THE HIGH COURT

[2014 No. 7827 P.]

IN THE MATTER OF THE ARBITRATION ACT 2010

BETWEEN

OCEAN POINT DEVELOPMENT COMPANY LIMITED

(IN RECEIVERSHIP)

PLAINTIFF

AND

PATTERSON BANNON ARCHITECTS LIMITED, P.H. McCARTHY CONSULTING ENGINEERS LIMITED, MULCAHY McDONAGH & PARTNERS LIMITED, CALLAN MAGUIRE PARTNERSHIP AND CLANCY PROJECT MANAGEMENT LIMITED TRADING AS CLANCY CONSTRUCTION

DEFENDANTS

JUDGMENT of Mr. Justice David Barniville delivered on the 10th day of May, 2019.

Introduction

1. This is my judgment on an application by the fifth defendant, Clancy Project Management Limited trading as Clancy Construction ("Clancy"), for an order under Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") which has force of law in the State by virtue of section 6 of the Arbitration Act 2010 (the "2010 Act"), referring the dispute between the plaintiff, Ocean Point Development Company Limited (in receivership) ("Ocean Point"), and Clancy, which is the subject of these proceedings, to arbitration on the basis that the dispute is the subject of an arbitration agreement between the parties. The arbitration agreement on which Clancy relies is clause 38 of a written contract in the standard RIAI form (2002 version) dated 2nd March, 2007.

2. While the motion issued by Clancy seeks other reliefs, including orders pursuant to the inherent jurisdiction of the court referring the dispute to arbitration or, alternatively, staying, dismissing or striking out the proceedings by reason of the arbitration agreement, Clancy confirmed at the outset of the hearing of the application that the only order sought by it is an order under Article 8(1) of the Model Law.

3. Ocean Point has resisted Clancy's application on two principal grounds. First, Ocean Point contends that Clancy repudiated the arbitration agreement by commencing summary proceedings in the High Court in October 2008 seeking payment on foot of an architect's certificate issued on 15th September, 2008, on foot of which Clancy obtained liberty to enter final judgment in the sum of €768,379.45 from the Master of the High Court on consent on 10th December, 2009 (the "summary proceedings"). Ocean Point contends that it accepted that repudiation by commencing these plenary proceedings against Clancy on 5th September, 2014 (the "plenary proceedings"). Second, Ocean Point contends that the court should refuse to make an order under Article 8(1) of the Model Law referring the parties to arbitration as the arbitration agreement is *"incapable of being performed"* within the meaning of that term in Article 8(1) of the Model Law. Ocean Point asserts that the arbitration agreement is *"incapable of being performed"*, as the claimant is the only one of the five defendants in the plenary proceedings which will be a party to any arbitration. Ocean Point contends that the absence of the other defendants in any such arbitration would present real and practical difficulties in various respects which render the arbitration agreement *"incapable of being performed"* as that term is properly to be construed.

Summary of decision

4. For the reasons set out in this judgment, I have concluded:

(1) The commencement of the summary proceedings by Clancy in October 2008 did not amount to a repudiation of the arbitration agreement and, consequently, the commencement of the plenary proceedings by Ocean Point in September 2014 did not amount to an acceptance by it of any repudiation by Clancy. The arbitration agreement comprised in clause 38 of the contract was, therefore, not repudiated and remains in force.

(2) The arbitration agreement is not *"incapable of being performed"* for the purposes of Article 8(1) of the Model Law. The fact that Clancy is only one of the five defendants that are sued in the plenary proceedings which will be involved in the arbitration with Ocean Point does not, in my view, render the arbitration agreement, or any arbitration taking place under it, *"incapable of being performed"*.

(3) As the parties are agreed that, subject to the points referred to above, (which I have decided against Ocean Point), the court has no discretion as to whether to make an order under Article 8(1) of the Model Law, I am satisfied that I am required to make the order sought by Clancy referring Ocean Point and Clancy to arbitration under clause 38(b) of the contract in respect of the dispute the subject of the plenary proceedings.

Relevant factual background

5. I set out below the relevant factual background to the application. The facts set out by me are either not in dispute between the parties or have been found as facts by me on the basis of the evidence.

6. On 2nd March, 2007 Ocean Point entered into the contract with Clancy, a construction company, for the construction by Clancy of a mixed use residential/commercial development (the "works") at Courtown Harbour in Co. Wexford. The contract was in the standard RIAI form (2002 version). The architect under the contract was Mark Bannon of Patterson Bannon Architects Limited, the first defendant in the plenary proceedings ("architect"). The second defendant, P.H. McCarthy Consulting Engineers ("McCarthy"), was engaged by Ocean Point as the structural engineers for the works. The third defendant, Mulcahy McDonagh & Partners Limited, were engaged as the project managers. The fourth defendant, Callan Maguire Partnership, was appointed as the quantity surveyor in respect of the works (replacing another firm which had originally been appointed). Clancy was appointed the contractor under the contract.

7. While a number of lengthy affidavits have been sworn in connection with Clancy's application and many issues have been raised by Ocean Point in response to the application, I shall confine myself to setting out and summarising only those facts which I believe are relevant to the issues which require to be determined on this application.

8. Ocean Point and Clancy were in dispute in relation to various issues concerning the works in early 2008. It was agreed by them to refer those disputed issues to conciliation under clause 38(a) of the contract. Ocean Point contended that the works carried out by Clancy were *"sub-standard"* for which it sought to blame Clancy. The gross value of the works in dispute at the time was approximately €4m (excluding retention). The principal differences between the parties related to measured work, variations and extension of time costs. Arthur Hickey was appointed as conciliator. For various reasons which it is not necessary to discuss here, it was not possible to resolve the disputed issues at the conciliation. It suffices to say that on 3rd October, 2008 Mr. Hickey brought the conciliation process to an end in the absence of any resolution of the disputed issues by the parties. Following the

termination of the conciliation, Clancy sought to invoke the arbitration provisions contained in clause 38(b) on 13th October, 2008, in circumstances to which I will return shortly.

9. In the meantime, the architect had issued a number of certificates under clause 35 of the contract. Two are relevant for present purposes. The first, certificate no. 15, was honoured by Ocean Point in September 2008 (although Francis Dooley has maintained on affidavit on behalf of Ocean Point that it ought not to have been honoured). The second, certificate no. 16 in the amount of €768,379.45 which was issued by the architect on 15th September, 2008 was not honoured by Ocean Point in circumstances where Ocean Point maintained that there were defects in the works carried out by Clancy. Following correspondence from its solicitors, McCann FitzGerald, on 7th October, 2008, Clancy commenced the summary proceedings against Ocean Point on 17th October, 2008 seeking payment of the sum certified as being due in certificate no. 16. Ocean Point's then solicitors, Mason Hayes & Curran, entered an appearance to the summary proceedings on 30th October, 2008. Clancy then issued a motion seeking liberty to enter final judgment in the amount of certificate no. 16. A number of replying affidavits were sworn on behalf of Ocean Point in response on 4th March, 2009. It is significant to note that Ocean Point did not contend in any of those replying affidavits that the claim made in the summary proceedings ought to have been referred to arbitration pursuant to clause 38(b) of the contract notwithstanding that that point had initially been made in correspondence by Mason Hayes & Curran on behalf of Ocean Point in October 2008.

10. A receiver was appointed over the assets of Ocean Point on 5th March, 2009. Although, initially asserting that there were defects in the works, the receiver ultimately did not oppose Clancy's application for liberty to enter final judgment. On 10th December, 2009, a consent order was made by the Master giving Clancy liberty to enter final judgment in the amount of €768,379.45 with interest to the date of the judgment.

11. Meanwhile, Clancy had sought to invoke the arbitration provisions in clause 38(b) of the contract in respect of the issues which had been the subject of the unsuccessful conciliation in 2008. Following Mr. Hickey's letter of 3rd October, 2008, terminating the conciliation, Clancy wrote to Ocean Point on 13th October, 2008 proposing three names for appointment as arbitrator and stating that failing a response by 20th October, 2008, Clancy would approach the President of the RIAI to appoint an arbitrator. The parties ultimately agreed on the appointment of Ms. Joan O'Connor as arbitrator, (the "arbitrator"). Clancy furnished a document entitled "*Contractor's Brief Particulars of Disputes (as requested by Arbitrator's fax 13/1/09)*" to the arbitrator on 20th January, 2009. That document set out the issues then in dispute between the parties which, as noted earlier, principally concerned measured work, variations and extension of time costs. The document did not include as an issue in the arbitration Clancy's claim for payment on foot of certificate no. 16 which was by that stage the subject of the summary proceedings.

12. Correspondence was exchanged between Clancy's solicitors, McCann FitzGerald, and Ocean Point's then solicitors, Mason Hayes & Curran, on a number of issues including the arbitrator's jurisdiction and the question of access to the site which was being sought by Clancy and the arbitrator for the purpose of the arbitration. Clancy had initially suspended the works in October 2008 and then terminated its employment as contractor on 22nd December, 2008 under clause 34 of the contract.

13. It was in the context of the proposed access arrangements to the site that Ocean Point was complaining about the adequacy of the insurance put in place by Clancy under the contract. I should make clear here that while it featured in the affidavits and in the submissions at the hearing, I do not regard the existence or adequacy of the insurance put in place by Clancy under the contract as being relevant to any issue which I have to decide on this application. The insurance issue arose in the context of the request for access to the site

during the early stages of the arbitration. I would, however, observe that on 20th February, 2007, a couple of weeks prior to the signing of the contract, it was accepted by Ocean Point and all other relevant parties that the insurances put in place in respect of the works were *"more than adequate for (the) project"* (as noted in the "*interview agenda*" document dated 20th February, 2007 prepared by the fourth defendant, Callan Maguire Partnership, the quantity surveyors).

