

THE HIGH COURT

[2020] IEHC 585
[2020 No. 4267 P]

BETWEEN

KD MECHANICAL ENGINEERS LIMITED

PLAINTIFF

AND

P.J. MCLOUGHLIN & SONS LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on the 11th day of November, 2020

Summary

1. This is an interlocutory injunction application in which the plaintiff ("KD Mechanical") seeks the payment from the defendant ("P.J. McLoughlin") of the sum of €314,880 to KD Mechanical's solicitor (to be held subject to a solicitor's undertaking), being the amount recommended following conciliation between the two parties, pending the outcome of arbitration.
2. The core issue in the within application concerns the interpretation of Clause 13.1.11 of the Public Works Contract for Building Works Designed by the Employer (Document Reference PW-CF 1 v.1.10) (referred to herein as the "Contract").
3. The question for determination is whether KD Mechanical, in light of the wording of Clause 13.1.11(1)(b) of the Contract, instead of providing the paying party, P.J. McLoughlin, with a bond as security, may provide an undertaking from its solicitor to hold €314,880 in its client account pending the outcome of arbitration between the parties. The issue in dispute between the parties therefore centres on the interpretation of the Contract.

Background

4. It is necessary for an understanding of the exact nature of the dispute between the parties to provide some relevant background before considering the terms of the Contract.
5. On 16th November, 2015 KD Mechanical entered into the Contract with Mayo County Council, the purpose of which was to provide certain mechanical and installation works for a swimming pool complex in Castlebar, Co. Mayo. The Contract was novated by Mayo County Council to P.J. McLoughlin on the same day, i.e. the 16th November, 2015.
6. On 19th March, 2019, a dispute arose between KD Mechanical and P.J. McLoughlin, the underlying reasons for which are not relevant to the within application. The parties agreed pursuant to Clause 13.1 of the Contract to enter into conciliation and following the appointment of a conciliator, a hearing took place on 8th January, 2020.
7. As no agreement was reached during the conciliation between the parties, in accordance with Clause 13.1.8 of the Contract the conciliator issued a recommendation to the parties. This recommendation was that P.J. McLoughlin pay KD Mechanical the sum of €314,880 (the "Recommended Sum").

8. As P.J. McLoughlin was not satisfied with the conciliator's recommendation, on 14th April, 2020 it issued a notice of dissatisfaction pursuant to Clause 13.1.9 of the Contract. By letter dated 15th April, 2020 P.J. McLoughlin indicated its wish to have the dispute referred to arbitration.
9. On 17th April, 2020 KD Mechanical issued a Notice of Arbitration and by letter of the same date informed P.J. McLoughlin that it intended to enforce Clause 13.1.11 of the Contract thereby requiring payment of the Recommended Sum from P.J. McLoughlin. A further letter dated 11th May, 2020 sent by the solicitors acting for KD Mechanical to P.J. McLoughlin stated that a solicitor's undertaking would be provided to P.J. McLoughlin & Sons Ltd to the effect that should the Recommended Sum be lodged into the client account of KD Mechanical, those monies would be held in the client account pending the outcome of the arbitration and not used for any purpose unless and until directed by the arbitral award or as agreed between the parties in writing.
10. While further correspondence issued between KD Mechanical and P.J. McLoughlin, it is clear that the offer to provide a solicitor's undertaking was not accepted by P.J. McLoughlin and no payment of the Recommended Sum was made.

Application for mandatory interlocutory relief

11. It is clear from the Notice of Motion issued by KD Mechanical that it is seeking a mandatory injunction against P.J. McLoughlin since it seeks an order directing P.J. McLoughlin to make a payment of €314,880 to KD Mechanical's solicitor's client bank account on the undertaking that the said sum would not be used for any purpose until directed by a final arbitral award.
12. Based on the decisions of the Supreme Court in *Maha Lingham v. Health Service Executive* [2006] 17 E.L.R. 137 and *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152, it is clear that KD Mechanical, if it is to succeed in obtaining an interlocutory injunction, which is a mandatory injunction, must show '*at least that [it] has a strong case that is likely to succeed at the hearing of the action*' (per Fennelly J. in *Maha Lingham*).

