THE HIGH COURT

[2017 No. 165 MCA]

IN THE MATTER OF THE PURPORTED APPOINTMENT OF AN ARBITRATOR TO ARBITRATE A CLAIM BY DOONIVER PLANT HIRE LIMITED AGAINST ACHILL SHELTERED HOUSING ASSOCIATION CLG

AND IN THE MATTER OF AN INTENDED ARBITRATION

AND IN THE MATTER OF THE ARBITRATION ACT 2010

BETWEEN

ACHILL SHELTERED HOUSING ASSOCIATION CLG

APPLICANT

AND

DOONIVER PLANT HIRE LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Brian McGovern delivered on the 12th day of January, 2018

1. The applicant in its Originating Notice of Motion dated 24th May, 2017, seeks the following reliefs:-

(i) an order pursuant to Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (*"the Model Law"*) that the purported appointment in or about the month of April 2017, by the President of the Royal Institution of Architects in Ireland of Donogh O'Riordan (*"the arbitrator"*) as arbitrator to arbitrate a claim by the respondent against the applicant is invalid and that the said Donogh O'Riordan does not have jurisdiction to so arbitrate; and

(ii) an order pursuant to Article 16(3) of the Model Law that the arbitrator erred in fact and in law in determining on 8th May, 2017, that he had

been validly appointed and that he had jurisdiction to continue with the arbitration.

2. In early 2008, the applicant entered into an agreement (*"the Construction Contract"*) with the respondent for the construction of six houses, a laundry building, site development works, drainage and services at Cuan Aoibhinn, Keel, Achill, Co. Mayo. The contract price was €1,241,988.04, or such other sums as should become payable by virtue of additions to or deductions from the contract sum or otherwise pursuant to the conditions of the contract.

3. On 14th February, 2011, the architect appointed in the Construction Contract gave notice of his intention to issue the Final Certificate. On 25th March, 2011, the respondent contractor wrote to the applicant giving notice of dispute under Clauses 35 and 37 of the contract and since that time certain issues in dispute remain unresolved.

4. One very unsatisfactory feature of this dispute is the delay by the respondent in requesting the appointment of an arbitrator. This step was taken on 2nd August, 2016, almost four and a half years after the previous engagement between the parties when the respondent had notified the applicant of a dispute.

5. As the parties were unable to agree an arbitrator, the respondent wrote to the President of the RIAI, Ms. Carole Pollard, asking her to appoint an arbitrator under Clause 37(b) of the Construction Contract which provides that the arbitrator shall be:-

> *"...such person as the parties hereunto may agree to appoint as Arbitrator or, failing agreement as may be appointed on* (sic) *the request of either party by the President for the time being of the Royal Institute of the Architects of Ireland."* (*"the RIAI"*)

6. In due course, the President of the RIAI nominated Mr. Donogh O'Riordan (*"the arbitrator"*) and on 8th May, 2017, the arbitrator made a preliminary ruling that

he had been validly appointed although he was aware that the applicant was contending that his appointment was invalid and that the precondition of prompt referral to conciliation of the dispute specified in the respondent's letters of 17th February, 2012, and 9th March, 2012, had not been met and furthermore that the notice of dispute given on 9th March, 2012, contained a new matter which had not previously been referred to and had not been the subject of a conciliation process.

7. The affidavits filed in this application set out the background facts which are not in dispute.

Issues

8. There are two issues that arise in this application. The first is whether or not the President of the RIAI was entitled to make a nomination or appointment of an arbitrator. The second is whether or not the arbitrator was entitled to rule, as a preliminary issue, that he was validly appointed.

The Model Law

9. Article 6 of the Arbitration Act 2010 provides that the Model Law shall have the force of law in the State both in respect of international commercial arbitrations and domestic arbitrations.

10. The two provisions of the Model Law most relevant to this application are Article 11 and Article 16.

11. Article 11 deals with the appointment of arbitrators and provides as follows:-

> *"(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.*
>
> *(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.*

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to

no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties."