14. While it has not been fully explained on affidavit by either side, it appears that the arbitration did not progress beyond these early skirmishes in January/February 2009 and the appointment of the receiver in March 2009, no doubt in recognition of the financial position of Ocean Point and the unlikelihood of recovering anything from it in the arbitration. In that regard, I note that notwithstanding that the receiver consented to judgment in the summary proceedings in December 2009, Ocean Point has failed to discharge the judgment entered for any part of it and the full amount remains due and owing by Ocean Point to Clancy.

15. Notwithstanding its failure to discharge the judgment entered in the summary proceedings, Ocean Point commenced the plenary proceedings almost five years later on 5th September, 2014. A statement of claim was delivered on 21st December, 2016. At para. 35 of the statement of claim, Ocean Point accepts that the contract which it entered into with Clancy was in the standard RIAI form (albeit that the statement of claim refers to the wrong date of the contract). At para. 40 of the statement of claim, it is alleged that the quality of Clancy's works was *"wholly inadequate"* and a *"non-exhaustive list of defects"* in the works is set out. Further alleged defects in the works are pleaded at para. 52. Paragraph 66 of the statement of claim sets out particulars of alleged negligence, negligent misstatement, breach of contract and breach of duty on the part of Clancy (see para. 66 (a)-(ff)). Particulars of Ocean Point's alleged losses are set out at paras. 69 to 72 of the statement of claim. They include the alleged loss of €3,257,000 (ongoing) allegedly incurred by Ocean Point on

"*extended financing*" and an alleged loss of €20,000,000 by way of alleged loss of profits from the development. At paras. 73 to 79 of the statement of claim the reliefs sought by Ocean Point are set out. They include a claim for damages for breach of contract.

16. It is against this factual background that Clancy contends in this application that the dispute between it and Ocean Point with regard to the issues raised in the plenary proceedings is covered by the arbitration agreement contained in clause 38(b) of the contract and should therefore be referred to arbitration. On that basis Clancy seeks an order under Article 8(1) of the Model Law referring the parties to arbitration in respect of that dispute.

17. Before considering the grounds on which Ocean Point opposes the making of an order under Article 8, I will refer briefly to the provisions of the contract which appear to me to be relevant to this application. I will then make a few observations in relation to Article 8 of the Model Law and the approach which the court is required to take when considering an application for an order under that provision. I will then consider the two grounds on which Ocean Point opposes the order sought by Clancy.

The contract

18. As noted earlier, it is common case between the parties that the contract is in the standard RIAI (2002 version) form.

19. Ocean Point has drawn my attention to and relies upon clauses 22 and 23 of the contract which required Clancy to maintain all risks insurance in respect of the works and, in particular, clause 23(b) which required that an all risks insurance policy be in the joint names of Clancy and Ocean Point. Ocean Point maintains that this was not done. However, in my view, this is completely irrelevant to the issues which I have to decide on the present application. In any event, it is clear from the material provided to me that:

(1) It was accepted by all relevant parties (including Ocean Point) that the insurances in place in respect of the works were *"more than adequate"* for the project before the contract was even entered into (see the "*interview agenda*" document dated 20th February, 2007 prepared by the quantity surveyors);

(2) All risks insurance cover was in place in respect of the works in the form of two insurance policies, one issued by Royal Sun Alliance and the other by Hibernian, which, while not in the joint names of Clancy and Ocean Point, covered Ocean Point (see, paras. 7, 8 and 9 of the affidavit sworn by Eoin O'Cofaigh on 13th November, 2009 in the context of the summary proceedings);

(3) The standard practice in the industry at the time of the contract and for many years before was for contractors to obtain a single all risks insurance policy to cover all projects undertaken by that contractor which would be renewed from year to year and would not specifically name the employer on the policy (see para. 7 of Mr. O'Cofaigh's affidavit); and

(4) The question of insurance was only raised as an issue when Clancy sought to obtain access to the site at the early stages of the arbitration in January/February 2009. I do not, therefore, believe that the provisions of the contract in relation to insurance are relevant to any issue which I have to decide on this application.

20. Clause 35 of the contract is relevant. That is the provision of the contract under which certificates were issued by the architect. Under Clause 35(b) of and the appendix to the contract, a certificate issued by the architect was required to be honoured by Ocean Point within seven working days of the presentation of the certificate to it by Clancy. Under clause 35(m), if Ocean Point did not pay to Clancy any amount certified within the period stipulated for payment, Clancy was entitled, without prejudice to any other rights or remedies, after seven working days from the latest date on which the certificate was required to have been

honoured, to charge interest to Ocean Point on the amount outstanding in respect of such certificate at a particular rate. These provisions are relevant in the context of the non-payment of certificate no. 16 which led to the commencement of the summary proceedings by Clancy in October 2008 and the judgment ultimately entered on consent in the amount of certificate no. 16 in those proceedings in December 2009.

21. The most significant provisions of the contract for the purposes of the present application is clause 38. Clause 38(a) deals with conciliation and requires disputes with regard to any of the provisions of the contract to be referred to conciliation and states that if a settlement of the dispute is not reached at conciliation, either party may refer the dispute to arbitration in accordance with clause 38(b).

22. Clause 38(b) which comprises the arbitration agreement for the purposes of Article 8 of the Model Law provides as follows:

> *"Provided always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress of the Works or after the determination of the employment of the Contractor under the Contract or the abandonment or breach of the Contract, as to the construction of the contract or as to any matter or thing arising thereunder or as to the withholding by the Architect of any certificate to which the Contractor may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference and such dispute or difference shall be and is hereby referred to the arbitration and final decision of such person as the parties hereunto may agree to appoint as Arbitrator or, failing agreement, as may be nominated on the request of either party by the President for the time being of the Royal Institute of the Architects of Ireland after consultation with the President of the Construction Industry Federation and the award of such Arbitrator shall be final and binding on the parties.*

Such reference, except on Article 3 or Article 4 of the Articles of Agreement or on the question of certificates, shall not be opened until after the Practical Completion or alleged Practical Completion of the Works or determination or alleged determination of the Contractor's employment under this Contract....Every or any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1954 (Number 26 of 1954), or the Arbitration Act (Northern Ireland) 1957 (as the case may be) or any act amending the same or either of them."

23. The parties disagree as to the proper interpretation of the scope of clause 38(b) and in particular whether that provision required Clancy to refer the dispute or difference between the parties in relation to the non-payment of the sum certified by the architect in certificate no. 16 to arbitration and precluded it from bringing the summary proceedings seeking payment of the amount so certified. That issue arises as part of the first ground of objection raised by Ocean Point to the effect that the commencement of the summary proceedings amounted to a repudiation of the arbitration agreement by Clancy which repudiation it is asserted was accepted by Ocean Point when it commenced the plenary proceedings in September 2014. However, before considering the two grounds on which Ocean Point seek to resist the making of an order under Article 8(1) of the Model Law, it is necessary to make certain observations in relation to Article 8 itself and the approach taken by the court to applications made under that provision.

Article 8 of Model Law

24. Clancy seeks an order under Article 8(1) of the Model Law referring the parties to arbitration in respect of the dispute the subject of the plenary proceedings. Article 8 (1) provides as follows:

> *"A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."*

25. The Model Law has force of law in the State and applies to both international commercial arbitrations and domestic arbitrations where the seat of the arbitration is Ireland, by virtue of s.6 of the 2010 Act.

26. In order for the provisions of Article 8(1) of the Model Law to be engaged, various requirements must be satisfied. First, an action must have been brought before the court in respect of a dispute between the parties. Second, the action must concern a *"matter which is the subject of an arbitration agreement"*. Third, one of the parties must request the reference to arbitration *"not later than when submitting his first statement on the substance of the dispute"*. If those requirements are satisfied, the court must refer the parties to arbitration (the word *"shall"* is used). The only circumstances in which the court's obligation to refer the parties to arbitration does not arise is where the court finds that the arbitration agreement is (i) *"null and void"* or (ii) *"inoperative"* or (iii) *"incapable of being performed"*. The onus of establishing the existence of one or more of these disapplying factors rests on the party who seeks to rely on them (see *Sterimed Technologies International v Schivo Precision Ltd* [2017] IEHC 35 (per McGovern J at para. 12, pp 4-5)).

27. It has been consistently held by Irish courts that where the requirements of Article 8(1) are met, the court must make the reference to arbitration. It is not a question of the court having a discretion to make the reference or not. It is a mandatory obligation.

28. In *K & J Townmore Construction Ltd v. Kildare and Wicklow Education and Training Board* [2018] IEHC 770 (*"Townmore"*), I approved of the following statement made by the High Court (McGovern J.) in *BAM Building Ltd v. UCD Property Development Company Ltd* [2016] IEHC 582 *("BAM")*:

> *"'The courts in this jurisdiction have long been supportive of the arbitral process and there is a line of recent authority which clearly establishes that Article 8 of the Model Law does not create a discretion to refer or not to refer matters to arbitration. If there is an arbitration clause and the dispute is within the scope of the arbitration agreement and there is no finding that the agreement is null and void, inoperative or incapable of being performed, then a stay must be granted. See P. Elliott and Company Limited (In Receivership and In Liquidation) v. F.C.C. Elliot Construction Limited [2012] IEHC 361; and, Go Code Limited v. Capita Business Services Limited [2015] IEHC 673."* (per McGovern J. at para. 6, p. 3).

A statement to similar effect was made by the High Court (McGovern J.) in *Kellys of Fantane (Concrete) Ltd (In Receivership) v. Bowen Construction Ltd (In Receivership) and anor.* [2017] IEHC 357 *("Kellys of Fantane")* (at para. 22, p. 8).