Interpreting the Contract

13. It is against this background therefore that this Court must consider the interpretation of Clause 13.1.11(1) of the Public Works Contract. It states as follows:

"If the conciliator has recommended the payment of money and a notice of dissatisfaction is given, the following shall apply:

- (1) The party concerned [P.J. McLoughlin] shall make the payment recommended by the conciliator, provided that the other party [KD Mechanical] first
 - (a) gave a notice, complying with the arbitration rules referred to in sub-clause 13.2, referring the same dispute to arbitration and
 - (b) gave the paying party [P.J. McLoughlin] a bond executed by a surety approved by the paying party [P.J. McLoughlin], acting reasonably, in

the form included in the Works Requirements, or if there is none, a form approved by the paying party [P.J. McLoughlin], acting reasonably, for the amount of the payment.”

14. This clause deals with the situation where the recommendation of the conciliator is not accepted by one of the parties, in this case, P.J. McLoughlin. The clause envisages the dispute being referred to arbitration subject to P.J. McLoughlin paying over the Recommended Sum to KD Mechanical, provided that KD Mechanical provides security for this payment to P.J. McLoughlin as outlined in sub-clause (b).
15. Sub-clause (b) outlines two options to be satisfied by KD Mechanical, the first option is the execution of a bond in the form included in the Works Requirements of the Contract or, if there is none, the second option is ‘a form’ approved by P.J. McLoughlin for the amount of the payment (€314,880).
16. In this case, there was no first option available to KD Mechanical as there was no form of bond included in the Works Requirements attached to the Contract. Accordingly, the dispute can be distilled down to the question of whether the reference in the second option set out in sub-clause (b), insofar as it refers to ‘a form’, should be interpreted as referring to a form of bond as suggested by P.J. McLoughlin or as referring to any other form of surety, such as a solicitor’s undertaking, as submitted by KD Mechanical.
17. KD Mechanical argues that a purposive interpretation should be applied to the clause and that as the purpose of the clause is to provide security to P.J. McLoughlin before it pays over the €314,880 to KD Mechanical, the term ‘form’ should be interpreted to include any form of security, and not just a bond. This is clear from the letter of 11th May, 2020 from KD Mechanical’s solicitors to P.J. McLoughlin in which they make no reference to ‘a bond’ but state:

“The contract terms make it clear that the Recommended Sum be lodged by the paying party on adequate form of security being provided pending the outcome of the arbitration.

In that regard, we are instructed to and we are prepared to provide an undertaking to P.J. McLoughlin & Sons Ltd that where the Recommended Sum is lodged into our client bank account, pending the outcome of the arbitration, that the said sum will be held in our client account and will not be used for any purpose unless and until otherwise directed by the arbitral award or as agreed by the parties in writing.”
(Emphasis added)

18. As already noted, the first option in sub-clause (b) states that KD Mechanical must provide a bond in a form included in the Works Requirements. The sub-clause adds that if there is no such bond then the second option is a ‘form’ approved by P.J. McLoughlin. It is this Court’s view that when the term ‘form’, in the second option, is considered in the context of sub-clause (b) as a whole, that it logically refers back to the same term as is

used in the first option, i.e. a form of bond and not a form of security, as submitted by KD Mechanical.

19. It is accordingly this Court's view that a literal and logical interpretation of the term '*form*' in this second option is a reference back to a form of bond, which is mentioned in the first part of sub-clause (b). This is because, it is this Court's view that the sub-clause is primarily concerned with a form of bond and so it is also this Court's view that the logical interpretation is that the second reference to '*form*' is also a reference to a form of bond. The first form of bond is one set out in the Contract, while the second form is a form of bond agreed between the parties, in this Court's view.
20. To interpret the term '*form*' as referring to something else, such as a 'form of security', is, in this Court's view, interposing words into the second part of sub-clause (b) that are not there and are not required or indeed justified by the first part of sub-clause (b).
21. This Court does agree with KD Mechanical that *if* it was to give a purposive interpretation of the word '*form*' then this term could be interpreted as including other forms of security, apart from bonds, such as a solicitor's undertaking. However, it seems to this Court that a purposive interpretation of sub-clause (b) is not required, and on a literal and logical interpretation of the sub-clause, the reference in the second option is to a form of bond.

