Introduction

[1] This is an appeal by the second named defendant ("the appellant") from the decision of Weatherup J on 8 January 2015 in which he acceded to the plaintiff /respondent's ("the respondent") application for removal of a stay of proceedings granted to the appellant on 13 February 2013 for referral of a dispute between the parties to arbitration.

[2] Mr Stevenson appeared on behalf of the appellant and Mr Gibson appeared on behalf of the respondent. We are grateful to counsel for their well marshalled skeleton arguments augmented by concise and carefully presented oral submissions.

Factual background

[3] The appellant, with a registered address in Italy, is the manufacturer of plant and machinery used, inter alia, for the processing of timber flooring. In 2008 the respondent identified a machine manufactured by the appellant which would allow the respondent to make two layer and three layer flooring using slats of pine instead of birch wood which had previously been used by the respondent. On 23 July 2008 the respondent entered into a hire purchase agreement with the first defendant in respect of such a machine and a deposit of £73,000 was paid and credit was required for the balance of the purchase price. The machine was then purchased by the respondent.

[4] The dispute between the appellant and the respondent arose because the machine allegedly failed to operate properly with the result that the respondent claims to have sustained loss by reason of the appellant's alleged negligence and breach of contract. The particulars of loss claim the cost of purchase of £193,000, increased costs incurred of £21,000, loss of profits on the North American market of £700,000 and an additional loss of profits which describes a gross margin of £325,000 with the total amount of the claim adding up to £1.249m.

[5] The contract between these parties contained an arbitration clause which provided that any dispute arising out of the contract should be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC") in Vienna ("the Rules") by arbitrators appointed in accordance with those Rules.

[6] Upon the respondent issuing proceedings for breach of contract and negligence, the appellant applied for a stay of the proceedings under section 9 of the Arbitration Act 1996 ("the 1996 Act") so that the dispute would proceed to arbitration. Section 9 provides, where relevant, as follows:

> "(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.
>
> (2) …..
>
> (3) …..

> (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."

[7] On foot of the appellant's application an Order was made by Weatherup J on 13 February 2013 in the following terms:

> "(1) Action against the second named defendant be stayed pending arbitration.
>
> (2) Unless the arbitration proceedings commence within 28 days from the date hereof, the stay against the second named defendant shall be lifted "

[8] The appellant submitted a request for arbitration before the International Court of Arbitration. Various steps were taken over the succeeding 18 months but an impasse emerged over the question of costs. The respondent and the appellant blame each other for the impasse that developed in the arbitration.

[9] Article 36 of the Rules deals with costs. It is provided that after receipt of the request the Secretary General may request the claimant to pay a provision in advance in an amount intended to cover the costs of the arbitration until the terms of reference have been drawn up. As soon as practicable the court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses. The advance on costs fixed by the court shall be payable in equal shares by the claimant and the respondent. The amount of any advance on costs fixed by the court may be subject to readjustment at any time during the arbitration. In all cases any party shall be free to pay any other party's share of any advance costs should such other party fail to pay its share. Where a request for an advance on costs has not been complied with and after a consultation with the Arbitral Tribunal the Secretary General may direct the Arbitral Tribunal to suspend its work and set a time limit, which must not be less than 15 days, on the expiry of which the relevant claims shall be considered as withdrawn – as happened in this case

[10] Notice was given by the ICC on 15 May 2013 that having three arbitrators increased the Arbitral Tribunal's fees and expenses, for example travel and hotel expenses. They applied a cost calculator which was said to be available on the ICC's website which provided estimated fees. With one arbitrator the fee was $11,437 and with three arbitrators $34,311, where the claim made by the first defendant was valued at €100,000. It was stated that if the parties agreed to have one arbitrator the court should be informed as soon as possible.

[11] Upon notice being given of a single arbitrator the ICC issued a Notice on 8 October 2013 stating that the Secretary General had readjusted the provision for

advance on costs to $11,000 taking into account that there was to be a sole arbitrator. The appellant had already paid $3,000 so there was a balance of $8,000 due to be paid for fees.

[12] On 7 November 2013 the ICC issued a further Notice whereby the ICC noted the amount in dispute to be $1.756m which was stated to be the £100,000 for the appellant's claim and the £1.249m to represent the respondent's counterclaim. As a result the fees then due in respect of the arbitration amounted to $95,000 of which each party was liable to pay one half. Thus the payment then due by the appellant was $36,500, he having already paid £11,000 and the respondent was due to pay $47,500.

[13] In a letter of 17 January 2014, copied to the ICC, the respondent's solicitor indicated that it intended to proceed defending the appellant's claim through the arbitration proceedings but was not making a counterclaim in light of concern that any counterclaim would not be met by the appellant given its financial standing. This was repeated in correspondence of 1 August 2014 to the ICC.