12. For the purposes of Article 6, the High Court has been designated as the forum for dealing with such matters and, within the High Court, issues arising under the Model Law shall be decided by the designated arbitration judge.

13. Article 16 of the Model Law deals with the competence of an arbitral tribunal to rule on its jurisdiction. It provides:-

"(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its

authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

The Construction Contract

14. For the purposes of this application, the relevant clauses in the Construction Contract are Clause 35, Clause 37 and Supplement C (which deals with conciliation procedures). Clause 35(f)(i) provides that within three calendar months of the date of Practical Completion (defined in Clause 28(b)) of the Works, the Contractor shall furnish the Architect with all documents necessary for the computations required under the Construction Contract.

15. Upon compliance with Clause 35(f)(i), the contract goes on to provide at Clause 35(f)(iii) that the final measurement is to proceed and valuation of the Works shall proceed and be completed within the Period of Final Measurement specified in the appendix, namely six months. Not later than the end of that period and before the architect issues the Final Certificate the contractor and employer are required to be furnished with the *"priced bills of the final account"*. Clause 35(g) requires the

architect to issue notice of his intention to issue the Final Certificate within 21 days after the latest of the following:-

(i) the end of the Defects Liability Period;

(ii) final completion;

(iii) 40 working days after completion of the Final Measurement and Valuation of the Works.

After a period of 30 working days elapses and unless the architect receives notice of arbitration during that period he is required to issue the Final Certificate.

16. Clause 37 deals with dispute resolution and provides as follows:-

"37(a) Provided always that in case any dispute or difference shall arise between the Employer or the Architect and the Contractor as to the construction of the Contract or as to any matter or thing arising thereunder, other than any dispute or difference arising under Clause 39, or as to the withholding of any certificate to which the contractor may claim to be entitled, then either party shall forthwith give to the other written notice of such dispute or difference, and prior to any reference to arbitration under sub-clause (b) of this Clause, such dispute or difference shall be referred to conciliation in accordance with the Conciliation Procedures set out in Supplement (C) to these conditions. [Emphasis added]

(b) If a settlement of any dispute or difference is not reached under Conciliation Procedures under sub-clause (a) of this Clause, then either party may forthwith give to the other written notice that such dispute or difference has not been resolved and such dispute or difference shall be and is hereby referred to the arbitration and final

decision of such person as the parties hereunder may agree to appoint as Arbitrator or, failing agreement as may be appointed on the request of either party by the President for the time being of the Royal Institute of the Architects of Ireland, and the award of such Arbitration (sic) *shall be final and binding on the parties. Such reference, except on the question of certificates shall not be opened until after the Practical Completion or alleged Practical Completion of the Works or the determination or alleged determination of the contractors employment under this Contract, unless the employer and the contractor consent thereto in writing...* "[Emphasis added]

Discussion

17. In this case, the validity of the arbitration clause is not in dispute. The dispute centres around the issue of whether or not the arbitration clause is inoperable because the *"matters in dispute"* notified by the respondent to the applicant on 9th March, 2012, contained an additional item over and above what was contained in a notice of dispute dated 17th February, 2012, which was also served by the respondent on the applicant. A conciliation took place and on 21st February, 2012, the conciliator issued his recommendation which was dated 24th January, 2012. This recommendation was rejected by the applicant. That rejection prompted the notice of dispute served on 9th March, by the respondent.

18. The following two matters in dispute were common to the notice given on 17th February, 2012, and 9th March, 2012, namely:-

"(i) [Amended] final account ascertainment of 14th December, 2011 and related Notice of 10th January, 2012, as issued by email dated 11th January, 2012, of intention to issue the related Final Certificate.

(ii) Contractors Payment of Employer's share of the Conciliator's invoice relating to release of the Conciliator's Recommendation."

19. A further matter in dispute appeared in the notice of 9th March, 2012, namely:-

"(3) Employers deduction of liquidated damages".

