Mike Mitchell and **Margo Mitchell**, Plaintiffs v. **Mulvey Developments Limited, Steven Garvey** (practising under the style and title of **Adept Consulting Engineers**), **Thomas Mulvey, Robert Mulvey, Design Development Services Limited** and **The National House Building Guarantee Company Limited**, Defendants [2012] IEHC 561, [2009 No. 4373 P]

High Court 20th December, 2012

Arbitration – Issuing of proceedings – Estoppel – Engagement in proceedings by defendant – Subsequent invocation of arbitration clause – Whether defendant estopped by conduct from relying on arbitration clause – Whether seeking statement of claim constituting engagement in proceedings – Arbitration Act 2010 (No. 1), s. 6 – United Nations Commission on International Trade Law Model Law on International Commercial Litigation, 1985.

Contract – Interpretation – Change of name – Change of title of Minister of State – Whether change of title of Minister of State rendering contractual clause inoperative – Environment, Heritage and Local Government (Alteration of Name of Department and Title of Minister) Order 2011 (S.I. No. 193 of 2011) – Ministers and Secretaries Act 1924 (No. 16), ss. 1 and 2 – Ministers and Secretaries (Amendment) Act 1939 (No. 36), s. 6.

Section 6 of the Arbitration Act 2010 provides:-

> "Subject to this Act, the Model Law shall have the force of law in the State and shall apply to arbitrations under arbitration agreements concerning—
> (a) international commercial arbitrations, or
> (b) arbitrations which are not international commercial arbitrations."

Article 8(1) of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration 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."

The plaintiffs were owners of property which they contended was defectively constructed. In addition to the developer, the architect and the original owner of the lands in question, the plaintiffs also sued the sixth defendant pursuant to a guarantee under the "Home Bond Agreement" whereby it agreed to repair defectively constructed private dwellings in the event that one of its members defaulted on an obligation to repair. The agreement contained an arbitration clause. The clause stated that any dispute

between the plaintiffs and the sixth defendant would be referred to arbitration, with the decision on the arbitrator to be appointed, in the absence of agreement, being made by the Chairman of the sixth defendant after consultation with the Minister for the Environment and Local Government.

The sixth defendant was first notified of the alleged defects in the properties in 2005. Following the appointment of a contractor by the sixth defendant and the discharge of that contractor by the plaintiffs, the plaintiffs issued proceedings in 2010. The plaintiffs issued a motion for judgment in default in appearance, following which the sixth defendant entered an appearance. The sixth defendant then sought a statement of claim from the plaintiffs and following receipt further requested that the plaintiffs not issue a motion for judgment in default of defence. The plaintiffs did not issue that motion and approximately three months later, the sixth defendant invoked the arbitration clause for the first time, to which the plaintiffs objected. The sixth defendant gave no explanation for the delay in invoking the clause. The plaintiffs contended that the sixth defendant was estopped by its own conduct from relying on the arbitration clause, by virtue of its delay in invoking same, which delay they claimed was inherently prejudicial.

The sixth defendant sought an order that the proceedings be stayed pursuant to s. 6 of the Arbitration Act 2010 and article 8 of the UNCITRAL Model Law. The sixth defendant contended that they had not engaged with the merits of the case and that there had not been a clear unequivocal promise or representation that the arbitration clause would not be relied upon. The plaintiffs contended that the arbitration clause was rendered inoperative by reason of the change of name and title of the Minister for the Environment and Local Government to that of the Minister for the Environment, Community and Local Government.

Held by the High Court (Hogan J.), in refusing to stay the proceedings, 1, that the sixth defendant was precluded by its conduct from invoking the arbitration clause and had forfeited its right to invoke that clause, where it had represented that it was going to engage in the proceedings and defend the case on its merits. An unqualified letter that sought delivery of a statement of claim seemed to amount to an implied representation that the sixth defendant intended to contest the proceedings and suggested an engagement with the courts.

Furey v. Lurgan-ville Construction Co. Ltd. [2012] IESC 38, [2012] 4 I.R. 655 distinguished.

2. That the plaintiffs had altered their position to their detriment in acting on the strength of representations made by the sixth defendant. It could not be realistically supposed that the plaintiffs' solicitors would have given forbearance had it been suggested that the sixth defendant might invoke the arbitration cause and thus abort the entire legal process.