29. In fairness, Ocean Point did not dispute the mandatory obligation imposed on the court under Article 8(1) of the Model Law and did not contend that the court had a discretion to refuse to refer the parties to arbitration in respect of their dispute. However, the second ground on which Ocean Point resists Clancy's application is that the court is not obliged to refer parties to arbitration in respect of the dispute in circumstances where it contends that the arbitration agreement is "*inoperative*" as it was repudiated by Clancy and "*incapable of being*

performed" by reason of the absence of the defendants other than Clancy as parties to any arbitration which would have taken place under the arbitration agreement.

30. In addition to specific circumstances set out in Article 8(1) in which the mandatory obligation to refer to arbitration does not arise, the Irish Courts have also recognised that it is possible that the party seeking the reference to arbitration under Article 8 maybe estopped from seeking such reference. The circumstances in which such an estoppel would arise are rare as is clear from the decision of the Supreme Court in *Furey v. Lurgan-ville Construction Company Limited & Ors.* [2012] 4 I.R. 655 (*"Furey"*) and the decision of the High Court in *Go Code Ltd v Capita Business Services Ltd.* [2015] IEHC 673 ("*Go Code*") and *Townmore*.

31. At para. 72 of my judgment in *Townmore,* I stated:

> *"... While it is undoubtedly the case, as Clarke J. stated in the Supreme Court in Furey, and as McGovern J. confirmed in the context of the 2010 Act in Go Code, that a party may be estopped from relying on the provisions of an arbitration agreement in certain circumstances, in order for such estoppel for arise there must have been (a) a 'clear unequivocal promise or representation' to the effect that the arbitration agreement would not be relied upon and (b) the party seeking to oppose the reference to arbitration must have acted on the basis of the representation."* (Townmore, para. 72, p. 31).

32. Ocean Point does not contend that Clancy is estopped from relying on the arbitration agreement contained in clause 38(b) of the contract. It does however contend, as its first ground of objection to Clancy's application, that Clancy repudiated the arbitration agreement by commencing the summary proceedings in October 2008 to seek recovery of the sum certified in certificate no. 16 and that this repudiation in effect rendered the arbitration agreement "*inoperative*".

Clancy's case

33. Clancy's case on this application is very straightforward. It contends that the *"matters"* which Ocean Point seeks to litigate in the plenary proceedings (as appears from the statement of claim) fall within the scope of the term *"dispute or difference ... as to the construction of the contract or as to any matter or thing arising thereunder ..."* in clause 38(b) of the contract. It contends, therefore, that these are matters which are the subject of an arbitration agreement for the purpose of Article 8(1) of the Model Law and that the court is, therefore, required to refer the parties to arbitration in respect of those matters.

Ocean Point's response

34. Ocean Point's response is twofold. First, Ocean Point contends that the arbitration agreement has been repudiated by reason of the commencement of the summary proceedings by Clancy in October 2008 seeking payment on foot of certificate no. 16 and that such repudiation was accepted by Ocean Point when it commenced the plenary proceedings in September 2014 (the *"repudiation/inoperative ground"*). In effect, therefore, Ocean Point argues that the arbitration agreement has become *"inoperative"* within the meaning of that term in Article 8(1) of the Model Law. As part of the repudiation argument, Ocean Point contends that Clancy's claim for payment on foot of certificate no. 16 and Ocean Point's refusal to pay the amounts certified was caught by the arbitration agreement in clause 38(b) and that instead of commencing the summary proceedings, Clancy ought to have referred that dispute to arbitration under clause 38(b). Ocean Point argues that in those circumstances the commencement of the summary proceedings amounted to a repudiation of the arbitration agreement which it accepted by commencing the plenary proceedings. Ocean Point relies on case law on the interpretation of the arbitration agreements or arbitration clauses including *Gulliver v. Brady and Others* [2003] IESC 68 ("*Gulliver*"), *O'Meara v. The Commissioners*

of Public Works in Ireland and Others [2012] IEHC 317 (*"O'Meara"*), *BAM* and *Townmore* in support of its contention that the dispute in relation to certificate no. 16 fell within the scope of clause 38(b) of the contract. It also relies on a series of cases such as *P.J. Hegarty & Sons Limited v. Royal Liver Friendly Society* [1985] I.R. 524 (*"Hegarty"*) and *Moohan v. Bradley (t/a Bradley Construction) and S. & R. Motors (Donegal) Limited* [2007] IEHC 435 (*"Moohan"*) where it was held that it was open to an employer to seek to defend a claim for judgment on foot of an architect's certificate by relying on a set off in respect of any cross-claim which the employer might wish to maintain. Ocean Point further relies on two English cases, *Downing v. Al Tameer Establishment & Anor* [2002] 2 All ER (Comm) 545 (*"Downing"*) and *BEA Hotels NV v. Bellway LLC* [2007] 2 Lloyd's Rep 493 (*"BEA Hotels"*) in support of its contention that the commencement of the summary proceedings amounted to a repudiation of the arbitration agreement by Clancy.

35. Second, Ocean Point contends that the arbitration agreement is *"incapable of being performed"* for the purposes of Article 8(1) of the Model Law and that, therefore, the court is not obliged to refer the parties to arbitration in respect of the matters the subject of the plenary proceedings (the *"incapability of performance ground"*). It advances a series of arguments in support of this contention which may briefly be summarised as follows. First it says, by reference to a number of English dictionary definitions, that the word *"incapable"* should be interpreted as meaning something which *"lack[s] the ability or required quality to do something"* (Oxford English dictionary (paperback 6th Ed.)) and which is *"lacking the required quality or characteristic"* (Oxford Dictionary of English (8th Ed.)). It also relies on an entry in respect of the word *"incapable"* in Stroud's Judicial Dictionary of Words and Phrases (9th Ed., 2016) which records in respect of the phrase *"incapable of being performed"* in s. 1(1) of the English Arbitration Act, 1975 that those words *"are to be construed as referring only to the question whether an arbitration agreement was capable of*

being performed up to the stage when it resulted in an award". Ocean Point submits that an arbitration involving only Ocean Point and Clancy and not any of the other defendants in the plenary proceedings would lack the requisite quality of an arbitration in the sense of one which was capable of being performed up to the stage where it could result in an award. As I understand the argument, Ocean Point advances that contention as a result of the practical difficulties caused by the absence of the other defendants. It submits that an arbitration with only Clancy of the five defendants involved *"is so fraught with real, and practical difficulty that, in the true sense of the phrase, it is incapable of being performed"* (para. 12 of Ocean Point's written submissions). Ocean Point relies on the complexities arising in relation to the apportionment of liability as between the relevant wrongdoers under the Civil Liability Act, 1961 (as amended) (the "1961 Act (as amended)") in circumstances where all of the five defendants were potentially *"concurrent wrongdoers"* within the meaning of that term in the 1961 Act. Ocean Point submits that it is hard to contemplate how an arbitrator could separate out the liability of Clancy (if any) from the liabilities of the other four defendants and that it would be impractical for an arbitrator to adjudicate on the dispute between Ocean Point and Clancy in the absence of evidence from the other four defendants (although it should of course be pointed out that the absence of the other four defendants from any arbitration between Ocean Point and Clancy does not mean that evidence from those other parties cannot be obtained for the purpose of the arbitration whether by means of the procedures available under Article 27 of the Model Law or otherwise). Ocean Point relies on what it contends would be the *"absolute impossibility"* of the arbitrator deciding on the prospective liabilities of the relevant wrongdoers in the absence of the other four defendants in the plenary proceedings from the arbitration. Ocean Point relies on a number of authorities supporting this part of its case including *Paczy v. Haendler & Natermann G.M.B.H.* [1981] 1 Lloyd's Rep 302, (*"Paczy"*), *Kelly v. Lennon* [2009] IEHC 320 ("*Kelly*") and *O'Connor v. Duffy t/a*

Duffy Gaffney Partnership & Ors [2014] IEHC 97 ("*O'Connor*"). I should add that Ocean Point also initially raised an issue about the fact that the other four defendants in the proceedings were not put on notice by Clancy of the motion to refer to arbitration. However, that argument was, in my view, misconceived by Ocean Point. The parties to the arbitration agreement are Ocean Point and Clancy and there was, therefore, no obligation on Clancy to put the other parties to the plenary proceedings who are not parties to the arbitration agreement on notice of the motion to refer.

36. I will now address each of the two grounds raised by Ocean Point by way of objection to Clancy's motion to refer under Article 8(1) of the Model Law.

(1) **The repudiation/inoperative ground**

37. There are two limbs to this ground of objection. The first requires consideration as to whether Clancy was required to go to arbitration under clause 38(b) of the contract in respect of Ocean Point's non-payment of the amount certified by the architect in certificate no. 16. This limb requires a consideration of the terms of clause 38(b), the principles which the court should apply in construing the provisions of the arbitration agreement and the application of those principles to the provisions of the clause 38(b) itself. In that context it also requires a brief assessment of the approach that the courts have taken in considering claims for judgment on foot of certificates issued by architects under building contracts. The second limb, however, is whether, even if clause 38(b) of the contract, as properly construed in accordance with the applicable legal principles, was broad enough to encompass the dispute between the parties arising from the failure by Ocean Point to pay the amount certified by the architect in certificate no. 16, the failure to invoke the arbitration provisions in clause 38(b) and the invocation of the jurisdiction of the High Court by the commencement of the summary proceedings seeking payment of the amount uncertified amounted to a repudiation

by Clancy of the arbitration agreement as that term is properly to be understood in this context.

38. For reasons which I will shortly discuss, I have reached the conclusion that even if the issue or dispute between the parties arising from the failure by Ocean Point to pay the amount certified in certificate no. 16 did fall within the scope of the arbitration agreement contained in clause 38(b) of the contract (and I do not believe that it did), the commencement of the summary proceedings to obtain judgment in the amount certified did not amount to a repudiation by Clancy of the arbitration agreement. That is so on the basis of the relevant legal principles as they can be ascertained from two English cases relied upon by Ocean Point, namely, *Downing* and *BEA Hotels* and having regard to the fact that at the same time as the summary proceedings were commenced, Clancy was also seeking to invoke the arbitration procedures contained in clause 38(b) and to obtain the appointment of an arbitrator in respect of the other disputes which it had with Ocean Point which had been the subject of the conciliation which collapsed in early October 2008. The commencement of the summary proceedings by Clancy was not, in my view, a repudiation by it of the arbitration agreement.