Support for this interpretation of the Contract

22. In support of this Court's conclusion, is the fact that there are other sections of the Contract which refer to a '*bond*', *albeit* in different contexts, but without any suggestion that other forms of security such as a solicitor's undertaking would be sufficient or are included. In addition, where other forms of security are stated to be acceptable, such as insurance, the drafters of the Contract went to the trouble of explicitly stating them, which they did not do (in the context of solicitors' undertakings) in relation to Clause 13.1.11(1).
23. For example, in the context of a performance bond, Clause 1.5 provides that:

"Before the Starting Date, unless the Schedule, part 1E, says that no bond is required, the Contractor shall give the Employer a performance bond in the form in the Works Requirements, or, if there is none, a form approved by the Employer. The performance bond shall be in the amount stated in the Schedule, part 1E, and shall be executed by the Contractor and by a surety approved by the Employer."

Thus, in this clause, it is to be noted there is a reference here to a '*bond*' and to a '*surety*', without any suggestion that a solicitor's undertaking would be sufficient.

24. Similarly Clause 2.7.1, in the context of legal opinions, states:

"If the Contractor or any person executing a bond, guarantee, warranty or other deed or agreement required by the Contract is not an individual or a company incorporated in Ireland the Contractor shall give the Employer, together with the Agreement or other document, a legal opinion that

the Contractor, or other counterparty, is an entity duly incorporated under the laws of its place of incorporation and is a separate legal entity [...].”

Here, while there is a suggestion of other forms of security, i.e. a guarantee, this is explicitly stated, unlike with a solicitor’s undertaking, which is not expressly referenced in Clause 13.1.11(1).

25. Also Clause 9.1.2, in the context of the starting date, states:

“Before the Starting Date [unless already given by the Contractor before the Contract Date, for example in response to a letter of intent] the Contractor shall give the Employer all of the following, all executed, as relevant, by the relevant persons:

- (1) the Agreement
- (2) a performance bond, if required by the Contract
- (3) a parent company guarantee, if required by the Contract
- (4) if the Works Requirements state that the Contractor or the Contractor’s nominee is to be appointed as project supervisor for the construction stage, the required appointment, and the developed safety and health plan required by the Construction Regulations
- (5) evidence that the insurances required by the Contract are in effect
- (6) any collateral warranties required by the Contract

However, collateral warranties may be given on a later date that the Employer’s Representative have agreed to.”

While again there is a suggestion of other forms of security in addition to a bond, i.e. a parent company guarantee, this is explicitly stated, unlike with a solicitor’s undertaking, which is not expressly referenced in Clause 13.1.11(1).

26. In addition, Clause 11.3.3, in the context of retention, states:

“If, within 10 working days of the issue of the certificate of Substantial Completion of the Works, or another date agreed by the Employer’s Representative, the Contractor provides to the Employer a retention bond in the form in the Works Requirements, or, if there is none, a form approved by the Employer, for the amount retained by the Employer, and executed by a surety approved by the Employer, the Contractor shall be entitled to invoice the Employer for the balance of the money retained.”

This clause, like Clause 1.5 (and indeed Clause 13.1.11), refers only to a bond and there is no suggestion that other forms of security such as a solicitor’s undertaking are included.

27. Finally, in this regard, Clause 12.1.1(4), in the context of termination, states:

"The Employer may, without limiting any other right or remedy, terminate the Contractor's obligation to complete the Works by notice to the Contractor if any of the following occurs:

[...]

(4) the Contractor fails to maintain the required insurances or performance bond."

