Gibson Joint Venture v Department of the Environment for Northern Ireland [2001] APP.L.R. 12/21

JUDGMENT SHEIL J IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND 21st December 2001

1. In this originating summons Gibson Joint Venture (hereinafter referred to as the applicant) seeks pursuant to section 12(1) of the Arbitration Act 1996 an extension of time within which to refer to arbitration a dispute with the Department of the Environment for Northern Ireland (hereinafter referred to as the respondent).

2. On 8 February 1995 the respondent, by letter dated 8 February 1995, awarded to the applicant a contract to construct stage 3 of the Newry Bypass in County Down. The Babtie Group Limited, Civil Engineers (hereinafter referred to as Babtie) was appointed by the respondent as engineers for the purposes of the contract, the day to day involvement being entrusted to Mr David Coultas, a Civil Engineer and Divisional Director of that company.

3. Part of the contract works involved blasting through solid rock. This was a specialist task which the applicant sub-contracted to Rocklift Limited on 16 May 1995, which appointment was approved by Mr Coultas. In the course of carrying out the blasting operations Rocklift Limited had to adapt its drilling and blasting operations by reason of nearby housing thereby incurring additional costs to it of approximately £56,000. On 14 January 1997 the applicant forwarded this claim by Rocklift Limited to Babtie. On 11 December 1997 Mr Duff, a director of Babtie, informed the applicant by letter that "no additional monies will be awarded" and went on to say that "should you require any clarification regarding this matter, please do not hesitate to contact our Mr D Coultas." On 19 January 1998 the applicant wrote to Babtie enclosing "for the attention of Mr Duff" a notice of dispute served on the applicant by Rocklift Limited pursuant to clause 18(2) of the sub-contract and went on to state that "we are therefore required under the contract (*between the applicant and the respondent*)to notify the engineer of a dispute under clause 66(1) of the ICE, 5th Edition, conditions of contract and ask for his decision in writing as per this clause." The relevant part of Clause 66(1) reads as follows:

   "Clause 66(1) If any dispute or difference of any kind whatsoever shall arise between the employer and the contractor in connection with or arising out of the contract of the carrying out of the works including any dispute as to any decision, opinion, instruction, direction, certificate or valuation of the engineer (whether during the progress of the works or after their completion and whether before or after the determination abandonment or breach of the contract) it shall be referred to and settled by the engineer who shall state his decision in writing and give notice of same to the employer and to the contractor. …. Such decisions shall be final and binding upon the contractor and the employer unless either of them shall require that the matter be referred to arbitration as hereinafter provided.

   …. if either the employer or the contractor be dissatisfied with any such decision of the engineer then and in any such case either the employer or the contractor may within three calendar months after receiving notice of such decision …. require that the matter shall be referred to the arbitration of a person to be agreed between the parties … .)"

4. On 4 March 1998 Mr Duff of Babtie wrote to the applicant [68] acknowledging receipt of the notice of dispute and went on to state that "in accordance with conditions of contract clause 66(1) we hereby confirm our decision as stated previously in our letter of 11 December 1997 that no additional monies will be awarded." The letter went on to give reasons for that decision and concluded by stating that "if you have any queries or require any further information, please do not hesitate to contact David Coultas." On 6 April 1998 the applicant wrote to Babtie, "for the attention of Mr Coultas", requesting Babtie to "reconsider" its decision and concluded by stating that we "confirm that we formally give permission for Rocklift and Babtie to meet directly to further discuss this detailed subject." [179]. On 8 April 1998 [180] Mr Coultas replied to the applicant as follows:

   "We acknowledge receipt of your letter of 6 April 1998 requesting that we reconsider our position regarding the above mentioned claim. However, as no further information regarding the basis of your claim has been submitted to us since our previous letter of 4 March 1998, we confirm that we do not consider the basis of your claim to be valid. In addition, we again request that you advise us as to whether this claim is being pursued in relation to the conditions of contract, clause 12 adverse physical conditions and artificial obstructions.

   We remain willing to discuss this matter further if required."