39. The first limb of this ground of objection, therefore, involves a consideration of whether the dispute arising from the non-payment by Ocean Point of the amount certified by the architect in certificate no. 16 fell within the scope of the provisions of clause 38(b) such that Clancy was required to go to arbitration in respect of that issue. I have set out earlier in this judgment the relevant provisions of clause 38(b). Ocean Point contends that Clancy's claim for payment under certificate no. 16 and its refusal to pay that sum gave rise to a "*dispute or difference*" between it and Clancy and that that dispute or difference was *"as to the construction of the contract or as to any matter or thing arising thereunder..."* thereby requiring Clancy to refer the issue to arbitration under clause 38(b).

40. In considering that argument, it is necessary to start by setting out the relevant principles concerning the interpretation of an arbitration agreement. Having referred to the leading cases in this jurisdiction and in England and Wales (including *Gulliver, Fiona Trust & Holding Corporation & Ors v. Privalov & Ors* [2007] 4 All Er 951 (also reported under the name *Premium Nafta Products Ltd & Ors v. Fili Shipping Company Ltd & Ors*. [2007] UKHL 430) ("*Fiona Trust*"), *O'Meara* and *BAM*), I attempted to summarise the relevant principles in the judgment I gave in *Townmore* as follows:

> *"(1) In construing an arbitration agreement, the court must give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration agreement.*
>
> *(2) The construction of an arbitration agreement should start from an assumption or presumption that the parties are likely to have intended any dispute arising out of the relationship which they entered into to be decided by the same body or tribunal. In other words there is a presumption that they intended a 'one-stop' method of adjudication for their disputes.*
>
> *(3) The arbitration agreement should be construed in accordance with that assumption or presumption unless the terms of the agreement make clear that certain questions or issues were intended by the parties to be excluded from the jurisdiction of the arbitrator.*
>
> *(4) A liberal or broad construction of an arbitration agreement promotes legal certainty and gives effect to the presumption that the parties intended a 'one-stop' method of adjudication for the determination of all disputes.*
>
> *(5) The court should construe the words 'arising under' a contract and the words 'arising out of' a contract when used in an arbitration agreement broadly or liberally so as to give effect to the presumption of a 'one-stop' adjudication and the former*

words should not be given a narrower meaning than the latter words. Fine or 'fussy' distinctions between the two phrases are generally not appropriate." (*Townmore*, para. 53, pp. 21-23).

41. I propose to adopt and apply those principles of interpretation in considering whether the issue between Clancy and Ocean Point concerning the non-payment by Ocean Point of the sum certified by the architect in certificate no. 16 fell within the scope of the arbitration agreement contained in clause 38(b) of the contract. It seems to me that the most relevant principle summarised by me in *Townmore* for the purposes of this issue is principle (3), namely, that the arbitration agreement should be construed in accordance with the assumption or presumption that the parties are likely to have intended any dispute arising out of their relationship to be decided by the same body or tribunal rather than by different bodies or tribunals *"unless the terms of the agreement make clear that certain questions or issues were intended by the parties to be excluded from the jurisdiction of the arbitrator"*. Clause 38(b) specifies the disputes or differences which fall within its scope. They are *"any dispute or difference"* arising between Ocean Point and Clancy *"as to the construction of the contract or as to anything or matter arising thereunder..."*. If the clause stopped there, one could see considerable force in the argument advanced by Ocean Point that clause 38(b) was wide enough from its terms to cover a dispute in relation to the payment of a sum certified by the architect under the contract. However, clause 38 (b) does not stop there. It goes on specifically to refer to the question of certificates and to identify the type of dispute or difference between the parties in relation to certificates which would fall within the scope of the clause. The dispute or difference in relation to certificates which would fall within the scope of the clause is a dispute or difference *"as to the withholding by the architect of any certificate to which the contractor may claim to be entitled"*. Clause 38(b) makes clear, therefore, that the type of dispute or difference between the parties which falls within the

scope of the clause insofar as certificates are concerned is a dispute or difference in relation to the withholding of the certificate by the architect and not a dispute or difference arising from the non-payment by Ocean Point of the amount certified by the architect. It does not appear that that latter type of dispute in relation to certificates was intended by the parties to fall within the scope of clause 38(b). I am not overlooking the fact that further down in clause 38(b) there is an express statement to the effect that the reference to arbitration, except in relation to certain issues including *"on the question of certificates"*, shall not be opened until certain events have occurred. It seems to me however that this reference to the *"question of certificates"*, while potentially wider than the earlier reference to certificates in the clause, is intended to refer back to (and not extend) the earlier reference, namely, the reference to the dispute being as to the withholding of the certificate by the architect. Neither reference to certificates in clause 38(b) appears to me to be wide enough to encompass a dispute arising from the non-payment by Ocean Point of an amount certified by the architect. In my view, the terms of the agreement (namely clause 38(b)) do make clear that certain questions or issues were intended by the parties to be excluded from the jurisdiction of any arbitrator appointed under clause 38(b) and that one of those questions or issues was a dispute or difference between the parties arising from the non-payment by Ocean Point of an amount certified by the architect. Such an interpretation is entirely consistent with the principles of interpretation of arbitration agreements discussed and summarised by me in *Townmore.*

42. It is unnecessary for me to consider in any detail the case law relied on by Ocean Point in relation to applications for summary judgment on foot of architects' certificates issued under contracts containing arbitration agreements or arbitration clauses and the circumstances in which summary judgment was granted in some of those cases with cross claims being referred to arbitration on foot of the relevant arbitration agreement or clause. I do note, however, that in a series of cases including *Hegarty, Moohan* and *Killerk Ltd v.*

Houlihan [2009] IEHC 358 (*"Killerk"),* the courts have considered the status of architects' certificates in the context of applications for summary judgment. In *Hegarty,* Murphy J. was careful to point out that the *"..the value of precedent in the actual construction of documents as opposed to the principles by which they fall to be construed may be of relatively little value ... "*. It is interesting to note that in *Moohan* and *Killerk,* Clarke J. and Kelly J., respectively, granted summary judgment with a stay or partial stay to allow cross claims to be dealt with in arbitrations provided for under the relevant contracts. Neither *Moohan* nor *Killerk* involved arbitration agreements covered by the 2010 Act and the precise terms of the contracts at issue were obviously critical in those cases. Therefore, while the precedent value of these cases is limited in the present context, it is worth noting that the courts have been inclined to proceed to entertain applications for a summary judgment for amounts on foot of architects' certificates notwithstanding the existence of arbitration clauses in the relevant contracts. However, in light of the conclusions I have reached in relation to the proper interpretation of clause 38(b) and my view that a dispute or difference between the parties arising from the non-payment by Ocean Point of an amount certified by the architect does not fall within the scope of the clause, it is unnecessary for me to consider this line of case law any further.

43. I should however make one further observation in relation to this first limb of the repudiation ground of objection. While it was initially raised in correspondence by Mason Hayes & Curran, who were then acting for Ocean Point, on 23rd October, 2008 and 3rd November, 2008 that the claim for payment on foot of certificate no. 16 the subject of the summary proceedings did fall within the scope of clause 38(b) of the contract and was required to be pursued by Clancy by way of arbitration, the point was not pursued and was not raised as an issue in any of the replying affidavits sworn on behalf of Ocean Point in the summary proceedings. No application to stay those proceedings and to refer any dispute to

arbitration was made by Ocean Point in the summary proceedings. Mr. Dooley on behalf of Ocean Point gives a purported explanation for this at para. 17 of the supplemental affidavit he swore in response to Clancy's motion to refer under Article 8 on 21st August, 2018. He accepted that the issue was not raised in the replying affidavits in the summary proceedings. However, he then stated:

> *"It had always been your Deponent's intention, on behalf of the Plaintiffs herein* [i.e. Ocean Point], *to defend these proceedings, partly on the basis that the matter should have gone to Arbitration. It was your Deponent's intention that this matter would be properly raised when a full Defence to the proceedings was filed. However, given that a Receiver was appointed, on or about the 5th March, 2009, your Deponent was never in a position to actually instruct Solicitors to file a formal Defence to the within proceedings."*

Apart from evidencing a fundamental misunderstanding of the legal position under the then relevant provisions which were s. 5 of the Arbitration Act, 1980 (the "1980 Act")(which required a party who wished to apply to the court to stay the proceedings on foot of an arbitration agreement to do so *"at any time after an appearance has been entered, and before delivering any pleadings or taking any other steps in the proceedings*" (my underlining)), I find this assertion by Mr. Dooley wholly unconvincing. It would not have been possible for Ocean Point to seek to stay the summary proceedings on foot of the arbitration agreement contained in clause 38(b) in circumstances where replying affidavits were delivered dealing with the substance of the defence which Ocean Point sought to raise in those proceedings under the then applicable law contained in s. 5 of the 1980 Act. Those replying affidavits would clearly have amounted to *"other steps in the proceedings"* and, once taken, would have precluded Ocean Point from seeking to stay the summary proceedings. No good reason has been furnished by Ocean Point for failing to make the point in the replying affidavits in

the summary proceedings and for failing to take any action to stay the proceedings under the then applicable law. It may be going too far to infer from the failure to raise the point in the replying affidavits or to seek a stay prior to then that Ocean Point and its legal advisors had reached the same conclusion that I have reached in relation to the proper interpretation of clause 38(b) and the non-applicability of that clause to disputes arising from the non-payment of an amount certified by the architect as opposed to a dispute arising from the withholding by the architect of a certificate under the contract, but they may well have done. In any event, I have reached the conclusion that clause 38(b), as properly construed in accordance with the relevant legal principles, did not and does not extend to disputes arising from the non-payment of an amount certified by the architect under the contract.

