[2019] IEHC 770
No Redaction Needed
Approved Judgment

THE HIGH COURT

[2018 No. 169S]

BETWEEN

K&J TOWNMORE CONSTRUCTION LIMITED

PLAINTIFF

AND

KILDARE AND WICKLOW EDUCATION AND TRAINING BOARD

DEFENDANT

JUDGMENT of Mr. Justice David Barniville delivered on the 21st day of December, 2018

Introduction

1. This is my judgment on an application by the defendant, Kildare and Wicklow Education and Training Board (the "Board"), for an order pursuant to Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") referring the parties to these proceedings to arbitration in accordance with an arbitration agreement between the Board and the plaintiff, K&J Townmore Construction Limited (the "contractor"). In the alternative, the Board seeks an order pursuant to the inherent jurisdiction of the court staying the proceedings to enable a conciliation to take place between the parties pursuant to a provision of the contract to which they are parties.

Background

2. In very brief summary, the Board, a statutory body corporate established pursuant to s. 9 of the Education and Training Boards Act, 2013, entered into a Public Works Contract (Public Works Contract for Minor Building and Civil Engineering Works designed by the Employer) with the contractor on 6th October, 2014 (the "PWC") under which the Board engaged the contractor and the contractor agreed to

carry out construction works at St. David's National School in Naas, County Kildare. The contractor claims that the Board is indebted to it in the sum of €206,245.72 (exclusive of VAT) in respect of the construction works carried out by it. It claims that that sum is due and owing by the Board by way of an account stated and settled and seeks judgment in that amount in proceedings commenced by a summary summons issued on 13th February, 2018.

3. The Board contends that the PWC contains an arbitration agreement (in Clause 13.2) under which the parties agreed that any dispute arising "*under*" the PWC is required to be "*finally settled*" by arbitration in accordance with the arbitration rules identified in a schedule to the PWC. The Board contends that a dispute has arisen in relation to the contractor's claim, that the dispute has arisen "*under*" the PWC and that it, therefore, falls within the scope of the arbitration agreement.

4. The contractor says that, as its claim is made on foot of an account stated and settled, the dispute in relation to it has not arisen "*under*" the PWC but under or on foot of a separate agreement which supersedes the PWC and the arbitration agreement contained in it and is not subject to that arbitration agreement.

5. The contractor also relies on other grounds on which it contends that the arbitration agreement should be disapplied in respect of its claim. Those other grounds include a contention that the Board is estopped from relying on the arbitration agreement by virtue of its alleged agreement of the contractor's final account (giving rise to the account stated and settled) and a further contention that the agreement is "*inoperative*" within the meaning of that term in Article 8(1) for the same reason.

The issues

6. The essential, or principal, issue which I have to decide, therefore, is whether the claim made by the contractor, which is ostensibly made on the basis of an account allegedly stated and settled and which is disputed by the Board, is one which arises "*under*" the PWC, thereby falling within the scope of the arbitration agreement between the parties contained in clause 13.2 of the PWC or whether the contractor's claim falls outside the scope of that agreement. A number of subsidiary issues also arise such as whether the Board is estopped from relying upon the arbitration agreement or whether that agreement is "*inoperative*" on the grounds for which the contractor contends.

The PWC

7. As noted earlier, the Board and the contractor entered into the PWC on 6th October, 2014, to carry out construction works consisting of the construction of six classrooms, a sports hall, a library, common areas and access roads, a parking area and a basketball court at St. David's National School in Naas, County Kildare.

8. The contractor claims that by a certificate dated 14th September, 2015, issued by MCOH Architects ("MCOH"), the appointed representatives of the Board under the PWC, it was certified that the works the subject of the PWC were practically complete on 31st August, 2015. It is alleged that the contractor sent its proposed final account to MCOH on 28th October, 2015. The contractor claims that at a meeting between the contractor's representatives and representatives of the Board, including its then chief executive, Seán Ashe, and its quantity surveyors, on 27th September, 2016, agreement was reached on the contractor's final account in the sum of €1,891,125.00 (excluding VAT) subject to deductions as appropriate for any retention

moieties and any previously paid amounts. The contractor claims that following such deductions, the total due and owing to it is €206,245.72 (exclusive of VAT).

9. The contractor relies on correspondence from Mr. Ashe, the Board's former chief executive, dated 27th May, 2017 confirming the Board's agreement, as employer, to the sum agreed at the meeting on 27th September, 2016 and confirming that the Board would provide instructions to its representative (MCOH) to arrange for payment of the sum agreed, subject to the appropriate deduction in respect of previously paid amounts and any retention moieties which would be appropriate at that juncture. The contractor further relies on a letter sent on the same date (29th May, 2017) by Mr. Ashe on behalf of the Board to MCOH requiring them to issue the penultimate payment certificate in the amount agreed. The contractor claims that notwithstanding further demands, the balance due of €206,245.72 (exclusive of VAT) has not been paid and remains due and owing on foot of the agreed final account.

The proceedings

10. The contractor issued a summary summons seeking payment of the amount allegedly due on 13th February, 2018. The contractor's claim is described at para. 3 of the special indorsement of claim as being for payment of the sum of €206,245.72 (exclusive of VAT) "*arising on foot of an account stated and settled*". Particulars of the contractor's claim are then set out. Those particulars include the following:-

> "*(a) Pursuant to Contract in writing dated 6 October 2014 the Plaintiff was appointed as contractor for the purpose of carrying out works at St David's National School, Pipers Hill, Naas, County Kildare.*

(b) By certificate dated 14th September 2015 issued pursuant to the said Contract the works were certified as practically complete on 31st August 2015.