It is again to be noted that while there is a suggestion of other forms of security, i.e. 'insurances', in addition to bonds, this is explicitly stated, unlike with a solicitor's undertaking, which is not referenced in Clause 13.1.11(1).

28. In summary, the foregoing bald references to 'bonds' in some clauses, without any suggestion of a solicitor's undertaking as an alternative, and the explicit references in other clauses to other forms of security such as insurance (while there is no explicit reference to a solicitor's undertaking in Clause 13.1.11) reinforces this Court's view that Clause 13.1.11 should not be interpreted as going beyond 'bonds' so as to include a reference to a solicitor's undertaking.
29. Some further support for this Court's view, is the fact that the Public Works Contract is a form of contract that is prepared by the Department of Public Expenditure and Reform. On its website, www.constructionprocurement.gov.ie, there is provided some explanatory information regarding the Contract. In particular, details regarding "*Authorised Bonding Businesses*" are provided by the Office of Government Procurement on that website. In this section, there are details of the types of entities which provide bonds, namely banks and insurance undertakings. This section of the website also sets out where a list of such insurance undertakings is to be found. It is to be noted that there is no reference therein to security which would be regarded as equivalent to bonds being provided by entities other than banks or insurance companies, such as solicitors. Although not in any way determinative of the issue (since this is simply an explanatory section of the website of the Department that drafted the Contract, and this section is not part of the Contract), it nonetheless is of some relevance to note that this section of the website does not contemplate security, other than bonds.

Service of the notice of arbitration?

30. This Court will next deal with the question of whether KD Mechanical had complied with sub-clause (a) of Clause 13.1.11(1), namely whether it gave notice referring the dispute to arbitration, since this was a matter which was also in dispute between the parties.
31. Under Clause 13.1.11(1) of the Contract, P.J. McLoughlin is obliged to make the payment recommended by the conciliator, not only if a form of bond was provided by KD Mechanical, but also if KD Mechanical had given a notice referring the dispute to arbitration. However, in these proceedings, P.J. McLoughlin did not concede the Notice of Arbitration was properly served on it and hence this matter had also to be considered by this Court.

32. Clause 4.14 of the Contract provides that notices shall be sent to the address of the parties set out in the schedule, as updated by the relevant party. In this case the address in the Contract was that of Mayo County Council and it was not updated by P.J. McLoughlin after the novation of the contract from Mayo County Council to P.J. McLoughlin. The purpose of service is clear from the Supreme Court decision in *Danske Bank v. Meagher* [2014] IESC 38 at para. 48, where Laffoy J. quotes Dixon J. in *Royal Bank of Ireland v. Nolan* [1958] 92 I.L.T.R. 60 to the effect that:

“One could not overlook the fundamental purpose of service which was to give the defendant notice and sufficient warning of the proceedings that he might have to contest.”

33. In this instance, if KD Mechanical had served the Notice of Arbitration in accordance with the wording of the Contract, it would have served that notice on Mayo County Council and P.J. McLoughlin would not have been notified of the Notice of Arbitration. It is also important to bear in mind that the obligation was upon P.J. McLoughlin to update the notice provisions of the Contract and it failed to do so.

34. Therefore, in circumstances where P.J. McLoughlin had failed to update the address for the purposes of service, KD Mechanical was faced with the task of putting P.J. McLoughlin on notice of the arbitration. It did so by sending notices by registered post to the registered office of P.J. McLoughlin (which were returned not called for). However, in addition, it sent the Notice of Arbitration by email to two email addresses, redacted1@pjmcloughlin.ie and redacted2@pjmcloughlin.ie. Sworn evidence was provided to this Court that these were the two email addresses used by solicitors for KD Mechanical throughout the conciliation process in communicating with P.J. McLoughlin. Evidence was also provided that KD Mechanical’s solicitors had received correspondence from both these email addresses. Evidence was also provided of email delivery notification to both these addresses.