44. Notwithstanding my conclusion in relation to the first limb of the repudiation ground of objection, I will proceed to consider the next limb which is predicated on the assumption that the dispute in relation to the non-payment of the amount certified in certificate no. 16 was required to have been, and was not, pursued by way of arbitration under clause 38(b) and that such amounted to a repudiation of the arbitration agreement by Clancy. I have no difficulty in considering this limb of the argument as I have reached the conclusion that there is no basis whatsoever for the contention by Ocean Point that the commencement of the summary proceedings in respect of a certificate no. 16 amounted to a repudiation of the arbitration agreement contained in clause 38(b) even if, contrary to my earlier conclusion, that claim was one which fell within the scope of clause 38(b). I have reached the conclusion that Ocean Point's contention that the commencement of the summary proceedings amounted to a repudiation of the arbitration agreement is fundamentally misconceived as a matter of law and fact. I have reached that conclusion for the following reasons.

45. There is no real dispute between the parties as to the legal principles to be applied in considering whether an arbitration agreement can be said to have been repudiated by one of

the parties so as to preclude that party from being entitled to rely upon the agreement. There are two relevant English cases from which these principles can be derived. The first is the decision of the Court of Appeal of England and Wales in *Downing*. The second is a decision of the High Court of England and Wales in *BEA Hotels*. I will now consider each of these cases.

46. In *Downing* the English Court of Appeal had to consider whether a defendant who sought a stay of proceedings under s. 9 of the (English) Arbitration Act, 1996 had previously repudiated the arbitration agreement such that the agreement had become "*inoperative*". The relevant section of the English legislation required the court to grant a stay unless it was satisfied that the arbitration agreement was "*null and void, inoperative, or incapable of being performed*", being the same words used in Article 8(1) of the Model Law. Having referred to some earlier relevant case law including *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] AC 909, the Court of Appeal stated that in determining whether an arbitration agreement had been repudiated, conventional contractual principles have to be applied. In that regard, Potter L.J. stated:

> "*... the court approaches the question of whether or not a party has lost the right to arbitrate under the secondary contract* [i.e. the arbitration agreement] *by applying the traditional principles of the law of contract and, in particular, the 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.*" (per Potter L.J. at para. 25, p. 553).

47. Potter L.J. continued:

> "*... in appropriate circumstances, a party may be held to have repudiated by anticipatory breach, and/or by an unequivocal rejection of any obligation to arbitrate,*

before such arbitration has been instituted by the other party to the agreement." (per Potter L.J. at para. 25, p. 553).

48. In that case, the parties had entered into a contract for the joint exploitation of an invention. The contract contained an arbitration agreement. The claimant alleged a breach of the contract by the defendant. The claimant invited the defendant to agree to the appointment of arbitrators under the arbitration agreement. In response, the defendant denied that there was ever any agreement between the parties and further responded to the claimant's threat of proceedings by stating that any such proceedings would be vigorously defended and a counterclaim pursued. The claimant then purported to accept the defendant's repudiation of the contract and commenced proceedings. The defendant then sought a stay of those proceedings under s. 9 of the (English) Arbitration Act, 1996. The High Court held that the defendant's correspondence denying that there had been any contract was a repudiation of the arbitration agreement but went on to hold that the claimant had not unequivocally accepted that repudiation either by service of the writ or by correspondence. The High Court, therefore, granted the defendant's application for the stay. The claimant appealed to the English Court of Appeal, contending, first, that the correspondence between the parties amounted to a repudiation of the arbitration agreement and, second, that he had unequivocally accepted the repudiation and that, therefore, the arbitration agreement was *"inoperative"* for the purposes of s. 9 of the English legislation. The English Court of Appeal held that the High Court had been right to hold that the defendant's correspondence amounted to a repudiatory breach of the agreement to arbitrate. The defendant's letter had been written against the background of a scrupulous effort by the claimant to set up arbitration proceedings under the arbitration agreement which had been met by a denial that any contractual relationship existed between the parties. That stance had been maintained by the defendant's statement that the claimant's proposed proceedings would be defended and a

counterclaim pursued rather than any suggestion being made by the defendant that the proceedings were inappropriate by reason of the arbitration clause. The English Court of Appeal held, therefore, that prior to the issue and service of the proceedings by the claimant, the defendant had plainly evidenced an intention not to be bound by the agreement to arbitrate. The English Court of Appeal held that the High Court had been wrong to conclude that the issue and service of the proceedings did not amount to a clear and unequivocal indication that the claimant had accepted the defendant's repudiation of the arbitration agreement. The English Court of Appeal held that the question of whether or not the issue and service of proceedings was an unequivocal acceptance of the repudiation depended upon the previous communications of the parties and whether or not, on an objective construction of the state of play when the proceedings were commenced, the fact of the issue and service of the proceedings amounted to an unequivocal communication to the defendant that its earlier repudiatory conduct had been accepted in the sense that it was clear that the issue of the proceedings (i) was a response to the defendant's refusal to recognise the existence of the arbitration agreement or any obligation under it and (ii) reflected a consequent decision on the part of the claimant to abandon the remedy of arbitration in favour of court proceedings. The English Court of Appeal held that those conditions were satisfied in that case.

49. The facts of that case were rather stark in that the defendant had gone so far as to deny that any contractual relationship existed between the parties. It is clear from the judgment of the English Court of Appeal that in order to amount to a repudiation of an arbitration agreement, the words or conduct of the relevant party must demonstrate an intention no longer to be bound by the arbitration agreement in the sense of amounting to an unequivocal rejection of any obligation to arbitrate. This is consistent with the principles applied by the Irish courts in considering whether one party to a contract had repudiated that contract: see, for example, *Berber v Dunnes Stores* [2009] IESC 10. When I come in a moment to recall the

relevant facts, it will be evident that the conduct of Clancy in commencing the summary proceedings did not demonstrate an intention to no longer to be bound by the arbitration agreement in the sense of amounting to an unequivocal rejection of any obligation to arbitrate.

50. The circumstances in which an arbitration agreement may be found to have been repudiated by one party were further considered by the English High Court in the second case relied on by Ocean Point, *BEA Hotels*. In that case, the question had arisen in the course of an arbitration as to whether the commencement of certain proceedings in Tel Aviv constituted a repudiation of a reference to arbitration, which repudiation had been accepted. The arbitrator held, in a partial award on jurisdiction, that the arbitration agreement had not been repudiated and that the claimant remained obliged to arbitrate. The claimant appeared against the award to the English High Court under s. 67 of the (English) Arbitration Act, 1996. The English High Court (Cooke J.) held that the arbitration agreement had not been repudiated. It is unnecessary to consider the rather complicated facts of that case in any detail. The relevance of the case is the clear restatement by the court of the test to be satisfied in order to establish repudiation of an arbitration agreement. The case made before the High Court was that by pursuing claims against the claimant and others in the Israeli proceedings, the defendant evinced an intention not to be bound by the agreement to refer those claims to arbitration. In that regard, Cooke J. stated:

> *"13. In order to show a repudiation of that agreement to refer, it was not disputed that BEA would have to show that Bellway evinced an intention no longer to be bound by that agreement and that Bellway's conduct would have to be such that a reasonable person, in BEA's shoes, would understand Bellway to be saying that it was not prepared to continue with the reference. It was common ground that it was not repudiatory merely to bring proceedings in breach of an arbitration agreement, even*

if the claims pursued in those proceedings were plainly ones which were subject to the arbitration agreement. It was undisputed that a breach of an arbitration agreement by bringing other proceedings was only repudiatory if it was done in circumstances that showed that the party in question no longer intended to be bound to arbitrate. It was also agreed that such an intention could not lightly be inferred and could only be inferred from conduct which was clear and unequivocal. If there was some other reason for the [bringing] of proceedings it would be hard to infer that the party bringing them intended to renounce its obligation to arbitrate.

14. Thus, if the conduct of that party in all the surrounding circumstances did not reveal a clear intention not to be bound by the agreement to refer the claims in question to arbitration, it could not be said that the arbitration agreement or reference had been repudiated. If it was clear that the party intended to pursue the arbitration, again there could be no repudiation. ...". (per Cooke J. at paras. 13-14, p. 496).

51. On the facts, the court concluded that the defendant had made clear on the proceedings that it was not making any claim against the claimant in the civil proceedings which fell within the scope of the arbitration agreement. The court concluded that there was no breach of the agreement to arbitrate let alone any repudiatory breach.

52. *BEA Hotels* makes clear that a breach of an arbitration agreement by bringing other proceedings is only repudiatory if it is done in circumstances that make very clear that the party in question no longer intends to be bound to arbitrate and that such intention could not lightly be inferred and could only be inferred from conduct which was clear and unequivocal. In my view, this also represents the position in Irish law.

53. In the present case, at the very same time as Clancy was corresponding with Ocean Point seeking payment on foot of certificate no. 16 and threatening and subsequently

commencing the summary proceedings seeking payment of the amounts certified, it was also engaged in correspondence with Ocean Point seeking to invoke the provisions of clause 38(b) and the appointment of an arbitrator to adjudicate on the issues between the parties which had been the subject of the conciliation before Mr. Hickey which collapsed in early October 2008. Clancy's solicitors, McCann FitzGerald, wrote to Ocean Point on 7th October, 2008 seeking payment on foot of certificate no. 16 within seven days, failing which the summary proceedings would be commenced. Those proceedings were ultimately commenced on 17th October, 2008. Ocean Point's then solicitors, Mason Hayes & Curran, responded on 23rd October, 2008 confirming that an appearance would be entered to those proceedings and asserting that Clancy had no entitlement to issue the summary proceedings having regard to clause 38 of the contract (Mason Hayes & Curran had written an earlier letter dated 21st October, 2008 which post-dated the commencement of the summary proceedings but pre-dated the service of those proceedings on Ocean Point). While these events were occurring in the context of the summary proceedings, the conciliation process involving the issues described earlier (namely the differences between the parties in relation to measured work, variations and extension of time costs) collapsed.