(c) On or about 27 September 2016 the parties agreed the Final Account in regard to the works in the amount of €1,891,125 excl Vat.

(d) The Final Account was confirmed in correspondence dated 27 September, 2016, sent by the Plaintiff to the Defendant and on or about 29 May 2017 the Defendant wrote to the Plaintiff stating:

[the terms of the letter were then set out] …

(e) After all appropriate deductions the Plaintiff is entitled to payment of the sum of €206,245.72 on foot of the agreed account, and was so entitled to payment as and from 27 September 2016, which sum is due and owing to the Plaintiff."

11. Following the entry of an appearance on behalf of the Board, the contractor issued a motion seeking liberty to enter final judgment in the amount claimed on 23rd April, 2018. That motion, which was grounded on an affidavit sworn by Denis Lahart on 23rd April, 2018, was returnable before the Master on 8th June, 2018.

Motion to Refer to Arbitration

12. Prior to the return date of the motion for summary judgment, the Board issued its motion on 1st June, 2018, seeking an order pursuant to Article 8(1) of the Model Law referring the parties to arbitration in reliance on the provisions of clause 13.2 of the PWC. In the alternative, it sought an order pursuant to the inherent jurisdiction of the court staying the proceedings to enable conciliation to take place under clause 13.1 of the PWC.

13. The Board's application was grounded on an affidavit sworn by its current chief executive, Dr. Deirdre Keyes, on 30th May, 2018. In her affidavit, Dr. Keyes relied on the provisions of clause 13 of the PWC (which I will refer to further below) and contended that the contractor's claim for payment was in dispute and that that dispute came within the scope of the arbitration agreement contained in clause 13.2.

14. In order that the court was "*fully apprised of the nature of the dispute between the parties*", Dr. Keyes summarised the grounds on which the Board was disputing the contractor's entitlement to payment at para. 5 of her affidavit of 30th May, 2018. The grounds so summarised are as follows:-

> "• *That the final account does not have the value attributed to it by the Plaintiff due to defects in construction and the necessity for additional corrective works;*
>
> • *That the final account provided by the Plaintiff does not include all matters agreed between the parties and the Defendant does not have liability for those matters pursuant to Clause 11.5.1 of the PWC;*
>
> • *That the Plaintiff is in breach of contract and the Defendant is entitled to damages which should be set-off against any final account;*
>
> • *That the final account is not binding as the individual who purported to negotiate it on the Defendant's behalf did not have authority to do so;*
>
> • *That the final account is not binding as it did not follow the requirements of Clause 11.5 of the PWC;*

- *That no amount is due and owing to the Plaintiff in circumstance where the employer's representative has not issued a penultimate payment certificate in accordance with Clause 11.5.2 of the PWC."*

15. Mr. Lahart swore a replying affidavit to that of Dr. Keyes on 28th June, 2018. He confirmed the contents of the affidavit which he had sworn on 23rd April, 2018, for the purpose of grounding the contractor's application for liberty to enter final judgment and added some additional detail including the minutes of the meeting on 27th September, 2016, at which the contractor alleges its final account was agreed (which he exhibited to this affidavit). Mr. Lahart pointed out that the Board was represented at that meeting not only by its then chief executive, Mr. Ashe, but also by its quantity surveyors. Mr. Lahart then addressed the grounds on which the Board was disputing the contractor's entitlement to payment, as summarised by Dr. Keyes in her affidavit. Mr. Lahart did not accept that there was any basis for or validity to those grounds. He also contended that the dispute between the parties did not arise "*under*" the PWC but was rather a dispute as to whether the account agreed by the Board was binding upon the Board and that that was not a dispute arising "*under*" the PWC. Consequently, he asserted that the dispute between the parties which is the subject of the contractor's proceedings did not fall within the scope of the arbitration agreement contained in clause 13.2 of the PWC. Dr. Keyes disputed that assertion in a further affidavit which she swore on 12th July, 2018.

16. Before considering the principal issue between the parties, namely, whether the dispute the subject of the contractor's proceedings falls within the scope of the arbitration agreement contained in clause 13.2, I should first identify the statutory

provisions relevant to this application. I will then outline the relevant provisions of the PWC which arise for consideration.

Relevant statutory provisions

17. The Board brings its application pursuant to Article 8(1) of the Model Law which 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."*

18. Section 6 of the Arbitration Act 2010 (the "2010 Act") provides that subject to that Act, the Model Law has force of law in the State and applies to arbitrations under arbitration agreements concerning both *"international commercial arbitrations"* and arbitrations which are not *"international commercial arbitrations"*. Section 6 of the 2010 Act, therefore, adopts the Model Law both for international commercial arbitrations and for domestic arbitrations where the seat is Ireland.

The arbitration agreement

19. It is common case between the contractor and the Board that the PWC contains an arbitration agreement in clause 13.2. The issue between the parties is that the Board contends that the dispute the subject of the contractor's proceedings falls within the scope of the arbitration agreement whereas the contractor contends that it does not.