[14] The parties were dissatisfied with the amount they were being required to pay as fees in respect of the arbitration. On 26 May 2014 the ICC issued another Notice stating that the respondent had consistently refused to pay its share of the advance on costs and the ICC had invited the appellant to pay the outstanding share of the advance on costs in its entirety. However, despite its failure to pay the share of the advance on costs, the respondent was not invited to make any payment to the Secretariat. It was stated that this failure to date did not have any impact on the respondent's general obligation under the Rules to pay 50% of the advance on costs.

[15] In correspondence of 11 August 2014 the appellant wrote to the ICC International Secretariat raising again the issue of costs. The terms of the letter included the following extracts:

> "We note that the ICC holds in the amount of $95,000 on advance fees. This corresponds to the current exchange rate of approximately 70,000 euros …. The determination of the applicant's interest is a maximum of 100,000 euros. Therefore the continuation of the dispute is completely uneconomical for the complainant. ….
>
> The cost of fixing ICC seems arbitrary and unfair. For both parties, for economic reasons the ICC process will not be granted. The only benefiting party here is ICC. The contracting parties, however, are the great losers in this arbitration."

[16] Significantly, however, the letter concluded:

> "Against this background, we encourage ICC to reconsider the taxation of costs again and give the parties the opportunity to end the dispute reasonably."

[17] The ICC, having responded on 22 August 2014 to the effect that it would submit the renewed objections to the court and revert back, responded on 4 September 2014 in the following terms:

> "Following claimant's objection to the application of Article 36(6) of the Rules, on 4 September 2014, the International Court of Arbitration of the International Chamber of Commerce ('Court') decided that the claims are considered withdrawn. Therefore, pursuant to Article 36(6) of the Rules, claimant's claims are considered withdrawn as of 12 August 2014, without prejudice to the reintroduction of the same claims in another arbitration (*our emphasis*)."

[18] The ICC followed this up with a final letter of 18 September 2014 in which it recorded that "pursuant to the withdrawal of the claims" it intended to destroy any documents, communications or correspondence submitted.

Principles Governing a Stay of Legal Proceedings under the 1996 Act

[19] Weatherup J correctly invoked *Russell on Arbitration* 23rd Edition at paragraph 7.046 in setting out the basic three grounds on which a stay might not be granted. These are where relevant:-

(a) The agreement is null and void where the arbitration agreement (as opposed to the matrix agreement) was never entered into or where it was entered into but subsequently has been found to have been void ab initio. (*No argument was made that this principle was applicable in the present case).*

(b) The agreement is inoperative for example where the arbitration agreement has been repudiated or abandoned or contained such an inherent contradiction that it could not be given effect.

(c) The arbitration agreement will be incapable of performance as where, even if the parties were ready, willing and able to perform, the agreement could not be performed by them. A distinction must be drawn between a party being incapable of performing the agreement and the agreement being incapable of being performed. It is only the latter that renders the agreement incapable of performance. (See Paczy v Haendlar and Natermann GmbH [1981] 1 Lloyds Reports 302). Impecuniosity is not a circumstance of that kind.

[20] In Downing v Al Tameer [2002] EWCA Civ 721 Potter LJ distilled a number of other propositions. First, that an arbitration agreement is a separate contract which can survive the ending of the obligation of the parties to perform the primary obligations created by the main contract in which the arbitration agreement is contained or to which it relates.

[21] Secondly, the obligation on the parties to perform the arbitration agreement would remain in force, despite its repudiation by the defendant, unless and until the claimants communicated to him that they accepted such repudiation as bringing to an end the obligations of both parties to perform the arbitration agreement, it being necessary for such an acceptance to be unequivocal.

[22] Thirdly, conventional contractual principles are the ink with which such agreements are written .They must be applied, albeit those principles may not be easy to apply in a case of a secondary contract, which requires separate consideration from the main contract to which it is collateral or ancillary and which is said to have been repudiated.

[23] Fourthly, the court approaches the question of whether or not a party has lost the right to arbitrate under the secondary contract by applying the traditional principles of the law of contract and a particular doctrine of repudiation whereby if one party, by words or conduct, demonstrates an intention no longer to be bound by the contract, it is open to the other party to accept such demonstration as a repudiation and thereby to bring the contract to an end. There must be acceptance of the repudiation by the other party.