54. Following the termination of the conciliation process in early October 2008, Clancy wrote to Ocean Point on 13th October, 2008 referring to the termination of the conciliation process and informing Ocean Point of Clancy's wish to proceed to arbitration on the outstanding issues. The names of three arbitrators were proposed for appointment and it was indicated that if there was no agreement on the appointment of one of those persons as arbitrator, Clancy would request the president of the RIAI to make an appointment. I was informed at the hearing that an approach was made to the president of the RIAI for the appointment of an arbitrator but before an appointment was made, the parties agreed on the appointment of Ms. Joan O'Connor. There was some further correspondence between

McCann FitzGerald and Mason Hayes & Curran in relation to the issue the subject of the summary proceedings and the issues which Clancy wished to refer to arbitration. For example, in a letter dated 3rd November, 2008, Mason Hayes & Curran referred to the summary proceedings and stated that Ocean Point was reserving its rights in relation to those proceedings having regard to the terms of clause 38. The same letter then went on to address Clancy's request for the appointment of an arbitrator in relation to the other issues.

55. As noted earlier, the arbitration proceeded to a certain point following Ms. O'Connor's appointment. Following a request from the arbitrator, a notice setting out the issues the subject of the arbitration was sent by Clancy to the arbitrator on 20th January, 2009 (that is a document entitled "*Contractor's Brief Particulars of Disputes (as requested by Arbitrator's fax 13/1/09)*"). However, the arbitration did not proceed to conclusion as explained by Mr. Dooley on behalf of Ocean Point at para. 32 of his affidavit of 26th June, 2018. He noted that there was a disagreement between the parties over jurisdictional issues and a receiver was appointed to Ocean Point on 5th March, 2009. The arbitration did not progress further. On the other hand, the summary proceedings did proceed to conclusion with a consent order being made on 10th December, 2009 that Clancy be at liberty to enter final judgment in the sum of €768,379.45 with interest up to the date of the judgment and costs.

56. It is quite clear to me that Clancy issued proceedings in relation to the claim on foot of certificate no. 16 on the basis that it was of the view that that claim did not fall within the scope of the arbitration agreement contained in clause 38(b). I have concluded earlier in this judgment that Clancy was correct in that belief. However, even if it was wrong in that belief, I do not accept that the commencement of the summary proceedings amounted to a repudiation of the arbitration agreement contained in clause 38. The fact that Clancy sought to invoke the arbitration procedures contained in clause 38 in connection with the disputes

which had been the subject of the conciliation process and the fact that parties proceeded down the road of an arbitration in relation to those disputes following the appointment of Ms. O'Connor is entirely inconsistent with a repudiation by Clancy of the arbitration agreement by commencing the summary proceedings in relation to the claim on foot of certificate no. 16. In order to establish that the commencement of the summary proceedings amounted to a repudiation of the arbitration agreement such as would preclude Clancy from relying upon clause 38 to have the disputes the subject of the plenary proceedings referred to arbitration, it would have to be demonstrated that a commencement of the summary proceedings was done in circumstances that showed that Clancy no longer intended to be bound by the arbitration agreement and where such intention cannot lightly be inferred and can only be inferred from conduct which was clear and unequivocal. In my view, it is very clear that there was no such repudiation of the arbitration agreement by Clancy on the basis of the facts as I have set them out. I do not accept that the commencement of the summary proceedings amounted to a repudiation of the arbitration agreement.

57. The facts of this case are very different to *Downing* (as I have summarised them earlier) and are closer to (but obviously not identical to) the facts of *BEA Hotels*. In the present case, Clancy made clear that the dispute which it was raising on the summary proceedings concerned its entitlement to be paid on foot of certificate no. 16. It also made it clear that the issues which it was seeking to have referred to arbitration, and which it did refer to arbitration in late 2008/early 2009, were those other issues which had been the subject of the failed conciliation and which were set out in the Brief Particulars of Disputes document to which I have just referred. Far from evincing an intention to disavow the arbitration agreement by commencing the summary proceedings, Clancy made it clear that it was seeking to raise in those proceedings issues which were not the subject of the arbitration agreement and was seeking to have issues which were the subject of that agreement referred

to arbitration. In my view, it is quite clear on the facts that there was no repudiation of the arbitration agreement by Clancy. Since there was no repudiation by Clancy, the commencement of the plenary proceedings by Ocean Point did not amount to an acceptance of any repudiation. In those circumstances, the repudiation ground of objection advanced by Ocean Point must fail. The arbitration agreement did not become "*inoperative*" on the grounds advanced by Ocean Point or at all.

(2) **The incapability of performance argument**

54. As summarised above, Ocean Point contends that an arbitration involving Clancy only and not the other four defendants in the plenary proceedings would be *"incapable of being performed"* as that term is used in Article 8(1) of the Model Law and that, consequently, the court should refuse to make an order under that provision referring the parties to arbitration in respect of the dispute the subject of the plenary proceedings. An arbitration with only one of the defendants in the plenary proceedings involved would, it asserts, present real and practical difficulties rendering such an arbitration *"incapable of being performed"*. I noted earlier that Ocean Point relies on various dictionary definitions in support of its contention that an arbitration involving Clancy only and without the involvement of the other four defendants as parties to the arbitration would lack the *"required quality"* or *"characteristic"* of an arbitration and that the arbitration agreement giving rise to such an arbitration would be *"incapable of being performed"*.

55. I do not accept that there is any validity to this ground of objection raised by Ocean Point. In my view, the objection is based on a misreading of the provisions of Article 8(1) of the Model Law and flies in the face of the decision of the High Court (Ryan J.) in *Franmer Developments Ltd. v. L&M Keating Limited and Others* [2014] IEHC 295 ("*Franmer*") which is directly relevant and applicable to the issues raised in this application. Neither side

made reference to *Franmer* in the respective written submissions. I drew the parties attention to the case at the commencement of the hearing. As we shall see that case is virtually on all fours with the present case.

56. Before turning to *Franmer* and the attempt by Ocean Point to distinguish the case from the present case in the course of the oral submissions, it is necessary to refer briefly to earlier cases in which an objection along similar lines to that now advanced by Ocean Point was raised. The first is the decision of the Supreme Court in *Furey*. *Furey* was decided under the pre-2010 Act regime. One of the grounds raised by the plaintiffs in *Furey* in response to an application by the first defendant, the contractor under a building contract, to stay the proceedings pursuant to s. 5 of the 1980 Act was that if the proceedings against that defendant were stayed pending arbitration, with the proceedings against the other defendants not being so stayed, there would be a multiplicity of separate legal processes which would be unjust to a sufficient degree to justify the first defendant's stay application being refused. Various other grounds of objection were raised by the plaintiffs which are not relevant in the present context. The multiplicity of actions ground of objection was not pursued at the oral hearing in circumstances where it was accepted that the court did not have a general discretion under s. 5 of the 1980 Act to take account of factors such as those identified by Lord Denning MR in *Taunton–Collins v. Cromie* [1964] 1 WLR 633. The plaintiffs accepted that such a general discretion did not exist in Ireland and, therefore, this ground of objection was not pursued on the appeal and did not have to be ruled on by the court.

57. The second relevant case is the decision of the High Court (Laffoy J.) in *Mount Juliet Properties Limited v. Melcarne Developments (t/a Walsh Brothers) & Others* [2013] IEHC 286 ("*Mount Juliet*"). This was another case arising out of a dispute under a building contract. Proceedings were brought by the plaintiff, the developer, against a number of defendants including the contractor, the architects, the consultant mechanical and electrical

engineers and the consulting structural engineers. The two firms of engineers brought separate applications under Article 8 of the Model Law in circumstances where they contended that the disputes between the plaintiff and them were the subject of separate arbitration agreements. One of the grounds on which the plaintiff initially resisted the applications was that there were a number of other defendants in the proceedings who were not parties to the alleged arbitration agreements who had served notices of indemnity and contribution in the proceedings on the two relevant defendants who had brought the Article 8 applications. However, the plaintiff ultimately did not pursue this ground of objection as it acknowledged at the hearing that, under Article 8 of the Model Law, the court did not have a discretion when considering an application under Article 8 which was framed in mandatory terms. While noting, at para. 51 of her judgment that the plaintiff had referred to the multiplicity of proceedings in order to identify the inconvenience created by the remaining issues in the proceedings being prosecuted before the court with the issues between the plaintiff and the two relevant defendants being arbitrated in separate arbitrations, Laffoy J. observed (at para. 52) that, as was the case in *Furey*, the court did not have to address the issue, as the plaintiff had unequivocally accepted that the court had no jurisdiction in the matter under Article 8. The position, therefore, is that neither *Furey* (which pre-dated the 2010 Act) nor *Mount Juliet* (where the 2010 Act applied) had actually to consider and rule on a ground of objection such as that now raised by Ocean Point.