5. Direct discussions then took place between Mr Coultas of Babtie and Mr McGoff, Managing Director of Rocklift Limited.

6. On 23 April 1998 [119] Mr McGoff wrote to the applicant stating that, having discussed the matter with Mr Coultas, Mr Coultas had stated that he could see no merit in the claim for the additional costs of approximately £50,000 made by Rocklift Limited. The letter [119] concluded by stating:

   "We now formally give you notice that we wish to proceed to arbitration according to clause 18/5 of our sub-contract. Could you now process this on our behalf."

7. In an affidavit filed on behalf of the applicant in support of its application to extend time for referring the dispute between the applicant and the respondent to arbitration, Mr Ronald Rea, the applicant's Civil Engineer who had been dealing with this matter on behalf of the applicant, states in paragraph 7 that he understood the statement by Mr Coultas in his letter of 8 April 1998 [180] that "we remain willing to discuss this matter further if required" to mean that there was a potential for ongoing discussion. He goes on to accept in paragraph 7 of that affidavit that "that process however was brought to an end when I received the letter dated 23 April 1998 [181] from Rocklift Limited indicating that there was a complete impasse between Mr Coultas for Babtie on behalf of the Department of the Environment and Rocklift Limited". In paragraph 8 of that same affidavit Mr Rea continues:

"I still awaited notification from Babtie about the outcome of the discussion as I believed this would trigger any arbitration process. I still believed, as per the letter of 8 April 1999 [180], that Babtie's wanted a reply on the clause 12 point which arose in that correspondence."

8. In paragraph 9 of the same affidavit Mr Rea continues: *"I heard nothing further from Babtie. The matter came again to my attention following a discussion with Mr McGoff of Rocklift Limited on 15 June 1998. It emerged from that discussion that there was no further discussion from Babtie either to Rocklift or ourselves since Rocklift's letter 23 April 1998 [181] to Gibson Joint Venture. I therefore realised with Mr McGoff that it was necessary to start arbitration and invoke the arbitral clauses in the contract and I proceeded to do that as appears from the correspondence."*

9. At paragraph 10 of the same affidavit Mr Rea continues: *"On 16 June 1998 [182] I wrote to the Babtie Group to confirm the clause 12 point. I thereafter forwarded an arbitration notice to Babtie on 18 June 1998. Babtie reverted to me on 24 June 1998 pointing out that the notice should have gone to the Department of the Environment (NI). I then served the Department of the Environment (NI) by letter dated 26 June 1998."*

10. At paragraph 11 Mr Rea continues: *"I took no steps in the intervening time between April 1998 and June 1998 as I believe that the matter was still under review by Babtie. I was waiting to hear by letter or other communication from Babtie on behalf of the Department of the Environment. Further the circumstances whereby there was to be a discussion directly between the sub-contractor and the engineer relating to a decision was not a matter with which I had in my reasonable contemplation at the time of signing the contract with the Department of the Environment for Northern Ireland. I don't believe that it would have had that within its contemplation either and have had no intimation of that."*

11. Mr Coyle, counsel for the applicant, now accepts that the letter dated 4March 1998 [68] from Babtie to the applicant constituted a final and binding decision by the engineer (Babtie) for the purposes of clause 66(1) of the main contract and that the applicant had a period of three calendar months from 4 March 1998 to refer the matter to arbitration, in the absence of an order of the court extending time under section 12(1) of the Arbitration Act 1996. The three month period expired on 3 June 1998 and accordingly the applicant's notice to refer the matter to arbitration was 23 days out of time.

12. Mr Coyle seeks an extension of time pursuant to section 12 of the Arbitration Act 1996, which reads as follows:

"Section 12

(1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall 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, or

(b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun.

the court may by order extend the time for taking that step.

(2) Any party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time.

(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 to the provision in question, and that it would be just to extend the time, or

(b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

(4) *The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed* (by agreement or by a previous order) has expired."

13. I do not accept the applicant's submissions under section 12(3)(a) of the Act that the additional costs incurred by reason of the presence of nearby houses or and/or the direct discussions between Rocklift Limited and Babtie, were outside the reasonable contemplation of the parties when they agreed to the three month time limit within which to refer any dispute to arbitration or that it would be just to extend the time on those grounds.

14. Mr Coyle on behalf of the applicant also relies upon section 12(3)(b) of the Act, submitting in the present case that the conduct of Mr Coultas/Babtie makes it unjust to hold the applicant to the strict terms of the time limit for serving notice of referral to arbitration on the respondent. In making his submission under section 12(3)(b) of the Act Mr Coyle made it clear that he did not intend any criticism of the conduct of Mr Coultas.