20. The arbitration agreement is contained in clause 13.2 of the PWC. Clause 13.2 must be read with clause 13.1.

21. Clause 13 of the PWC is headed "*Disputes*". Clause 13.2 has the subheading "*Arbitration*" and states:-

> "*Any dispute that, under sub-clause 13.1, may be referred to conciliation shall, subject to sub-clause 13.1 be finally settled by arbitration in accordance with the arbitration rules identified in the Schedule, part 1N. For the purposes of those rules, the person or body to appoint the arbitrator, if not agreed by the parties, is named in the Schedule part 1N.*"

22. Clause 13.2 requires arbitration in the case of any dispute which may be referred to conciliation under clause 13.1. It is necessary, therefore, to turn to clause 13.1 to ascertain the type of dispute which may be referred to conciliation and which must be "*finally settled*" by arbitration under clause 13.2.

23. Clause 13.1 bears the subheading "*Conciliation*" and provides, at clause 13.1.1 as follows:-

> "*If a dispute arises under the Contract, either party may, by notice to the other, refer the dispute for conciliation under this sub-clause 13.1. The notice shall state that it is given under sub-clause 13.1 of the Contract.*"

24. A dispute which may be referred for conciliation under clause 13.1 is a dispute which arises "*under the Contract [i.e. the PWC]*".

25. In circumstances where the parties are agreed that there is a dispute between them as to the contractor's entitlement to be paid the sum claimed in its proceedings, the essential, or principal, issue to be determined on this application is whether that dispute arises "*under*" the PWC, as the Board contends, or not, as the contractor contends.

Jurisdiction to refer to arbitration: Article 8

26. It is well established that where the requirements of Article 8(1) of the Model Law are met, the court must make the reference to arbitration. It does not have a discretion to do so.

27. I approve of the following statement made by the High Court (McGovern J.) in *BAM Building Limited v. UCD Property Development Company Limited* [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)

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

29. Accordingly, if the dispute the subject of the contractor's claim in the proceedings falls within the scope of the arbitration agreement contained in clause

13.2 of the PWC, I have no discretion and am required by Article 8(1) of the Model Law to refer the parties to arbitration.

Principles of interpretation of arbitration agreements

30. The determination of the scope of an arbitration agreement involves an exercise of contractual interpretation. That exercise, however, while attracting the general principles of contractual interpretation, is conducted in a particular context. The authorities (discussed below) establish that a presumption arises that the parties intend that where a contract incorporates an arbitration agreement it is presumed that the parties intend all of their substantive disputes to be determined by arbitration. This presumption is given concrete effect by the strong support for the arbitral process shown by the Irish courts, particularly, but not only, following the enactment of the 2010 Act. The endorsement given by the Irish courts in the context of the 2010 Act to the broad or liberal approach to the construction of arbitration agreements is but an example of the significant support which the Irish courts have shown for the arbitral process.

31. While in the past the outcome of cases may have turned on differences between the meaning of disputes arising "*under*" and those arising "*out of*" a contract, the effect of more recent authorities is that courts are less likely to differentiate between those phrases and are more likely to interpret them broadly so as to bring the dispute at issue within the terms of the arbitration agreement. However, the parties' freedom of contract means that it is always open to them to agree clearly as to which disputes between them fall within the scope of the arbitration agreement and which fall outside its scope.

32. Before turning to the more recent authorities under the 2010 Act, I should refer briefly to one decision of the Supreme Court in the context of the pre-2010 Act

legislative regime. The case is *Gulliver v. Brady & ors* [2003] IESC 68 ("*Gulliver*"). In that case, the Supreme Court was required to interpret an arbitration clause contained in a memorandum of understanding between a specialist tax adviser and a firm of solicitors. The relevant clause provided that any disputes between the parties "*arising out of or in relation to*" the agreement were required to be referred to arbitration to be governed by the provisions of the Arbitration Acts 1955-1980. The dispute between the parties was as to whether the appellant had become a full equity partner in the firm. The appellant argued that the dispute fell outside the terms of the arbitration clause. The Supreme Court, in a judgment delivered by Geoghegan J., found that it was unclear whether the appellant was claiming an entirely new and different agreement without reference to the memorandum of understanding which contained the arbitration clause or whether he was claiming an amended agreement. The court concluded that at the very least the memorandum formed part of the partnership contract alleged by the appellant and it was difficult therefore to see how it could be argued that the arbitration clause would not apply. However, even if that were not so, the Supreme Court held that, even if the arbitration clause could not be regarded as having been incorporated expressly or by implication into any amended or substituted partnership agreement, the essential feature of the dispute was still whether the appellant's rights and obligations as against the firm arose out of the memorandum of understanding. The Supreme Court held that the dispute was captured by the arbitration clause "*beyond any doubt*" as it was a dispute "*in relation to*" the agreement.

33. Geoghegan J. cited with approval extracts from Mustill and Boyd *Law and Practice of Commercial Arbitration*, 2nd Ed., on the meaning of the words "*in relation to*" and "*arising out of*" in the context of an arbitration clause and found that those

words were of considerable width and had been given a wide meaning. Geoghegan J. also referred to Russell On Arbitration, 22nd Ed., where, dealing with the words *"in relation to"* in the context of an arbitration clause, the editors noted that that phrase as well as the phrase *"arising out of"* had been held to have a broad or wide meaning and were said to have a wider meaning than *"arising under a contract"* (see p. 8 of the judgement of Geoghegan J.). The Supreme Court held that the dispute did fall within the arbitration clause and stayed the proceedings.