58. However, *Franmer* dealt squarely with and rejected such an objection. Similar to the present case, in *Franmer,* the first defendant, the building contractor, sought an order under Article 8 referring a dispute with the plaintiff, the developer, to arbitration. The contract between the plaintiff and the first defendant was, as here, in the standard RIAI form and contained clause 38. The plaintiff had also sued in the proceedings the architect, the quantity surveyor, a windows and doors domestic sub-contractor and the consulting engineer. As

here, the dispute arose as a result of alleged substandard building works carried out in respect of an apartment development. The plaintiff's claim was that each of the defendants failed in their contractual duties to carry out their work to an adequate standard. The claims were made in contract and in tort. In objecting to the first defendant's application, the plaintiff contended that a dispute between it and the first defendant could not be separated out or distilled from the disputes which the plaintiff had with the other defendants who were not parties to the arbitration agreement. The plaintiff submitted that to deal those disputes separately would render the running of the arbitration "*impossible*" and "*completely impractical*". The plaintiff contended that on that basis the arbitration agreement was *"null and void, inoperative or incapable of being performed".*

59. Ryan J. rejected the objection and made the orders sought under Article 8. In commenting on a typical situation which arises in building contract cases, Ryan J. stated:

> *"It is common in building contract cases to find multiple defendants or that the issues are technical and complicated. The fact that the determination of a case involves greater complexity by proceeding in one way rather than another is not an important consideration, although if it comes to a judgment based on practicality, such a circumstance is obviously material. If the arbitrator decides that the builder is liable and makes an award that is a separate matter from whether any of the other defendants has a liability to the plaintiff."* (per Ryan J. at para. 15, p. 9).

60. In addressing the fact that the plaintiff's claim against the contractor could be dealt with in the requested arbitration, he pointed out that if the matter went to hearing in the High Court with all of the defendants present (as the plaintiff wished would happen) there would still have to be separate consideration given by the court to the respective liabilities of the each of the defendants. He further noted that there was nothing to stop the other parties from making their claims in the High Court proceedings as against the contractor, as those matters

would not be referred to arbitration (a similar point was subsequently made by the High Court (Barrett J) and accepted in *O'Connor*). Having referred to *Furey* and *Mount Juliet* and to the fact that orders were made in those cases staying the proceedings or referring the parties to arbitration, as the case may be, notwithstanding the multiplicity of claims and the service of notice of indemnity, Ryan J. proceeded to refer to what he described as a *"more fundamental problem with the plaintiff's opposition to the reference to arbitration"*, at para. 19 of his judgment. He stated as follows:

> *"[The plaintiff's counsel] emphasised the practical inconveniences and difficulties which he says make the arbitration incapable of being performed with only the plaintiff and the first defendant as parties. I do not agree, as I have said. However, it seems to me that [the plaintiff's counsel's] reading of the exceptions on which an arbitration may be refused under Article 8(1) is incorrect. The party is entitled to an order referring the matter to arbitration unless the court finds 'that the agreement is null and void, inoperative or incapable of being performed'. It is not that the court finds that the arbitration is inconvenient or even incapable of being performed but, rather, that the agreement for arbitration is so incapacitated."* (per Ryan J. at para. 19, p. 11).

61. Ryan J. continued (at para. 20):

> *"It is indeed very difficult to see in what circumstances an arbitration that is otherwise legitimate could be null and void or inoperative or incapable of being performed because it will be complex or difficult or inconvenient."* (per Ryan J. at para. 20, p. 11).

62. It can be seen, therefore, that Ryan J. was drawing attention to the fact that in order for the mandatory obligation on the court under Article 8(1) to refer the parties to arbitration to be disapplied, what must be *"null and void, inoperative or incapable of being performed"*

is the arbitration agreement itself and not an arbitration taking place under it. Ryan J. made clear that it is the agreement for arbitration which must be *"so incapacitated"*, in other words *"incapable of being performed"*, in order for the court's obligation to make the reference to be disapplied. It is true that Ryan J. went on in para. 20 to note that it would be very difficult to see how an arbitration which was otherwise legitimate could be *"null and void, inoperative or incapable of being performed"* merely because it would be complex, difficult or inconvenient. However, that observation must be read in the context of what the judge had made very clear in the preceding paragraph of his judgment. Ryan J. could not have been clearer or more direct in what he was saying in that earlier paragraph and in pointing to the mistake made by the plaintiff in that case in focusing its attention on the arbitration which would take place under the arbitration agreement rather than on the arbitration agreement itself. The observations made by Ryan J. at para. 20 of his judgment must be read in that clear context. Lest there be any residual doubt about that (and I do not believe that there can be), the position was put beyond doubt by what the judge stated at para. 21. There, Ryan J. concluded:

> *"In my opinion, there are no features of this case that make the agreement to arbitrate incapable of being performed within the meaning of Article 8."* (per Ryan J. para. 21, p. 11) (my underlining).

63. The court did go on to observe that the matter was not so complex or difficult that it would make an arbitration under the arbitration agreement *"impracticable"*. Ryan J. continued:

> *"If one were to adopt the meaning of Article 8 that is offered by the plaintiff, namely, that it is the difficulty of the arbitration that is relevant as a consideration, it is impossible to accept that the mere fact that the architect is also sued in the litigation and will be a certain or probable witness in the arbitration in the claim between*

plaintiff and builder is a bar to referring the matter. Neither is that a reason for thinking that the matter could not be decided by an arbitrator." (per Ryan J. at para. 21, pp. 11-12).

64. Here, Ryan J. was restating his conclusion that the focus of attention in the relevant part of Article 8(1) should be on the arbitration agreement rather than on the arbitration taking place under the arbitration agreement. However, he made it clear that even if (as the plaintiff contended) the focus was on the arbitration rather than on the arbitration agreement, the fact that the arbitration dealt only with the claims against one of the parties and not against the others who would remain involved in the proceedings was not a reason not to make the reference to arbitration.

65. Counsel for Ocean Point submitted at the hearing that the careful analysis conducted by Ryan J. at paras. 19, 20 and 21 of his judgment was incorrect and contained inherent contradictions. To that extent, counsel submitted that I should decline to follow it. However, for the reasons I have just identified, I do not accept that submission. Leaving aside the very limited circumstances in which it would be open to me to decline to follow a decision of another judge of the same court (*Re Worldport Ireland Ltd.* [2005] IEHC 189 and *Irish Trust Bank Ltd. v. Central Bank of Ireland* [1976-1977] ILRM 50), I am in full agreement with the analysis set out by Ryan J. in those paragraphs of his judgment in *Franmer*. In my view, the analysis of Article 8(1) provided by Ryan J. on the approach the court should take in considering whether one of the disapplying factors is present, as set out in those paragraphs of the judgment is absolutely right. I reject the submission therefore that I should decline to follow the approach taken by Ryan J. on the grounds that it is erroneous. I do not accept that it is.

66. In the concluding remarks in his judgment, Ryan J. pointed out that if the case was to proceed in court and was not referred to arbitration, it would be heard and determined by a

judge who would in any event have to distinguish between the different discrete causes of action which the plaintiff was maintaining against the participating defendants. He noted that although there was a *"certain obvious convenience in having all of the relevant parties before the court in the one proceeding"*, it did not follow that that was the only way in which the disputes could be resolved. He concluded, therefore, that there was no basis in Article 8(1) of the Model Law on which to refuse the reference sought by the first defendant.

67. *Franmer* is a clear authority against the incapability of performance ground of objection advanced by Ocean Point.

68. Ocean Point, nonetheless, relies on a number of other cases in support of this ground of objection. It is necessary to comment very briefly on those. First, Ocean Point relies on the decision of Clarke J. in *Kelly*. However, it seems to me that that case is very much against Ocean Point and supports the case made by Clancy. In *Kelly* a dispute arose between the plaintiffs, who were the purchasers, and the defendant, who was the vendor, under a contract for the sale of certain lands. The plaintiffs contended that the contract was at an end and brought proceedings seeking a declaration to that effect and the return of the deposit. The defendant disputed the entitlement of the plaintiffs to those orders and maintained that the contract continued in effect and remained capable of enforcement. Further, the defendant maintained that the dispute was covered by an arbitration clause contained in the contract of sale and sought to have the proceedings stayed (under s. 5 of the 1980 Act). Clarke J. carefully analysed the issues which would require to be determined between the parties by a court or by an arbitrator. He concluded that two of the issues were matters purely for the court but that one of the issues clearly fell within the scope of the arbitration clause. The issue he had to decide, therefore, was the proper course which the court should adopt where some, but not all, of the issues which arose in the proceedings were the subject of a valid and binding arbitration clause and where, as in that case, those issues related not to stand alone

causes of action themselves but were components of the matters that would need to be determined by the court in order to come to a proper decision on a single cause of action which, in that case, concerned the continuing validity of the contract (see para. 6.8 of the judgment, p. 14).

69. In that context, Clarke J. stated (at para. 7.1) that:

> *"... the starting point must be to give full recognition to the fact that the parties have agreed between themselves in the contract to refer any questions under* [the contract] *to arbitration. A court should not seek to go behind that decision of the parties. In those circumstances it does not seem to me that there could be any legitimate basis for the court taking on the role, which the parties had agreed to refer to an arbitrator, of determining any issues which arise under* [the relevant provision in the contract] ". (para. 7.1, p. 14).

70. However, the court noted that in order for there to be a final determination as to the continuing existence of the contract, it was necessary that some issues be decided by the court and some by an arbitrator. That fact, while unusual, arose by reason of the terms of the contract which provided for arbitration in limited circumstances only. It was necessary, therefore, for the court to determine what it should do when faced with the situation, as in that case, where there was a single cause of action, the proper resolution of which required a determination potentially of some issues over which the court had jurisdiction and some issues which the parties had agreed to refer to arbitration. Clarke J. held that, in such a situation, the court had a discretion as to the proper course of action to adopt which discretion should be exercised with a view to ensuring, insofar as possible, a speedy resolution of all of the issues which arose while at the same time ensuring that the court did not *"trespass on determining any issue which has been properly made the subject of an arbitration agreement between the parties"* (para. 7.4, p. 15).

71. Clarke J. emphasised that the discretion to which he was referring did not extend to the court *"taking over a jurisdiction to determine any issue properly referred to arbitration"* but rather that discretion concerned the approach which the court should take in determining how the various elements of the case (being those which were properly within the jurisdiction of the court and those validly referred to arbitration): *"should be sequenced so as to maximise the likelihood of a speedy and just resolution of all issues between the parties"*. (para. 7.5, pp. 15-16).