35. It is clear from *Lancefort v. An Bord Pleanála* [1997] IEHC 83 at p. 9 per Morris J. that:

“the purpose and object of achieving proper service in Court proceedings is to ensure that the party concerned is adequately informed of the matters contained in the notice so as to suffer no prejudiced.”

With this in mind, it is relevant to note that in the affidavits sworn on behalf of P.J. McLoughlin by its director, Mr. Mervyn McLoughlin (“Mr. McLoughlin”), it is alleged that proper service was not effected upon the Company. However nowhere in these affidavits is it stated that the Company, or that Mr. McLoughlin, on behalf of the Company, was not aware of the Notice of Arbitration. Instead, a most generalised averment is sworn to the effect that due to Covid-19 the Company was not in a position to view, read or engage with emails. The most that Mr. McLoughlin states is that ‘as far as [he] is concerned’ the company, P.J. McLoughlin, has not been served a Notice of Arbitration by KD Mechanical.

36. Furthermore, it is not alleged that P.J. McLoughlin has been prejudiced by the manner in which it was purported to be put on notice. Indeed, in this regard P.J. McLoughlin has averred that it wishes the dispute to go to arbitration and as noted previously, in its letter dated as far back as 15th April, 2020, P.J. McLoughlin indicated its wish to have the dispute referred to arbitration.
37. In all these circumstances and in light of the sworn evidence regarding the attempts to serve by hand on the company's registered office and to serve on the 'home' address of Mr. McLoughlin (as set out in the Companies Registration Office) and the evidence regarding the service of the notices by email, it is this Court's view that KD Mechanical did comply with Clause 13.1.11(1)(a) by giving notice to P.J. McLoughlin of the referral of the dispute to arbitration.

Conclusion

38. Compliance with *both* sub-clause (a) and sub-clause (b) of Clause 13.1.11(1) is necessary for KD Mechanical to be entitled to the injunction. This Court has held that the offer of a solicitor's undertaking is insufficient for compliance with sub-clause (b). Thus, although KD Mechanical has won before this Court its claim that it complied with sub-clause (a), it lost its claim that it complied with sub-clause (b) and so this Court must refuse the injunction sought by KD Mechanical to compel the payment of the Recommended Sum.
39. This Court does have considerable sympathy for KD Mechanical as it seeks to recover the €314,880 which the conciliator recommended P.J. McLoughlin pay it pursuant to the terms of the binding Contract. This is because extensive and persuasive sworn evidence was provided to this Court of the difficulties which it had in attempting to serve documents on P.J. McLoughlin and its director Mr. McLoughlin (including the fact that there was the blocking up of a post box with wood). In this regard, evidence was also provided of Mr. McLoughlin's home address being Hawthorn Lodge according to Companies Office forms filed in 2009 on the registration of P.J. McLoughlin, yet Mr. McLoughlin avers in these proceedings (to support P.J. McLoughlin's claim that it was not evading service) that this was not his home address for the past twenty years. This leads to the conclusion that either the Companies Office forms signed in 2009 in relation to Mr. McLoughlin's home address is incorrect or his averment in these proceedings is incorrect.
40. However, for a mandatory injunction to be granted this Court must be convinced that KD Mechanical has a strong case that is likely to succeed at the hearing of the action. In view of this Court's interpretation of sub-clause (b), this Court has no option but to refuse the interlocutory injunction sought by KD Mechanical.
41. Therefore, even though KD Mechanical has been waiting some time to receive from P.J. McLoughlin payment of the sum recommended by an independent conciliator and the fact that a solicitor's undertaking would provide P.J. McLoughlin with significant security in relation to the payment of that sum, and the fact that this Court has sympathy with the difficulty KD Mechanical has had in serving proceedings on P.J. McLoughlin, unfortunately from KD Mechanical's perspective, none of this is sufficient, as a matter of law, to enable

this Court to read into a Public Works Contract, which is of general use throughout the country, words (*'a form [of security] approved by the paying party'*) which are not there.

42. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. To deal with those final orders, this case can be put in for mention one week from delivery of this judgment, at 10.30 am.