34. Although Geoghegan J. in *Gulliver* noted that the editors of the then edition of Russell expressed the view that the words *"arising out of"* and *"in relation to"* contract were said to have a wider meaning than *"arising under a contract",* I do not read the judgment of Geoghegan J. as expressly endorsing that view. However, even if it did, it seems to me that given more recent developments in Ireland since the enactment of the 2010 Act and the repeated endorsement by the Irish courts of important statements of principle on this point in a leading English case which found against there being a significant difference in the meaning to be attributed to these various phrases in an arbitration clause, it would not be appropriate to attach great significance to the use of those phrases, unless of course the arbitration agreement is clear as to what is or is not intended to be included within its scope.

35. The English decision referred to above is of course, the well-known decision of the House of Lords in *Fiona Trust & Holding Corporation and Ors v. Privalov and Ors* [2007] 4 All ER 951 (also reported under the name *Premium Nafta Products Limited and Ors v. Fili Shipping Company Limited and Ors* [2007] UKHL 40) (*"Fiona Trust").* The decision of the House of Lords in *Fiona Trust* which endorsed the decision of the Court of Appeal in that case led the editors of the more recent (and current) edition of Russell On Arbitration, 24th Ed., to state (at para. 2-98):-

"Although previously the words 'arising under the contract' had sometimes been given a narrower meaning, that should no longer be so. The words 'out of' and 'under' should be widely construed. This approach was wholeheartedly endorsed by the House of Lords in Fiona Trust..." (Russell para. 2-098, p.79).

36. Later, at para. 2-101 the editors of Russell state:-

"Although previously the words 'arising under the contract' had sometimes been thought to have a narrower meaning, that should no longer be so. The words 'out of' and 'under' should be widely construed." (Russell, para. 2-102, pp.81-82, citing *Mabey and Johnson Limited v. Danos* [2007] EWHC 1094 and *Interprods Limited v. De La Roue International Limited* [2014] EWHC 68 (Comm)).

37. Before looking at some of the more recent Irish cases which endorsed the statements of principle made in this context by members of the House of Lords in *Fiona Trust*, it is necessary to say something about that decision itself.

38. In *Fiona Trust* the owners of a number of vessels had entered into charters with a number of charterers. The owners alleged that the charters were procured by bribery and purported to rescind them. They commenced proceedings for a declaration that the charters had been validly rescinded. The charterers applied for a stay under the English Arbitration Act, 1996 on the basis that the dispute should have been determined by arbitration. That application was refused by the High Court but granted on appeal by the Court of Appeal. The House of Lords affirmed the decision of the Court of Appeal. The opinion of Lord Hoffman in the House of Lords is particularly significant and his statements in relation to the interpretation of an arbitration clause have been emphatically endorsed in a number of Irish cases.

39. The arbitration clause at issue in that case provided that although *"any dispute arising under [the charter]"* was to be decided by the English courts, either party could elect *"to have any such dispute referred ... to arbitration in London"*. It further provided that a party would lose its right to elect for arbitration where the other party served a written notice of a dispute which stated expressly that a dispute *"ha[d] arisen out of [the charter]"*. Lord Hoffman treated the clause as if it were a simple arbitration clause. The owners argue that the clause did not apply. One of the grounds on which they so contended was that as a matter of construction the dispute between the parties was not a dispute *"arising under the charter"*. The other ground relied on by the owners was that the jurisdiction and arbitration clause was liable to be rescinded and was, therefore, not binding upon them.

40. In a passage which has been cited with approval and applied by the High Court (McGovern J.) in *BAM* (at para. 19, p 9), *Kellys of Fantane* (at para. 19, p. 7) and *Achill Sheltered Housing Association CLG v. Dooniver Plant Hire Limited* [2018] IEHC 6 (*"Achill"*) (at para. 24, p. 11), Lord Hoffman stated:

> *"Both of these defences raise the same fundamental question about the attitude of the courts to arbitration. Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which 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 was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this*

purpose will influence the way in which one interprets their language." (per Lord Hoffman at para. 5)

41. Then, in a passage cited with approval and applied by the High Court (Charleton J.) in *O'Meara v. Commissioners of Public Works in Ireland* [2012] IEHC 317 *("O'Meara")* and by McGovern J. in *BAM* (at para. 19, pp. 9-10), Lord Hoffman stated:

"6. In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.

7. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation

should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention." (per Lord Hoffman at paras. 6 and 7)

42. Lord Hoffman's comments at para. 7 of his opinion in *Fiona Trust* were also cited with approval and applied by the High Court (McGovern J.) in *Kellys of Fantane*.

43. Lord Hoffman continued (at para. 8 of his opinion):

"A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause..."

