THE HIGH COURT

[2012 No. 7902 P.]

BETWEEN

FRANMER DEVELOPMENTS LIMITED

PLAINTIFF

AND

L&M KEATING LIMITED, NEIL BENNETT TRADING AS NEIL BENNETT ASSOCIATES, AIDEN G. WALSH, PATRICK J. RYAN, BRENDAN O'MARA, DERRY SCULLY, GERARD CAMPBELL TRADING AS BRUCE SHAW PARTNERSHIP AND HYNES FITZGERALD ARCHITECTURAL WINDOWS SYSTEMS LIMITED AND MALACHY WASLH AND COMPANY LIMITED TRADING AS MALACHY WALSH AND PARTNERS

DEFENDANTS

JUDGMENT of Mr. Justice Ryan delivered on the 4th June, 2014.

1. This is an application by the first defendant for an order under s. 6 of the Arbitration Act 2010 and Article 8 of the UNCITRAL Model Law or pursuant to the inherent jurisdiction of the Court staying the proceedings in the case pending the arbitration of the dispute as between the plaintiff and the first defendant under, and in accordance with, an arbitration agreement between those parties.

2. The plaintiff is a developer and the first defendant a building contractor. Those parties entered into a building contract in the standard RIAI form containing clause 38 providing for arbitration of disputes in or about April, 2007. The contract was for the building of 24 apartments in one block located at Kilrush, Co. Clare. The other defendants are respectively as follows: the second defendant is the architect; the third defendant, the quantity surveyor; the fourth defendant, a windows and doors domestic subcontractor retained by the first defendant building contractor; and the

fifth defendant is the consulting engineer engaged by the architect, the second defendant, in connection with the fire alarm system. The architect is nominated in the contract as is the quantity surveyor.

3. The dispute arose as a result of alleged substandard building works carried out on the apartments in Kilrush. The plaintiff's claim is that the defendants each failed in their individual contractual duties to carry out their work to an adequate standard. The allegations include failing to exercise due care and attention, failing to comply with building regulations, providing substandard materials and failing to carry out the development in accordance with the contract documents.

4. By plenary summons dated 9th August, 2012, and statement of claim dated 5th April, 2013, the plaintiff claims damages from the first, second and third defendants for alleged loss and damage arising out of breach of contract, negligence, breach of duty and/or breach of professional duty and breach of statutory duty and breach of retainer in respect of the development at Quay Mills, Kilrush, Co. Clare. The plaintiff seeks damages against the fourth defendant in respect of the windows and doors and associated remedial works and also claims damages against the fifth defendant arising out of the supervision of the supply and installation of the fire alarm.

Affidavit Evidence

5. The affidavit grounding the application is dated 3rd May, 2013 and sworn by Mr Louis Keating, managing director and owner of the first defendant.

a. He states that throughout the period of works on the Merchants Quay development, the plaintiff had the benefit of a full time clerk of works whose role was to oversee quality control. The clerk of works occasionally gave directions to the first defendant and had some

interaction with the design team on behalf of the plaintiff. Snagging of the building began in 2008 with a final list submitted by the architect in August of that year. This contained minor items that were being dealt with by the first defendant.

b. On 2nd March, 2009, the first defendant was informed by way of letter from the plaintiff of a number of additional defects, including a condemnation of the windows provided. Mr Keating avers that over the following three months every effort was made to address the outstanding snags onsite and suggestions for dealing with the windows were put to the architect and design team. He says that the plaintiff agreed in principle to the suggestions to remedy the windows but sought an undertaking in the form of a letter from the manufacturer, SAPA, which was not possible to secure. The plaintiff, he avers, sought warranties from him that were not required to be given under the terms of the building contract.