Furey v. Lurgan-ville Construction Co. Ltd. [2012] IESC 38, [2012] 4 I.R. 655 distinguished.

Obiter dictum: The sixth defendant was entitled to know the case against it before deciding whether to invoke the arbitration clause. It would have been possible for a request for the statement of claim to have been made while simultaneously reserving the right to invoke the arbitration clause. Had the sixth defendant reserved that right, it would have put the plaintiffs on notice of that possibility.

3. That by virtue of s. 2 of the Act of 1924, the Minister was a corporation sole and enjoyed perpetual succession. All that had changed was simply a matter of nomenclature. The Minister, irrespective of his styling, remained the same Minister. It followed that the same legal entity remained as a party to the contract and that the arbitration clause was fully effective as a matter of principle.

Case mentioned in this report:-

Furey v. Lurgan-ville Construction Co. Ltd. [2012] IESC 38, [2012] 4 I.R. 655.

Motion on notice

The facts have been summarised in the headnote and are more fully set out in the judgment of Hogan J., *infra*.

On the 15th May, 2009, the plaintiffs issued a plenary summons against the first and second defendant. The third to sixth defendants were joined to the proceedings by order of the Master of the High Court on the 10th February, 2010. On the 7th March, 2012, the sixth defendant issued a notice of motion pursuant to s. 6 of the Arbitration Act 2010 and article 8 of the UNCITRAL Model Law on International Commercial Litigation, seeking to refer the plaintiffs' proceedings to arbitration.

The motion was heard by the High Court (Hogan J.) on the 10th December, 2012.

Frank Beatty for the sixth defendant.

Damien Keaney for the plaintiffs.

Cur. adv. vult.

Hogan J. 20th December, 2012

[1] Under what – if any – circumstances is a party to an arbitration clause estopped or otherwise precluded by his or her own conduct from invoking the terms of that clause? This is the principal issue which arises for determination on this application to stay proceedings pursuant to s. 6 of the Arbitration Act 2010. The problem arises in the following way.

[2] The plaintiffs are the owners of certain property situate at Ocean Links, Strandhill, Co. Sligo. If their contentions are correct, then the property which they purchased in 2005 was seriously defective. To this end they have sued both the developer (the first defendant) and the original owners of the lands, the third and fourth defendants, who were both also directors of the first defendant company. The plaintiffs have also sued their architect, who is the second defendant.

[3] The sixth defendant is sued pursuant to the guarantee which it gave under the "Home Bond Agreement" whereby it agreed to repair defectively constructed private dwellings in the event that one of its members defaulted on its obligation to effect such a repair.

[4] It is not disputed but that the agreement contains an arbitration clause, although the plaintiffs deny the validity of that clause and maintain that it is inapplicable in the present case. They also contend – and, as we have noted, this is the essential issue for resolution on this motion – that the sixth defendant is estopped by its own conduct in relying on the terms of the arbitration clause contained at para. 6.1 of the agreement.

[5] The clause itself provides in relevant part that:-

> "Any dispute or difference which arises between the purchaser and/or [the sixth defendant] and/or the Member in connection with or arising in relating to this agreement shall be referred to arbitration and the final decision of the arbitrator to be appointed (in the absence of agreement between the parties) on the application of a party to the dispute or difference to the Chairman of [the sixth defendant], for the time being after consultation with the Minister for the Environment and Local Government."

Whether the arbitration clause remains effective

[6] Before considering the broader question of estoppel by conduct, it is necessary to examine the first point taken by the plaintiffs, which is that the clause has been rendered inoperative by reason of the change of name and title of the Minister from that of the Minister for the Environment and Local Government to that of the Minister for the Environment, Community and Local Government. In my view, this point is entirely unsustainable for the following reasons.

[7] Following the establishment of the State in 1922, the Oireachtas quickly acted to ensure that Government departments were placed on a proper statutory footing and did not depend for their existence on some form of pre-existing Crown prerogative. Thus, s. 1(iv) of the Ministers and

Secretaries Act 1924 created the Department of Local Government and Public Health. Section 2 of the Act of 1924 provides that Ministers of State have legal personality and enjoy perpetual succession.