44. Having made these important observations, Lord Hoffman then turned to the construction of the clause itself. He referred to a number of the cases in which various forms of words in arbitration clauses were considered by the courts and noted that in some of them a distinction was drawn between disputes "*arising under*" and "*arising out of*" the relevant agreement. Those cases included *Heyman v. Darwins Ltd* [1942] AC 356 and *Union of India v. E. B. Aaby's Rederi A/S, The Evje* [1975] AC 797 where conflicting views were expressed as to whether "*arising under*" had a narrower meaning than "*arising out of*". Lord Hoffman noted that in *MacKender v. Feldia AG* [1967] 2 QB 590, the Court of Appeal had decided that a clause in an insurance policy submitting disputes "*arising thereunder*" to a foreign jurisdiction was wide enough to cover the question of whether the contract could be avoided for

non disclosure. Having referred to these authorities, Lord Hoffman continued (at para. 12):

> *"I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law. It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsmen of so widely used standard form as [the charter in issue]...obviously regarded the expressions 'arising under this charter'... and 'arisen out of this charter' ... as mutually interchangeable. So I applaud the opinion expressed by Longmore L.J. in the Court of Appeal (at [17]) that the time has come to draw a line under the authorities to date and make a fresh start. I think that a fresh start is justified by the developments which have occurred in this branch of the law in recent years and in particular by the adoption of the principle of separability by Parliament in s. 7 of the 1996 Act. That section was obviously intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration. But s 7 will not achieve its purpose if the courts adopt an approach to construction which is likely in many cases to defeat those expectations. The approach to construction therefore needs to be re-examined."*

45. The concept of the separability of an arbitration agreement from the main contract provided for in s. 7 of the English Arbitration Act, 1996 to which Lord Hoffman was referring in the paragraph of his opinion just quoted, was also recognised in this jurisdiction under the pre-2010 Act regime. Examples of the application of this concept are found in the decisions of Morris J. in *Parkarran*

Limited v. M. & P. Construction Limited [1996] 1 I.R. 83 and of Kelly J. in *Doyle v. National Irish Insurance Co. Plc* [1998] 1 I.R. 89. The principle of separability is also now reflected in Article 16(1) of the Model Law. The comments of Lord Hoffman in paragraph 12 of his opinion (just quoted), therefore apply equally to the position of this jurisdiction.

46. Lord Hoffman continued (at para. 13), in a passage cited with approval and applied by McGovern J. in *BAM* at para. 19, p. 10:

> *"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at [17]: 'i[f] any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so'."*

47. Lord Hoffman stated that the language of the arbitration clause in the charter contained nothing to exclude disputes about the validity of the contract on any of the grounds claimed in the proceedings or otherwise and that, therefore, it applied to the dispute at issue.

48. The concurring opinion of Lord Hope in the House of Lords contains similar statements as to the requirement to interpret an arbitration clause in an international commercial contract in a broad manner. At para. 26 of his opinion, he stated:

> *"The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes*

legal certainty. It serves to underline the golden rule that if the parties wished to have issues as to the validity of their contract decided by one tribunal and issues as to the meaning or performance decided by another, they must say so expressly. Otherwise they will be taken to have agreed on a single tribunal for the resolution of all disputes".

49. Having referred to the particular clause at issue and having observed that there was nothing to indicate that the parties intended the disputes which were to be the subject of the jurisdiction of the English courts and consequently the arbitration clause were not to include disputes about the validity of the charter, Lord Hope stated (at para. 27):

"The simplicity of the wording is a plain indication to the contrary. The arbitration clause which follows it is to be read in that context. It indicates to the reader that he need not trouble himself with fussy distinctions as to what the words 'arising under' and 'arising out of' may mean. Taken overall, the wording indicates that arbitration maybe chosen as a one-stop method of adjudication for the determination of all disputes. Disputes about validity, after all, are no less appropriate for determination by an arbitrator than any other kind of dispute that may arise ... The purpose of the clause is to provide for the determination of disputes of all kinds, whether or not they were foreseen at the time when the contract was entered into."

50. Lord Hope continued (at para. 29):

"The Court of Appeal said that the time had come for a fresh start to be made, at any rate for cases arising in an international commercial context. It has indeed been clear for many years that the trend of recent authority has risked isolating the approach that English law takes to the wording of such clauses

from that which is taken internationally. It makes sense in the context of international commerce for decisions about their effect to be informed by what has been decided elsewhere."

51. The judgment of the Court of Appeal in *Fiona Trust*, which was delivered by Longmore L.J. and endorsed by the House of Lords, also refers to the presumption in favour of *"one-stop arbitration"* and the need for a *"liberal construction"* of an arbitration clause per Longmore L.J. (at para. 19).

52. While both the Court of Appeal and House of Lords made these statements of principle concerning the approach to the interpretation of an arbitration clause in the context of a clause contained in an international commercial contract, in my view, those statements of principle are equally applicable in this jurisdiction in light of the fact that the 2010 Act makes little if any distinction between domestic and international commercial arbitrations. As noted by Dowling-Hussey and Dunne, *Arbitration Law*, 3rd Ed., (Round Hall, 2018) the approach to the construction of arbitration clauses adopted by the House of Lords in *Fiona Trust* has been followed by the Irish courts and *"it is suggested that it is unlikely that the Irish courts will take the view that the approach to the construction of arbitration clauses set out in Fiona Trust should change or differ depending upon whether arbitration is domestic or international in character"*. (para. 3-112, p. 158). I fully agree with that observation and suggestion. In my view, the approach to the interpretation of an arbitration agreement outlined in *Fiona Trust* has been and indeed should be followed in Ireland, irrespective of whether the arbitration agreement is one concerning an international commercial arbitration or a domestic arbitration.

53. As noted earlier, many of the statements and dicta of Lord Hoffman in *Fiona Trust* have been expressly approved and applied by the High Court and represent

good law in Ireland. Briefly, it seems to me that the principles concerning the interpretation of an arbitration agreement which can be derived from *Fiona Trust* and from the Irish decisions which have cited that case with approval (and which I follow here) can be summarised 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.