72. Clarke J. then made the following observations:

> *"7.6 I should also emphasise that the analysis which I have engaged in has no bearing on a case where there are separate causes of action some, but not all, of which are the subject of a valid arbitration agreement. In those circumstances a court should have no difficulty in staying any aspect of the proceedings before the court in relation to those causes of action which are the subject of a valid arbitration agreement. The position with which I am concerned is different. It stems from the unusual circumstances of this case, where a determination of the single cause of action in the proceedings ... itself requires a resolution of a number of sub-issues, some but not all of which, are the subject of the arbitration agreement."* (para. 7.6, p. 16).

73. It can readily be seen, therefore, that *Kelly* was dealing with an entirely different situation to that which arises in the present case. *Kelly* does not, in my view, afford any support for Ocean Point's resistance to the order sought by Clancy under Article 8. Insofar as it is relevant at all, the judgment of Clarke J. in *Kelly* stresses the need to ensure that the court stays away from the areas of a dispute and causes of action which fall within the scope of a valid arbitration agreement. Clarke J. was astute to ensure that the court would not in any way be trespassing upon the determination of any issue which was properly the subject of an

arbitration agreement between the parties. To that limited extent, therefore, the case undermines the objection advanced by Ocean Point.

74. The next case on which Ocean Point relies is the decision of Barrett J. in *O'Connor*. Again, far from supporting Ocean Point's objection to the making of an order under Article 8 on the grounds of the multiplicity of actions and the practical difficulties in allocating responsibility as between the various parties, *O'Connor* would seem to undermine that objection. What Barrett J. decided in *O'Connor*, so far is as relevant for present purposes, is that notwithstanding the fact that proceedings were stayed (pending arbitration) against one defendant under s. 5 of the 1980 Act (in a case involving a number of defendants), it was open to one or more of the remaining defendants to serve a notice or notices of indemnity and contribution on the relevant defendant whose dispute with the plaintiff was being referred to arbitration. Barrett J. made an order in that case allowing the service of a notice of indemnity and contribution by one of the remaining defendants on the defendant who had obtained the stay in relation to its dispute with the plaintiff. A similar conclusion had been reached earlier by Ryan J. in *Franmer* (as appears from para. 16 of the judgment in that case). I agree with Ryan J. and Barrett J. on this point. If Ocean Point and Clancy are referred to arbitration under Article 8(1) of the Model Law in respect of the dispute between those parties which is the subject of the plenary proceedings, it will nonetheless be open to the defendants remaining in the proceedings to serve notices of indemnity and contribution on Clancy as issues between the defendants remaining in the proceedings and Clancy would not be the subject of any arbitration agreement. Equally, it may well be open to Clancy to reciprocate by serving notices of indemnity and contribution on those remaining defendants for the same reason.

75. If an order is made under Article 8(1) of the Model Law referring Ocean Point and Clancy to arbitration in respect of their dispute, the issues between Ocean Point and Clancy

will be addressed at the arbitration (subject of course to procedural issues such as security for costs, which may arise, being addressed). Ocean Point's claims against the other defendants will remain before the High Court. The claims and cross-claims for indemnity and contribution as between the other defendants themselves and as between those defendants and Clancy will also remain before the High Court. While no doubt all of this will be inconvenient and expensive, that has no bearing whatsoever on the issue as to whether the arbitration agreement is *"incapable of being performed"* for the purpose of Article 8(1) of the Model Law. The consequences to which I have just referred will arise by virtue of the fact that both the contract between Ocean Point and Clancy contains an arbitration agreement.

76. Insofar as Ocean Point seeks to rely on possible difficulties arising by virtue of the 1961 Act (as amended) and potential difficulties in the apportionment of liability as between Clancy and the other defendants in the plenary proceedings, in circumstances where its claim against Clancy is referred to arbitration, I do not agree that such alleged difficulties disapply the mandatory obligation on the court under Article 8 to make an order referring Ocean Point and Clancy to arbitration in respect of the dispute between them which is the subject of the plenary proceedings. As noted above, an arbitrator will be in a position to determine Clancy's alleged liability to Ocean Point whether in contract or in tort (see, for example, *O'Meara*). The court, if necessary, will be in a position to determine any alleged liability on the part of the other defendants to Ocean Point in the plenary proceedings. Any issues of apportionment as between the defendants remaining in the proceedings and Clancy will, if necessary, be determined in the plenary proceedings following the exchange of notices of indemnity and contribution. Like Ryan J. in *Franmer,* I do not see any of this as giving rise to insurmountable difficulties whether under the 1961 Act (as amended) or otherwise. In any event, in my view, none of this renders the arbitration agreement between Ocean Point and Clancy *"incapable of being performed"* for the purposes of Article 8(1) of the Model Law.

77. In addition, as I observed earlier, I do not accept that it will not be open to the parties to the arbitration, Clancy and Ocean Point, to obtain and call evidence at the arbitration from the other parties involved including the other defendants in the plenary proceedings. If necessary, the assistance of the court in obtaining such evidence could be sought by the arbitrator or by a party (with the approval of the arbitrator) under Article 27 of the Model Law. Even if there were difficulties in obtaining evidence from other parties (and I do not accept that that is necessarily the case), that would not render the arbitration agreement between Ocean Point and Clancy *"incapable of being performed"*.

78. Finally, insofar as Ocean Point seeks to rely on the dictionary definitions of *"incapable"* and the decision of the English Court of Appeal in *Paczy,* I do not accept that these definitions and that case provide any support for Ocean Point's contention that the arbitration agreement is *"incapable of being performed"*. The dictionary definitions define *"incapable"* as meaning something which lacks the *"required quality"* or *"characteristic"*. There is, in my view, no difficulty or incapacity with regard to the performance of the arbitration agreement by reason of the fact that the agreement and any arbitration taking place under it will be between Ocean Point and Clancy only and that the other defendants in the plenary proceedings will not be involved as parties. The arbitration agreement and, insofar as it is relevant, an arbitration taking place under it, will possess the *"necessary quality"* or *"characteristic"* of an arbitration agreement and of an arbitration taking place under such an agreement. I do not see how it can reasonably be otherwise contended.

79. Furthermore, the decision of the English Court of Appeal in *Paczy,* insofar as it has any relevance, seems to be against Ocean Point. In that case, the court was considering the construction of the words in s. 1(1) of the (English) Arbitration Act, 1975 which required the court to make an order staying proceedings where the dispute was covered by an arbitration agreement unless it was satisfied that the arbitration agreement was *"null and void,*

inoperative or incapable of being performed" (as under Article 8(1) of the Model Law). In giving the lead judgment of the English Court of Appeal, Buckley L.J. stated:

> *"In my judgment, on the true construction of these words, 'incapable of being performed' relates to the arbitration agreement under consideration. The incapacity of one party to that agreement to implement his obligations under the agreement does not, in my judgment, render the agreement one which is incapable of performance within the section any more than the inability of a purchaser under a contract for purchase of land to find the purchase price when the time comes to complete the sale could be said to render the contract for sale incapable of performance.*
>
> *The agreement only becomes incapable of performance in my view if the circumstances are such that it could no longer be performed, even if both parties were ready, willing and able to perform it. Impecuniosity is not, I think, a circumstance of that kind."* (per Buckley L.J. at 307)

80. As in *Paczy*, the arbitration agreement in the present case would only become *"incapable of performance"* if the circumstances were such that it *"could no longer be performed, even if both parties were ready, able and willing to perform it"*. That is most certainly not the case here. The arbitration agreement is, in my view, for the reasons outlined earlier, well capable of being performed. The only impediment to its performance is the refusal by Ocean Point to comply with its contractual obligation to pursue the issues which it seeks to raise against Clancy in the plenary proceedings by way of arbitration rather than litigation.

81. For these reasons, I find that the incapability of performance ground raised by Ocean Point by way of objection to the making of the order sought by Clancy under Article 8(1) of the Model Law is misconceived and I reject it.

Conclusion

82. In summary, I have rejected both of the grounds advanced by Ocean Point by way of opposition to the order sought by Clancy under Article 8(1) of the Model Law referring the parties to arbitration in respect of the issues raised by Ocean Point against Clancy in these plenary proceedings.

83. The court is subject to a mandatory obligation under Article 8(1) to make the order sought under Article 8 unless it is satisfied that the arbitration agreement is "*null and void, inoperative or incapable of being performed*".

84. The onus lies on Ocean Point to establish the existence of one or more of these disapplying factors. Ocean Point put forward two arguments in resisting Clancy's application. The first was that Clancy repudiated the arbitration agreement by commencing summary proceedings in October 2008 arising from the non-payment by Ocean Point of a sum certified by the architect under the contract by way of certificate no. 16. Ocean Point argued that it accepted the repudiation by commencing these plenary proceedings. In essence, Ocean Point argued that the repudiation and its acceptance of it meant that the arbitration agreement was "*inoperative*". For the reasons set out earlier in my judgment, I have rejected that argument. I am satisfied that Clancy did not repudiate the arbitration agreement by commencing the summary proceedings.

85. The second ground of objection raised by Ocean Point was that the arbitration agreement was "*incapable of being performed*" for the purposes of Article 8(1) in circumstances where the arbitration taking place under it would be between Ocean Point and Clancy only and the other defendants in the plenary proceedings would not be involved as parties. For the reasons I have set out above, I am satisfied that there is no basis for this ground of objection. Ocean Point has singularly failed to establish that the arbitration agreement is, in the circumstances which arise in this case, "*incapable of being performed*"

by reason of the fact that the arbitration will be between Ocean Point and Clancy and the other defendants will not be involved as parties in the arbitration.

86. I will, therefore, make the order sought by Clancy under Article 8(1) of the Model Law referring the parties (that is Ocean Point and Clancy) to arbitration under clause 38(b) of the contract in respect of the issues raised in these plenary proceedings.