20. But it is necessary to go back to 25th March, 2011, when the respondent first wrote to the applicant giving notice of dispute after the architect had given notice of his intention to issue the Final Certificate. There is no doubt that the matters in dispute notified on 25th March, 2011, are different to those referred to on 17th February and 9th March, 2012. It seems clear that the conciliator's recommendation was based on the dispute notified on 25th March, 2011, and there has been no conciliation with reference to the matters in dispute raised on 17th February, or 9th March, 2012.

21. The applicant raises a number of points on this issue. In the first place, it contends that the pre-condition of prompt referral to conciliation of the disputes specified in the respondent's letters of February and March 2012 had not been met. Secondly, it contends that the matters in dispute raised in February and March 2012, were not referred to conciliation and that accordingly, the power of the President of the RIAI to appoint an arbitrator is null and void. Its objections were set out in comprehensive terms in a letter from its solicitors dated 23rd December, 2016, to the respondent's solicitors.

The Law

22. In *Mayo County Council v. Joe Reilly Plant Hire Limited* [2015] IEHC 544, I stated at para. 11:-

"11. Article 16(1) provides that the Arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or

validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. This gives effect to the competence-competence doctrine. In John G. Byrnes (sic) *Limited v. Grange Construction and Roofing Co. Limited [2013] 1 I.R. 707 , Laffoy J. held that in an application brought under Article 16(3), the court may consider such evidence as it sees fit and is not bound by the submissions made to the arbitrator. I accept that as being the correct approach."*

23. The court went on to state:-

"13. In circumstances where the existence of an arbitration clause is not in dispute, the courts will be very slow to interfere with the arbitrator's ruling on his own jurisdiction having regard to the competence-competence principle.

14. A challenge under Article 16(3) is a challenge to the arbitrator's jurisdiction. It is not an appeal against his construction of the agreement. Rather, it is a challenge to his entitlement to embark on such an exercise. What this court has to decide is whether he had jurisdiction to hear the preliminary issue, or whether the arbitration clause giving him that power was spent. If he has jurisdiction then it is a matter for him as to how he construes the agreement. In this case, there is no challenge to the arbitration clause. The court therefore has to decide whether or not the arbitrator was correct in law in holding that he had jurisdiction to commence the hearing and rule on his own

jurisdiction including any objections with respect to the existence or validity of the arbitration agreement."

24. What the court has to do in this case is to determine whether or not the dispute which has arisen and has been referred to an arbitrator falls within the terms of the arbitration clause on a true construction of the agreement. In *Fiona Trust and Holding Company v. Yuri Privalov* [2007] UKHL, Lord Hoffman stated:-

"...only the agreement can tell you what kind of disputes [the parties] intended to submit to arbitration but the meaning the parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement is made. Businessmen in particular are assumed to have entered into agreements to which some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language."

25. If there are two possible constructions of an arbitration clause, the court is entitled to prefer the construction which is consistent with business commonsense and to reject the other.

26. The respondent argues that this application is premature in as much as the arbitrator has merely found that he had been validly appointed and has not dealt with the challenge to his jurisdiction. It points out that the arbitrator has expressly acknowledged that the applicant intended to challenge his jurisdiction under Article 16(3) and that the court can infer from that that he will go on to deal with that issue in due course.

27. The applicant argues that the President of RIAI has merely nominated the arbitrator but not appointed him. There is no point of substance in that submission.

The arbitrator has accepted his appointment and made a preliminary ruling that his appointment is valid. On the facts of this case it makes no difference whether the President of RIAI used the term *"nomination"* or *"appointment"* with regard to choosing an arbitrator.

28. The evidence clearly establishes that the arbitrator made a preliminary ruling that he had been validly appointed. That preliminary ruling was made by way of letter dated 8th May, 2017, in which he also acknowledged the respondent's entitlements under Article 16(3) *"...and your intention to challenge the validity of my appointment"*. He went on to state that he would continue the arbitral procedures while this request is pending.