54. The application of a number of these principles can be seen in some of the Irish cases under the 2010 Act.

55. In *O'Meara*, Charleton J., having referred to paras. 6 and 7 of the opinion of Lord Hoffman, interpreted the arbitration clause in the lease at issue so as to encompass all of the relevant disputes between the parties. Having noted that decisions from other jurisdictions, such as England and Wales, demonstrated an antipathy towards *"fine distinctions"* and allowing a situation to arise where part of the case is heard by an arbitrator and another part is heard before the court, Charleton J. held that the arbitration clause at issue in the case covered all disputes which might arise between the parties in connection with the lease or the subject matter of the lease, whether the dispute concerned a claim made in contract or in tort. The clause in question referred to *"all disputes which arise between the parties in connection with [the] lease or the subject matter of the lease…"*.

56. In *BAM*, McGovern J. had to interpret clause 13.2 of the PWC (being the same provision at issue in the present case). In that case, there had been a conciliation under clause 13.1. The defendant was dissatisfied with the recommendation of the conciliator and contended that it was void as having been made outside the required timeframe provided for in clause 13.1. The plaintiff did not accept that contention. The defendant contended that there was, therefore, a dispute between the parties on the issue which should be referred to arbitration under clause 13.2. McGovern J. adopted the views of Lord Hoffman at paras. 5, 6, 7 and 13 of his opinion in *Fiona Trust* and held that:-

"...the starting point of any interpretation of an arbitration clause should be on the basis of an assumption that, unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction, all disputes between the parties should be referred to arbitration where an arbitration clause exists." (per McGovern J. at para. 19, page 11)

57. The court held that the provisions of clause 13.2 were wide enough to cover the issue of the validity of the recommendation *"quite apart from the general presumption that exists in favour of such an interpretation"* (para. 25, page 12). The court, therefore, referred the parties to arbitration under Article 8(1) of the Model Law.

58. In *Kellys of Fantane*, McGovern J. again quoted with approval what Lord Hoffman had said at paras. 5 and 7 of his opinion in *Fiona Trust* and held that the arbitration clause at issue contained clear language indicating that the parties intended to divide the issues between those which had to be dealt with at arbitration and those which required to be dealt with by the court. The court was satisfied that the clause was clear in its terms and had a rational purpose which was to avoid a second layer of dispute resolution. He held, therefore, that the dispute was one which the parties had agreed would be dealt with by the courts and not at arbitration. This is a good example of where the wording used by the parties in the arbitration agreement was sufficient to displace the presumption of a "one-stop" dispute resolution process.

59. In *Achill*, McGovern J. had to consider whether the dispute which had arisen between the parties and which had been referred to an arbitrator fell within the terms of the arbitration clause in the contract at issue. Having referred to para. 5 of the opinion of Lord Hoffman in *Fiona Trust* (at para. 24, p. 11 of his judgment), McGovern J. stated:-

"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." (para. 25, page 11)

60. For reasons on which it is unnecessary to elaborate here, the court held that, on a proper construction of the clause at issue, the appointment of the arbitrator was invalid and made an order to that effect under Article 16(3) of the Model Law.

61. Finally, in *Mayo County Council v. Joe Reilly Plant Hire Limited* [2015] IEHC 544 (*"Reilly"*), McGovern J. was required to construe the terms of an arbitration clause arising in a contract for the remediation of a landfill site. The issue arose in a challenge to the jurisdiction of an arbitrator under Article 16 of the Model Law. The respondent carried out works under the contract. The engineer under the contract issued a final determination directing that a sum of money be paid to the respondent. The money was paid by the applicant and accepted by the respondent without qualification. Two and a half years later, the respondent issued a notice of dispute on the applicant and subsequently served a notice of referral of the dispute to arbitration. The applicant argued that because the respondent had accepted payment some years previously without qualification there had been accord and satisfaction. The arbitration clause required arbitration in respect of *"a dispute of any kind whatsoever aris[ing] between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works..."*. The applicant contended that if there was accord and satisfaction (as it claimed), that brought into existence a further agreement which superseded the contract in its entirety. In an argument which has echoes of the case made by the contractor in the present case, the applicant accepted that there was a valid arbitration clause and did not contend that the dispute was outside the scope of the clause but rather argued that the clause was

no longer operative by reason of the alleged accord and satisfaction. McGovern J. rejected the challenge to the jurisdiction of the arbitrator and held that he had jurisdiction in relation to the dispute. He further held that the question as to whether the respondent was estopped from seeking any further payment on foot of the applicant's assertion that there was accord and satisfaction was a matter for the arbitrator to determine. In other words, the issue of accord and satisfaction arose by way of defence to the claim made by the respondent in the arbitration, did not go to the issue of the arbitrator's jurisdiction and could be dealt with by the arbitrator.

Application of Principles to this Case

(a) Principal Issue

62. The contractor contends that the dispute the subject of its proceedings falls outside the scope of the arbitration clause as the cause of action asserted by it is an account stated and settled (that cause of action being described by Lord Atkin in the House of Lords *Siquiera v. Noronha* [1934] AC 332). The contractor contends that its claim is not made under the PWC and, therefore, the dispute between the contractor and the Board in relation to the claim is not a dispute which arises *"under"* the PWC. Therefore, it claims that the dispute does not fall within the arbitration clause contained in clause 13.2. The Board contests this approach and submits that having regard to the broad interpretation which should be given to the arbitration agreement and having regard to the manner in which the claim is pleaded in the summary summons in the proceedings, the dispute as to the contractor's entitlement to payment of the sum claimed is a dispute arising "*under*" the PWC which falls within the scope of the arbitration agreement.