[24] The concept of an agreement becoming inoperative by having been abandoned became a central issue in this case. Two key authorities on this concept repay careful analysis. First, Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA [1985] 1 WLR 925. In this matter charterers and owners of a vessel appointed an arbitrator to resolve a dispute in 1976. Points of claim were served by the charterers in 1981 and a further arbitrator was appointed in respect of the same dispute with the intention of instituting a fresh arbitration should it be held that the original arbitration had been abandoned. The owners sought an injunction restraining the charterers from taking any further steps in the arbitration. The court determined that, absent special circumstances, an offer to abandon the reference to arbitration and the acceptance of such an offer could not be inferred from the silence and inactivity of the parties, so that there was no binding agreement between them whereby the charterer was obliged to treat the claim as having been abandoned.

[25] Goff LJ said at 937B:

> "There is at present, under the laws of this country, no power in the court to dismiss a claim in an

> arbitration, as it can dismiss an action, for want of prosecution; nor do arbitrators in this country … have any equivalent power. So having regard to the contractual basis of arbitration, successive attempts have been made to invoke contractual remedies …
>
> If solutions such as actual repudiatory breach or lapse through effluxion of time are not available, the result would appear at first to be that either party to a reference which has gone to sleep is free to revive it even after many years of slumber. However, efforts have been made to harness other contractual concepts to a task for which they are, perhaps, not well suited … the first is that it may be inferred from long delay that the parties have mutually agreed to abandon the reference to arbitration, thereby bringing the reference to an end."

[26] We pause to observe that whereas 5 years was considered inadequate evidence of abandonment in that case, 8 years was proof of abandonment in Andre Cie SA v Marine Gransocean Ltd The Splendid Sun [1981] QB 694 where a claim had lain dormant for that time. Similarly in Paal Wilson & Company A/S v Partenreederei Hannah Blumenthal [1983] 1 AC 85 the absence of a trial date, and the approach for directions contributed to a conclusion that the reference to arbitration had been abandoned after a period of 6 years had elapsed.

[27] The second authority that offers assistance is Blindley Heath Investments Ltd v Bass and others [2014] EWHC 1366, a case strongly relied on in the instant appeal by Mr Good. This recent case is the authority for the proposition that the law of abandonment is based on the law of contract and so the question is whether, on an objective assessment of all the circumstances, including what was said or not said, written or not written, done or not done, an offer exists by one party to abandon the contract which is accepted by the offeree and which acceptance is communicated to the offeror. It is only in exceptional circumstances that silence and inactivity will be sufficient to found a contract of abandonment. An inference of abandonment from conduct can only be drawn where it is "quite plain" that it would be the correct inference to draw.

[28] Russell at paragraph 7-057 postulates that as a court does not have a discretion under section 9 of the 1996 Act, it does not have the power to impose conditions when granting a stay under the Act unless perhaps the stay has been granted pursuant to the court's inherent jurisdiction.

[29] The burden of proving that any of the grounds set out in section 9(4) has been made out lies upon the claimant in the proceedings and if the defendant can raise an

arguable case in favour of validity, a stay of the proceedings should be granted and the matter left to the arbitrators. See Hume v AA International Insurance [1996] LRLR 19 and Downing v Al Tameer [2002] EWCA Civ 721.

[30] Finally, counsel drew to our attention BDMS Ltd v Rafael Advanced Systems [2014] EWHC 451 where the court had to consider whether a failure by one party to pay its share of the ICC's costs and the subsequent withdrawal of the reference amounted to a repudiation of the arbitration agreement. Holding that it did not, Hamblin J said at paragraph [57]:

> "[5] It has to be proved that the arbitration agreement was repudiated, not merely the arbitration reference. If a claim is deemed withdrawn as a result of default in payment of the advance on costs, there is no restriction on the same claim being brought to arbitration again at a future time … Future arbitration of the same claim is expressly contemplated so that the irrevocable consequences as to arbitrability do not necessarily attach to the consequences of a failure to pay the advance on costs."

The decision of the Learned Trial Judge

[31] Weatherup J, having concluded that the case disclosed neither any repudiation of the arbitration by the appellant nor any acceptance of any repudiation by the respondent, determined at paragraph [28] as follows:

> "The arbitration proceedings have been treated as withdrawn by the ICC by their recent letter to that effect. Neither party to the arbitration intends to proceed. The plaintiff and the second defendant are not now acting under the arbitration agreement. Both the plaintiff and the second defendant accept that the other party will not act under the arbitration agreement. The opportunity has been available for them to do so and they have allowed that opportunity to be withdrawn. The concept of abandonment … applies in the circumstances of the present case. The parties have abandoned the arbitration agreement. That being so I am satisfied that on the ground of abandonment the agreement has become inoperative and the stay in the proceedings should be removed."