[8] Next, s. 6(1)(a) of the Ministers and Secretaries (Amendment) Act 1939 empowers the Government to alter the name of any Department of State. Section 6(1)(b) empowers the Government to alter the title of any Minister of State. This is precisely what was done by art. 4(b) of the Environment, Heritage and Local Government (Alteration of Name of Department and Title of Minister) Order 2011 (S.I. No. 193) which altered the name of the Minister to that of the Minister for the Environment, Community and Local Government.

[9] It is true that art. 4 is prefaced by the words "in any enactment or any instrument made under an enactment" and it is said that this change is effective only for statutes and statutory instruments and does not apply to private contractual agreements such as the one at issue here. This, however, is to miss the point so far as the contract is concerned. By virtue of s. 2 of the Act of 1924, the Minister is a corporation sole and enjoys perpetual succession. All that has changed is simply a matter of nomenclature: the Minister – irrespective of his or her styling as Minister for the Environment and Local Government (as formerly) or Minister for the Environment, Heritage and Local Government (as presently) – remains the same Minister. It follows that the same legal entity remains as a party to the contract and all that has happened is that the Minister has suffered a name change.

[10] It follows, therefore, that the arbitration clause is fully effective as a matter of principle. It remains now to consider whether the sixth defendant is estopped by its conduct from exercising its rights under that clause.

Whether the sixth defendant is estopped from exercising its rights under the arbitration clause?

[11] The gist of the plaintiffs' case is that the sixth defendant should be adjudged to have forfeited its right to elect for arbitration by virtue of its delay in seeking to invoke the arbitration clause, which delay is said to have been inherently prejudicial. Here it is necessary to sketch out some of the essential background facts.

[12] The sixth defendant was first notified of these complaints as early as 2005. In November, 2005 the sixth defendant wrote to the plaintiffs indicating that it was accepted that "there is a defect in the dwelling which falls within the terms of [the sixth defendant's] cover". The letter then gave

details of the defects which related to moisture penetration on the balcony which, in turn, had led to moisture ingress to ceilings and walls of the ground floor. The sixth defendant then contacted the builder, the second defendant. Various assurances were given by the second defendant that the building would be repaired, but to no avail.

[13] On the 28th March, 2007, the plaintiffs' solicitors wrote to the sixth defendant complaining that living conditions for the plaintiffs and their young family "have become intolerable", as there was "constant water ingress into the dwellinghouse". The plaintiffs' solicitors went on to the threaten litigation. The sixth defendant then appointed a contractor who reported in June, 2007 on remedial works that were necessary to be carried out. Efforts were made by the sixth defendant to have a contractor effect certain repairs in the autumn and early winter of 2007/2008, but the appointed contractor was ultimately discharged by the plaintiffs before any significant works could be carried out.

[14] By 2009 the plaintiffs had retained a new firm of solicitors and throughout 2009 that firm corresponded with the sixth defendant, while constantly threatening litigation. A formal letter before action was sent on the 25th January, 2010. Proceedings were served on the 24th March, 2010, but the sixth defendant only entered an appearance on the 18th April, 2011, *i.e.*, over a year later. In the meantime the sixth defendant had sought and obtained access to the plaintiffs' property in June, 2010 for the purposes of carrying out a detailed inspection. The plaintiffs' solicitor then wrote to the sixth defendant on the 13th August, 2010, seeking to ascertain the sixth defendant's position regarding the claim after the inspection. There was, however, no response to this request.

[15] The plaintiffs then found themselves obliged to issue a motion for judgment in default of appearance as all but the second defendant had failed to enter an appearance. Judgment was given by Ryan J. on the 11th April, 2011, against the first and third defendants in default of appearance. The curial part of that order recites that the sixth defendant was represented by counsel and, furthermore, that a statement of claim was filed in court *in lieu* of delivery. The order then recited that the sixth defendant was obliged to file an appearance within one week and to file a defence within four weeks.