63. It seems to me that the answer to this question is clear. The principles arising from the decision of the House of Lords in *Fiona Trust*, as approved and applied by

the courts in this jurisdiction under the 2010 Act, require me to give a broad interpretation to the provisions of clause 13.2. I must also start on the basis of a presumption or assumption that the parties intended all of the disputes arising between them in the course of their relationship to be covered by the dispute resolution scheme contained in their contract, the PWC. If the parties to a contract intend that certain disputes which arise between them in the course of their relationship are required to be referred to arbitration but others could be the subject of court proceedings, it is necessary for the parties to so provide in clear terms in their contract. No such provision has been made in the contract at issue in the present case, namely, the PWC.

64. Construing the provisions of clause 13.2 broadly, as I am required to do, I am satisfied that it does cover the dispute which the contractor has raised in the summary proceedings before the court. The fact that the proceedings are stated to be based upon an account stated and settled does not affect that conclusion. It is quite clear from the summary summons (and is so pleaded) that the contractor was appointed pursuant to the PWC, that those works under the PWC were certified pursuant to the PWC and that the contractor sent its final account for payment by the Board. All these events and steps took place and arose under or pursuant to the PWC. The meeting on 27th September, 2016, at which it is alleged the final account was agreed giving rise to the alleged account stated and settled arose in the context of the PWC and not otherwise. The parties would not have met were it not for the fact that they were parties to the PWC and works were carried out by the contractor under that contract for which it was seeking payment. The basis for the alleged account stated and settled is the agreement allegedly reached at that meeting. The meeting was inextricably bound up with the PWC as was the agreement allegedly reached at it.

Any dispute in relation to the existence and terms of the alleged agreement does, therefore, in my view, constitute a dispute which "*arises under the Contract*" for the purposes of clause 13.2 (and clause 13.1.1) of the PWC as those words are to be correctly construed.

65. The Board has sought to raise various grounds of defence to the claim based on the agreement allegedly reached at the meeting. The Board may or may not be correct in all or any of the defences which it seeks to raise and I express no conclusion in relation to the prospects of success of any of those defences. Indeed, as was stated by McGovern J. in *BAM*, it is not for the court to enquire whether one party's position in the dispute is tenable or not or whether the dispute sought to be referred to arbitration is "*real and genuine*", as a decision on the merits is one for the arbitrator to make (see *BAM*, at para 21, p. 12).

66. However, it is the case that there is a dispute on several grounds in relation to the enforceability and other aspects of the agreement allegedly reached at the meeting on 27th September, 2016. In my view, that dispute is clearly one which falls within the broad terms of the arbitration agreement contained in clause 13.2. Although not a perfect analogy, it seems to me that just as the issue as to accord and satisfaction was held by McGovern J. in *Reilly* to be an issue to be decided by the arbitrator rather than an issue going to jurisdiction, the alleged entitlement of the contractor to recover on foot of an account stated and settled is a matter which can be and must be decided by an arbitrator appointed under clause 13.2 of the PWC. Such a conclusion would also, in my view, be entirely consistent with the approach taken, and the conclusion reached, by Charleton J. in the High Court in *O'Meara* where disputes in relation to claims under contract and in tort were held to come within the terms of the arbitration agreement at issue in that case.

67. I am satisfied, therefore, that the dispute which has arisen in relation to the contractor's entitlement to recover on foot of an account stated and settled from the Board is a dispute which "*arises under the Contract [i.e. the PWC]*" and, therefore, falls within the arbitration agreement contained in clause 13.2 of the PWC. It is a dispute which must be determined at arbitration.

(b) Subsidiary issues

68. The contractor has raised two further grounds on which it contends that the Board is not entitled to the order sought referring the parties to arbitration under Article 8(1) of the Model Law. The contractor's contentions in that regard can be briefly dealt with as, in my view, there is no real substance to them.

69. The first subsidiary argument raised by the contractor is that the Board is estopped from invoking the arbitration agreement contained in clause 13.2 of the PWC. It contends that the agreement reached at the meeting on 27th September, 2016, gives rise to an estoppel in favour of the contractor and against the Board, such that the Board is estopped from relying on the arbitration agreement. The contractor relies on the decision of the Supreme Court in *Furey v. Lurgan-ville Construction Company Limited* [2012] 4 I.R. 655 (*"Furey"*). The contractor, in particular, relies on a passage from the judgment of Clarke J. in that case. At para. 35 of his judgment, Clarke J. stated that:-

> "*I agree that it is possible that a party, otherwise entitled to rely on an arbitration clause, may, by conduct, create an estoppel which prevents that party from being able to continue to place reliance on an entitlement to have the matter referred to arbitration. It follows that it is possible, in theory, that there may be cases where, although no step (within the meaning of s.5 of the 1980 Act) has been taken in the proceedings by a defendant, nonetheless the*

defendant has, by conduct, become estopped from relying on an arbitration clause. However, it seems to me that counsel for Lurgan-ville was correct when she argued that it is necessary in those circumstances that there be a clear unequivocal promise or representation to the effect that the arbitration clause would not be relied on and also that the plaintiff had acted on the basis of that representation." (per Clarke J. at para. 35, pp. 667-668).