15. The sub-section does not refer to wrongful conduct but merely to "the conduct of one party" which "makes it unjust to hold the other party to the strict terms of the provision in question." I hold as a matter of law that "the conduct" need not be wrongful conduct in order to avail of section 12(3)(b) of the Act.

16. Was the conduct of Mr Coultas/Babtie such as to make it "unjust" to hold the applicant to the strict terms of Clause 66(1) whereby the dispute had to be referred to arbitration within three calendar months after receiving notice of the decision of 4 March 1998?

17. In ***Harbour & General Works Limited v Environment Agency*** [1999] Building Law Reports 143 at 149 Coleman J stated: *"The enactment of section 12 of the 1996 Act 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 1996 Bill of the Departmental Advisory Committee under the chairmanship of Lord Justice Saville, as he then was. Under Section 27 the court had given the words `if (the court) is of the opinion that in the circumstances of the case undue hardship would otherwise be caused' a broad meaning and relatively benevolent application".

Coleman J went on to make it clear that that was no longer the case stating: *"Accordingly, the approach to the construction of section 12 has, in my judgment, to start from the assumption that when the parties agreed to 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 course of business, the claim would be time-barred unless the conduct of the other party made it unjust that it should."*

At page 151 Coleman J continued: *"For it to be held that the conduct of one party makes it unjust to hold the other party to the strict terms of the time-bar, there must, in my judgment, at the very least be conduct which has proved somehow to have led the claimant to omit to give notice in time. The exchanges between the parties during the last two working days of the period come nowhere near the kind of situation envisaged by section 12(3)(b). It cannot be said that the absence of further response to and critique of the conciliation notice involved some kind of injustice to HAGWL. In no way were they diverted from compliance with the requirement of clause 66. On the contrary, the letter of 25 September should have alerted them to the time-bar period in relation to their conciliation notice. As Mr Jeffrey Brice QC held in* ***Cathiship*** *[1998] 3 All ER 714 and 729, mere silence or failure to alert the claimant to the need to comply with the time-bar cannot render the barring of the claim unjust. There was certainly no conduct on the part of the respondents in this case which could cause it to be unjust for the claim to be time-barred."*

18. On the facts of the present case, while I have some sympathy for the applicant, I do not consider that the conduct of Mr Coultas/Babtie was such as to make it unjust to hold the applicant to the strict terms of clause 66(1). When the applicant received the letter dated 23 April 1998 from Rocklift Limited indicating that there was a complete impasse between Mr Coultas and Rocklift Limited, the applicant must or should have realised that the decision of 4 March 1998 stood and that the applicant had only three months from that date within which to refer the matter to arbitration in accordance with clause 66(1); the applicant failed to do so. That disposes of the present application in favour of the respondent.

19. If I am wrong in the above conclusion, the question arises whether Mr Coultas/Babtie was a "*party"* to the agreement because section 12(3)(b) of the Act refers to "*the conduct of one party*" making "*it unjust to hold the other party to the strict terms of the provision in question".* There is no definition of "*party*" in the Act, save that section 82(2) of the Arbitration Act 1996 states that "*references in this Part (which includes section 12) to a party to an arbitration agreement include any person claiming under or through a party to the agreement."* As already stated Babtie was appointed by the respondent as engineers for the purposes of the contract, the day to day involvement being entrusted to Mr Coultas. For the purposes of the present dispute and section 12(3)(b) of the Act, I do not consider that Babtie/Mr Coultas can be regarded as a *"party"* to the agreement or that the actions of Mr Coultas in acting as he did were done as a servant or agent of the Department of the Environment. Accordingly even if the conduct of Mr Coultas/Babtie "*makes it unjust to hold the other party (the applicant) to the strict terms of the provision in question"* [clause 66 (1)], the applicant cannot avail of section 12(3)(b) of the Act in order to obtain an extension of time from the court.

20. As the applicant has failed to satisfy the court that the facts of the case bring the case within the provisions of section 12(3)(a) or (b), the court has no alternative but to refuse to extend time under section 12(1) of the Act.

21. Accordingly I dismiss this summons.