29. I am satisfied that if the arbitrator went on to adjudicate on a preliminary issue as to jurisdiction that the court is given power under Article 16(3) to rule on any such adjudication. I am also satisfied that the court has the power under Article 16(3) to examine the validity of the arbitrator's appointment in the context of his preliminary ruling in that regard.

Conclusion

30. It seems to me that the provisions of Clause 37 of the Construction Contract are clear and unambiguous. It provides that *"...prior to any reference to arbitration under sub-clause (b) of this Clause such dispute or difference shall be referred to conciliation in accordance with the Conciliation Procedures set out in supplement (C) to these conditions"*. [Emphasis added]

31. The only matters in dispute that proceeded to conciliation were those raised on 25th March, 2011. The conciliator issued his recommendation on those matters on 21st February, 2012, and these recommendations were rejected by the applicant. It was that rejection which prompted the respondent to write on 9th March, 2012, referring to

its previous notice of dispute dated 17th February, 2012, and reiterating its request for the dispute to be referred to arbitration. In its previous notice of dispute of 17th February, 2012, it had informed the applicant that *"we will revert with a notice to concur on the appointment of an arbitrator"*.

32. But it was not until 2nd August, 2016, (almost four and a half years later) that the solicitors for the respondent wrote to the applicant requesting the appointment of an arbitrator. That was clearly in breach of its obligation to give such notice *"forthwith"* but in any event the dispute which the respondent was referring to arbitration was not the dispute which had gone to conciliation. In those circumstances, it was not permissible for the President of RIAI to nominate or appoint an arbitrator. In reaching that conclusion I do not accept the submission made on behalf of the applicant that the President of RIAI was under an obligation to make some inquiry as to whether or not she could validly appoint an arbitrator. It was up to the parties to the Construction Contract to decide whether they should apply for an appointment of an arbitrator pursuant to the dispute resolution clauses of the contract and the President of the RIAI was entitled (in the absence of any obvious deficiency) to assume that these steps were being taken properly.

33. Article 16(3) permits the court to review a preliminary ruling by an arbitral tribunal that it has jurisdiction. In my view, the preliminary ruling by the arbitrator that he had been validly appointed comes within the scope of that article.

34. If the arbitrator was incorrect in determining that he had been validly appointed, he has no *locus standi* to decide the challenge to his jurisdiction let alone to arbitrate the dispute between the parties.

35. Clause 37(b) provides that if a settlement of the dispute is not reached under conciliation then either party may forthwith give to the other written notice that such

dispute or difference has not been resolved and such dispute or difference shall be referred to arbitration. While Clause 37(a) requires that either party *"shall forthwith"* give to the other written notice of a dispute or difference to be referred to conciliation, the wording in Clause 37(b) is somewhat different in that it says that in the event that conciliation has not resolved the problem either party *"may forthwith"* give notice to the other party that the dispute has not been resolved and the matter shall proceed to arbitration. [Emphasis added]

36. Notwithstanding the permissive wording used in Clause 37(b) it is clear that the intention of the parties was that there would be no undue delay in taking the steps required to deal with disputes under the dispute resolution clause. The agreement requires that the parties act expeditiously. It is quite clear that the respondent failed to do so in this case by allowing approximately four and a half years to elapse between the notices of dispute issued in February and March 2012, and the request for the appointment of an arbitrator on 2nd August, 2016. While the arbitrator did not make any ruling on that question, it is a matter the court can take into consideration in determining whether the steps required in Clause 37 had been taken in order to permit a valid arbitration to take place. No explanation was offered to the court for the delay in making the reference.

37. As the conditions required under the contract for the appointment of an arbitrator were not met, it follows that the appointment of the arbitrator was invalid and the applicant is entitled to an order in the terms of paras. 1 and 2 of the Originating Notice of Motion.

Approved 12-01-18