70. The contractor contends that the Board did make a "*clear, unequivocal promise or representation*" to the effect that the arbitration agreement would not be relied on, by agreeing the contractor's account at the meeting on 27th September, 2016. It further contends that the contractor acted on that representation by not pursuing its greater claim under the PWC, by seeking payment on foot of the agreed account on the basis of an account stated and settled and by commencing proceedings to recover the amount so agreed. In addition to relying on *Furey*, the contractor also relies on the decision of the High Court (McGovern J.) in *Go Code Limited v. Capita Business Services Limited* [2015] IEHC 673 ("*Go Code*"). In that case McGovern J. applied *Furey* and found on the facts that no estoppel arose as there was no "*unequivocal promise or representation*" such as would be necessary to give rise to an estoppel of the type referred to by Clarke J. in *Furey*. It might be observed that while *Furey* was a case decided under the pre-2010 Act regime, *Go Code* was decided in the context of the 2010 Act and, in particular, in the context of an application to refer the parties to arbitration pursuant to Article 8(1) of the Model Law.

71. While accepting that an estoppel could arise in certain circumstances, provided the requirements set out by Clarke J. in *Furey* and applied by McGovern J. in *Go Code* were complied with, the Board contends that no estoppel can arise in the

present case as there was no "*clear unequivocal promise or representation*" by the Board to the effect that it would not rely on the arbitration agreement contained in clause 13.2 of the PWC.

72. I agree with the submission made on behalf of the Board in this regard. 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. In my view, neither of those conditions is satisfied in the present case.

73. In the first place, there is no evidence whatsoever of any promise or representation by the Board that it would not seek to rely on the arbitration agreement contained in clause 13.2 of the PWC in the event that any dispute arose arising from the alleged agreement reached at the meeting on 27th September, 2016. It appears from the evidence available on this application that the question of the arbitration agreement did not arise at all at that meeting. The agreement alleged to give rise to the account stated and settled is disputed on a number of grounds. There is, in my view, no evidence on which I could safely conclude that the Board made a "*clear and unequivocal promise or representation*" to the effect that it would not be relying on the arbitration agreement contained in clause 13.2 in the event that any dispute arose in relation to the agreement alleged to have been reached at the meeting.

74. In the second place, I am not satisfied that the evidence set out in the affidavits sworn by Mr. Lahart on behalf of the contractor establishes that the

proceedings were commenced on foot of any alleged promise or representation to the effect that the arbitration agreement contained in clause 13.2 would not be relied upon.

75. In those circumstances, I reject the contractor's contention that the Board is estopped from relying on the provisions of clause 13.2 of the PWC.

76. The final argument raised by the contractor in resisting the Board's application under Article 8(1) of the Model Law is that the arbitration agreement contained in clause 13.2 of the PWC was superseded by the agreement allegedly reached at the meeting on 27th September, 2016, such that clause 13.2 is now "*inoperative*" as that term is used in Article 8(1). The Board does not accept that the agreement allegedly made at the meeting in September 2016 is such as to supersede or render "*inoperative*" the arbitration clause contained in clause 13.2.

77. I cannot agree with the contractor's argument on this issue either. It seems to me that the contractor's argument in respect of this issue is a variant of, and is closely related to, the argument made by it to the effect that the dispute between the parties is not one which arises "*under*" the PWC as it arises under and in the context of a separate agreement, being that reached in September 2016 on foot of which it is alleged the account was stated and settled. I do not accept that any agreement which may have been reached at the meeting in September 2016 constitutes a separate agreement which takes any dispute in relation to that agreement outside of the scope of the arbitration agreement contained in clause 13.2, for all of the reasons discussed earlier in relation to the proper construction of the arbitration agreement. For those reasons, I was not satisfied that the parties had intended that certain of their disputes be referred to arbitration but that others could be referred to court when all of those disputes arose under and in the context of the PWC. I am not satisfied, therefore, that

the fact that a separate agreement may have arisen on foot of the account stated and settled (and that is in dispute between the parties) takes any dispute in relation to that agreement outside the scope of the arbitration agreement or otherwise renders the arbitration agreement "*inoperative*" under Article 8(1) of the Model Law. Therefore, I reject the contractor's submission on this subsidiary issue.

Conclusions

77. In conclusion, I am satisfied that clause 13.2 of the PWC contains an arbitration agreement which covers the dispute in relation to the claim which the contractor has brought by way of summary proceedings in the High Court. I am also satisfied that the Board is not estopped from relying on the provisions of clause 13.2 and that there is no other basis on which that provision is or has become "*inoperative*". In those circumstances, I am required by Article 8(1) of the Model Law to refer the parties to arbitration in accordance with the provisions of clause 13.2 of the PWC.

78. I confirm, lest there be any doubt about it, that the arbitrator appointed under clause 13.2 of the PWC would have jurisdiction to determine any dispute between the parties concerning the existence, enforceability and any other issues in relation to the account allegedly stated and settled.

79. I will, therefore, make an order pursuant to Article 8(1) of the Model Law referring the parties to arbitration in accordance with clause 13.2 of the PWC.

80. In light of my conclusions in relation to Article 8(1) of the Model Law, it is unnecessary for me to consider the alternative relief sought by the Board staying the proceedings to enable conciliation to take place under clause 13.1 of the PWC.