The submissions of the Appellant

[35] In essence Mr Good advanced the following arguments:

- There is no evidence in this case of an express offer on the part of the appellant to abandon the arbitration or an express acceptance by the respondent of any offer to abandon the arbitration agreement.

- No such implication can be derived from the facts. Both parties were actively engaged in the arbitration reference. The learned judge failed to distinguish between the ending of the arbitration *reference* on the one hand and the suggested ending of the arbitration *agreement* on the other.

The submissions of the Respondent

[36] In essence Mr Gibson advanced the following arguments:

- The appellant is really seeking a stay to frustrate and delay the proceedings in respect of the respondent's complaint. This is no more than an attempt to move the seat of dispute from Northern Ireland to Vienna notwithstanding that the respondent and first named defendant are both resident in Northern Ireland and the machine is situated in Northern Ireland.

- The appellant first applied for a stay on 3 January 2013, well over two years ago, and the net result is that the parties are today in exactly the same position as they were at the inception of the appellant's summons.

- The arbitration process has ended with the appellant's claim being withdrawn. It cannot now choose to hide behind its failure to properly proceed with the arbitration as justification for stifling the respondent's claim in this jurisdiction. In short, the arbitration has been struck out and the appellant has not carried through any progression of the arbitration.

Conclusion

[37] We have determined that the order of the learned judge should be reversed and that the appellant's application for a stay in the proceedings be granted. We have come to this conclusion for the following reasons.

[38] First, we find no basis for concluding on an objective assessment of all the circumstances that there has been an offer by one of the parties to abandon the arbitration aspect of the contract, which has been accepted by the other, and which acceptance had been communicated to the offeror. On the contrary, both parties were incontrovertibly actively engaged in the process of arbitration until an impasse was created by the costs issue before the ICC. This court has a certain sympathy

with the appellant in that the original order was couched in terms that the stay was conditional upon the arbitration being commenced within 28 days. As Mr Good contended, that left open the possibility of the respondent not taking those arbitration proceedings within 28 days and then coming back before the court and asking for the stay to be lifted. The appellant was granted a conditional stay only—in itself a questionable entity under the 1996 Act (see paragraph [28] above)—and was thereby obliged to issue proceedings before the ICC despite the appellant having no real cause of action. It simply wished to retain the sums that had been paid for the machine. Why would it wish to arbitrate? However, in the event the appellant did issue arbitration proceedings and both parties did engage. There is therefore no sense of the court order being frustrated or ignored. But for the impasse over the costs the matter would have proceeded to a hearing. There is no evidence – and it is not "quite plain"—that the appellant does not intend to process a further arbitration reference in the hope that this time the costs issue will have a happier outcome.

[39] Secondly, it is important to distinguish in the instant case between a termination of the arbitration *reference* before the ICC and termination of the arbitration *agreement* itself. Clearly the costs issue had led to the former but we find no sense of the latter being invoked by either party. On the contrary, the letter of 4 September 2014 from the ICC expressly envisaged that the same claim could be reintroduced in another arbitration notwithstanding that the present reference had been withdrawn. Far from creating an indication that neither party to the arbitration thereafter intended to proceed, this expressly left the door open for further arbitration reference. Accordingly, we find no basis for the proposition that the appellant and the respondent are not now acting under the arbitration agreement. There is no evidence by way of conduct or correspondence or inactivity to support such a finding. The passage of time has not been excessive in the context of the legal authorities cited before us and, of course, these current proceedings will have inevitably halted temporarily any further attempt to institute a further arbitration reference .

[40] Thirdly, in any event, it seems to us inescapable that the court's order has been complied with. The arbitration proceedings were commenced within 28 days from the date of the court order and therefore the stay should not be lifted. Obviously the efflux of time could serve to create a situation where the court might contemplate revisiting that order e.g. if there was persistent inactivity on the part of the appellant in the wake of the past reference being withdrawn but we are satisfied that is not the current position.

[41] Fourthly, it has to be recognised that the respondent contributed in no small fashion to the creation of the impasse by initially instituting a very substantial counterclaim which served to raise the costs to arguably unacceptable levels for both parties. To that extent the respondent has brought upon itself the difficulty that caused this reference to founder. It cannot now benefit from that action.

[42] We conclude, therefore, that there is no basis upon which a stay can be refused on the grounds that the agreement to arbitrate has become inoperative or that the agreement to arbitrate has been abandoned. In short, the burden of proving that any of the grounds set out in section 9(4) of the 1996 Act has been made out lies on the respondent at this time and it has manifestly failed to discharge that burden. The appellant at the very least has raised an arguable case in favour of the validity of the stay. Accordingly, this appeal succeeds and the stay on these proceedings should be maintained. We shall hear counsel on the question of costs.