[16] The sixth defendant finally entered an appearance on the 18th April, 2011. No explanation has been offered for the delay in filing such an appearance, but, in truth, it is difficult to understand why there should have been *any* delay in taking this routine step, much less a delay of over one year and one necessitating an application by the plaintiffs to court for

judgment. The sixth defendant's solicitors then wrote in June, 2011, seeking delivery of a statement of claim. A copy was furnished by letter dated the 17th August, 2011, and a copy of the defence was requested. It has to be said that this exchange is puzzling, since it is perfectly clear from the order of Ryan J. that the sixth defendant was already in possession of the statement of claim at the date of the making by him of his order. It is equally curious that neither solicitor appears to have alluded to this issue.

[17] Here again further delay enters the scene. The plaintiffs' solicitors wrote on the 9th September, 2011, requesting a defence, but on the 30th September, 2011, the sixth defendant's solicitors replied requesting the plaintiffs not issue a motion for judgment in default of defence. On the 28th November, 2011, the plaintiffs' solicitors wrote again referring to previous correspondence and stated:-

> "We have now afforded your client ample opportunity to provide your office with instructions and have exercised forbearance in respect of issuing a motion in default of defence."

[18] The letter writer called upon the sixth defendant to deliver a defence within seven days or else face another application for judgment in default of defence. By letter dated the 23rd December, 2011, the solicitors for the sixth defendant wrote to the plaintiffs' solicitors invoking the arbitration clause for the first time. This letter prompted the plaintiffs' solicitors to protest in strong terms in their reply of the 5th January, 2012, at the belated nature of the sixth defendant's endeavour to invoke the arbitration clause.

[19] One cannot but sympathise with their frustration and with that of their clients. Whatever the precise rights and wrongs of the matter, it seems evident that a private dwelling has been constructed in a defective fashion. This does not appear to be seriously disputed by the sixth defendant. While – perhaps – some of the delay may possibly be attributed to the plaintiffs and they may – perhaps – be faulted in discharging the contractor appointed by the sixth defendant, the underlying reality is that the sixth defendant has been aware since at least November, 2005 that the plaintiffs' house was defectively constructed. Moreover, the sixth defendant took over one year to enter an appearance and delayed for a further eight months before it purported to invoke the arbitration clause for the first time. If the sixth defendant intended to invoke the arbitration clause, it is rather difficult to understand why it waited so long before electing to do so. I fear that I cannot avoid observing that this is all the more unsatisfactory given that the sixth defendant has given no explanation for this delay.

The decision of the Supreme Court in Furey v. Lurgan-ville Construction Co. Ltd. [2012] IESC 38, [2012] 4 I.R. 655

[20] It is, however, necessary at this juncture to examine the decision of the Supreme Court in *Furey v. Lurgan-ville Construction Co. Ltd.* [2012] IESC 38, [2012] 4 I.R. 655. In that case the parties had entered into a building contract in 2002 whereby the first defendant agreed to construct a dwelling. The plaintiff purchasers commenced proceedings in June, 2005. The defendants immediately entered appearances. A motion for judgment in default of defence came before this court in June, 2006 and the defendants' solicitors sought the consent of the plaintiffs' solicitors for an extension of time and on that basis a consent order was duly made. Some ten days before a second motion for judgment came on for hearing the defendants' solicitors asserted for the first time the right to invoke the arbitration clause which was contained in the building contract.

[21] In his judgment, Clarke J. stressed at p. 665 that no step had been taken in the proceedings within the meaning of s. 5 of the Arbitration Act 1980 since the defendants had neither engaged with the merits of the case nor taken action "in invoking the jurisdiction of the court which leads to costs". So far as the estoppel point was concerned Clarke J. observed at p. 668 that in this context there would need to be "a clear unequivocal promise or representation to the effect that the arbitration clause would not be relied upon" and that the plaintiffs had acted upon that promise.

[22] Was that the case in *Furey v. Lurgan-ville Construction Co. Ltd.* [2012] IESC 38, [2012] 4 I.R. 655? Clarke J. at p. 668 did not think so:-

> "[36] It is true that the assertion of an entitlement to arbitrate came late in the day. It is also true that there was some additional correspondence after the motion for judgment was dealt with by consent. However, it does not seem to me that anything in the conduct of Lurgan-ville can be characterised as amounting to a clear and unequivocal representation or promise that Lurgan-ville did not intend relying on the arbitration clause. The arbitration clause did not come up at all. I am not, therefore, satisfied that there is anything on the facts of this case which could be said to amount to a sufficient representation or promise that the arbitration clause was not to be relied on by Lurgan-ville."