c. Mr Keating avers that every effort was made to reach agreement with the plaintiff to arrange remedial works from October, 2009 onwards. In April, 2010 the first defendant contacted the architect, Mr Neil Bennett, seeking the final certificate and outlining their intention to proceed to conciliation. Mr Bennett and Mr Aidan Walsh, the quantity surveyor, attempted to set up a conciliation process but the plaintiff did not participate. The first defendant received a 10-day notification that the final certificate would be issued, on the 23rd March, 2011, from Mr Bennett. On the 6th April, 2011, the plaintiff's solicitor was in contact seeking an arbitration hearing. It was Mr Keating's position at that

stage that the plaintiff company had been dissolved and had no legal existence. The RIAI confirmed, by letter of the 20th July, 2011, that there would be no arbitration. The final certificate was never furnished to the first defendant by Mr Bennett.

d. Mr Keating says that the plaintiff has since been restored to the register of companies and the objection on the ground of its capacity no longer exists. His preferred course of dealing with the matters is arbitration as set out in clause 38(b) of the Articles of Agreement. He argues that the first defendant is entitled to refer the dispute to arbitration because of clause 38(b) and also because of the plaintiff's failure to engage with the previously arranged conciliation process.

6. Mr Dermot Reidy, director of the plaintiff, swore a replying affidavit of the 15th November, 2013. He states that the arbitration clause in the agreement does not bind the second, third, fourth or fifth named defendants to arbitration. His belief is that if only the portion of the dispute relating to the first defendant is sent to arbitration, that will be unsatisfactory and, in effect, artificial, because the liability of the first defendant cannot be determined without reference to the other defendants. He avers that the only forum which could effectively deal with each party's liability is this Court, as to act otherwise would be a waste of court time and could give rise to an injustice between the parties. The allegations against the defendants are interlinked and the matter should be dealt with together in order to avoid any risk of contradictory findings being made.

7. In oral submissions Mr Patrick Dillon Malone S.C., for the first defendant/ applicant, said that s. 6 of the Arbitration Act 2010 is a general provision whereby the Model Law is adopted.

a. The relevant provision of the Model Law is Article 8 which states that the court "shall refer the parties to arbitration unless it finds the agreement is null and void, inoperative or incapable of being performed". The use of the word 'unless', he submits, indicates the mandatory character of the court's jurisdiction.

b. In regard to the exceptions to referring a matter to arbitration, he submitted that null and void will usually involve a defective or invalid formation, typically as a result of fraud, duress, illegality, certain types of mistake or lack of capacity. An inoperative agreement tends to arise where the agreement may once have been valid but has ceased to have effect by reason of revocation, *res judicata*, or where the time limit has expired. With the third exception, namely, "inoperative or incapable of being performed", counsel interpreted this to mean where the arbitration process cannot be realised or where the terms of the arbitration agreement itself are so vague or contradictory that the Tribunal cannot ascertain the parties' intention.

c. The burden of proof is on an objector seeking to establish incapacity under Article 8(1).

8. Counsel referred to authorities.

a. In *Lucky-Goldstar International (H.K.) Limited v. Ng Moo Kee Engineering Limited* (10th May, 1993, Kaplan J.) the court held that the parties' agreement to arbitrate any disputes that might arise under the contract was not nullified because they chose to be bound by the rules of a non-existent organisation.

b. In *Furey & Anor. v. Lurgan-ville Construction Company Limited and Ors.* [2012] IESC 38, Clarke J referred to the issue of multiplicity of actions and observed that *Taunton-Collins v. Cromie & Ors.* [1964] 1 W.L.R. 633 had to be considered in terms of s. 4 of the United Kingdom Arbitration Act, 1950 which allows a court to stay proceedings if "it is satisfied that there is no sufficient reason why the matter should not be referred" to arbitration.