Whether the decision in Furey v. Lurgan-ville Construction Co. Ltd. [2012] IESC 38, [2012] 4 I.R. 655 *also governs the present case*

[23] Counsel for the sixth defendant forcefully and eloquently argued that the decision in *Furey v. Lurgan-ville Construction Co. Ltd.* [2012] IESC 38, [2012] 4 I.R. 655 completely governed the present case. In both cases consent to an extension of time for the delivery of a defence was sought and in both cases orders to this effect were made. In both cases the arbitration clause was invoked very belatedly: in *Furey v. Lurgan-ville Construction Co. Ltd.* [2012] IESC 38 the period was 17 months after the service of the proceedings, whereas in the present case the period was four months longer again.

[24] There are, however, some differences as well. As we have seen, the sixth defendant's solicitors sought delivery of a statement of claim in June, 2011, after an order had been made providing for an extension of time for the entry of an appearance and the delivery of a defence. Passing over the question as to whether the sixth defendant already had a copy of the statement of claim (as, judging by the recitals in the order of Ryan J., it would seem to have had), an unqualified letter of that kind would seem to amount to an implied representation at that juncture and in those circumstances that that defendant was intending to contest the proceedings. The context here clearly suggests an engagement with the court.

[25] I do not overlook here the fact that counsel stressed that the sixth defendant was entitled to know the case against it before electing to decide whether to invoke the arbitration clause. But it would have been perfectly possible for such a request to be made while reserving simultaneously the right to invoke the arbitration clause. Had the sixth defendant reserved unto itself that right in correspondence, it would at least have put the plaintiffs on their guard and alerted them to this very possibility.

[26] In any event, this correspondence did set in train a sequence of events in August and September, 2011 whereby the plaintiffs altered their position to their detriment. Following the delivery of the statement of claim in August, 2011, the plaintiffs' solicitors sought to compel the sixth defendant to deliver its defence. In their letter of the 30th September, 2011, the sixth defendant's solicitors expressly asked the plaintiffs' solicitors to take no steps "for now in relation to bringing a motion for judgment in default of defence", adding that they could confirm that their client "does not intend to delay in these matters". The plaintiffs' solicitors clearly acted on the strength of this representation, as no motion was issued and the letter referring the matter to arbitration only issued almost three months

later once a further motion was threatened. Can it be realistically supposed that the plaintiffs' solicitors would have given such forbearance had it ever been suggested prior to that point that the sixth defendant might invoke the arbitration clause, thus aborting the entire legal process?

[27] In these circumstances, I find myself coerced to the conclusion that by its conduct after April, 2011, the sixth defendant represented that it was going to engage in the proceedings and to defend the case on its merits. In these circumstances, I must hold that it has forfeited its right to invoke the arbitration clause. I appreciate that a similar claim did not prevail in *Furey v. Lurgan-ville Construction Co. Ltd.* [2012] IESC 38, [2012] 4 I.R. 655, a case with facts not dissimilar to the present one. Yet it seems implicit in the judgment of Clarke J. in *Furey* that the matter was finely balanced by reference to the particular facts of that case. Here it is the *additional* factors which were not present in *Furey* which I find tip the scales in the opposite direction: the correspondence requesting a statement of claim; further requests for forbearance following delivery of the statement of claim and the fact that the delay was several months longer. All of these factors certainly led the plaintiffs to believe – by the late Autumn, 2011, if not earlier – that the sixth defendant intended to contest the matter on its merits and the plaintiffs acted upon that assumption.

Conclusions

[28] It follows, therefore, that for all of these reasons, I find that the sixth defendant is precluded by its conduct from invoking the arbitration clause. I will accordingly refuse to make the order sought pursuant to s. 6 of the Act of 2010 staying the proceedings.

Solicitors for the sixth defendant: *Crowley Millar*.

Solicitors for the plaintiffs: *McDermott Creed & Martyn*.

Eoin Byrne, Barrister