9. Mr Oisín Collins for the plaintiff submitted that in the Supreme Court's judgment in *Furey*, the remarks by Clarke J were *obiter dicta* and the particular point has not been determined conclusively in this jurisdiction.

a. Counsel accepted that Article 8 applies but submitted that the clause cannot be effected because the dispute that exists is one which cannot be separated out or distilled and cannot be dealt with practicably or possibly in an individual manner. The architect is an agent of the employer and is bound under the terms of the agreement, yet is not included in the arbitration agreement itself. The grounding affidavit outlines four disputes, (1) between the contractor and the employer, (2) the employer and the architect, (3) the architect and the contractor, and (4) the employer and the quantity surveyor. Counsel's argument is that the disputes should be dealt with together because the arbitration clause is not applicable to all of the parties. To deal with them separately would give rise to an impossibility and complete impracticality in terms of running the arbitration.

b. Counsel submits that the first defendant's defence is that all of the works done were certified by the architect. If this issue proceeds to

arbitration, it will result in a situation where the arbitrator will have to decide whether this is a defence in circumstances where he has no jurisdiction to determine any liability of the architect or make findings as to whether he did his job correctly in certifying, supervising, giving appropriate directions, providing appropriate drawings, carrying out site inspections and fulfilling the duties and obligations under his retainer because Mr Bennett is not bound by the arbitral clause. Because of this issue, any referral under clause 38(b) would be beyond the scope of the arbitrator and it would be beyond his jurisdiction to make an award in the circumstances.

c. If an award were to be made by an arbitrator, then under Article 36(1)(a)(iii) of the Model Law, the plaintiff would be back before the court seeking the enforcement of an award which contains a decision beyond the scope of the arbitration.

10. In reply, Mr Dillon Malone said that despite the tripartite aspect of the case, the arbitration clause stands alone and must be construed as a separate agreement.

Discussion

11. The plaintiff and the first defendant have a standard building contract incorporating the UNCITRAL Model law. The first defendant has invoked the arbitration clause – 38 – in the building contract. Clause 38(b) provides:-

> ".....either party shall forthwith give to the other notice of such dispute or difference and such dispute or difference shall be and is hereby referred to the arbitration and final decision of such person as the

parties hereunto may agree to appoint as Arbitrator..... the award of such Arbitrator shall be final and binding on the parties."

It follows that under clause 38(b), the applicant is *prima facie* entitled to have the matter referred to arbitration rather than litigated in court.

12. The plaintiff does not dispute that the arbitration clause is binding or that Article 8 of the Model Law, brought into effect by s. 6 of the Arbitration Act 2010, applies or that the building contractor is *prima facie* entitled under Article 8 to an order referring the matter to arbitration. However, the plaintiff claims that one or other of the exceptions contained in Article 8(1) of the Model Law applies in the circumstances of this case to deprive the contractor of the entitlement to have the matter referred to arbitration.

13. Article 8 is as follows:-

"Arbitration agreement and substantive claim before court

(1) 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 question in this case is whether the agreement is null and void or inoperative or incapable of being performed.

14. The reason advanced by the plaintiff is based on the nature of the case, involving as it does the other defendants and particularly the architect. Obviously, the architect is designated in the contract, which is entirely normal. The architect exercises a supervisory function on behalf of the employer. In this litigation, the plaintiff is suing the contractor and also the architect and the quantity surveyor, in

addition to the fourth and fifth defendants. The argument is based principally on the fact that the architect is involved in the case not only as supervisor on behalf of the employer company, but also as a defendant. In these circumstances, it is said that the arbitration cannot proceed as a discrete unit of dispute resolution independent of the determination of the other issues involving necessarily the other parties. Therefore, the arbitration is null and void, inoperative or incapable of being performed. The reality is that the case is based on the last of these propositions, namely, that the arbitration is, or will be, inoperative or incapable of being performed for the reasons mentioned.

15. The fact that the architect is sued and is also intimately involved in the case is not a reason for depriving the builder of its contractual right. It is common in building contract cases to find multiple defendants or that the issues are technical and complicated. The fact that the determination of a case involves greater complexity by proceeding in one way rather than another is not an important consideration, although if it comes to a judgment based on practicality, such a circumstance is obviously material. If the arbitrator decides that the builder is liable and makes an award that is a separate matter from whether any of the other defendants has a liability to the plaintiff.

16. The plaintiff does not suggest, and neither does the contractor, that the other parties can be made to join in an arbitration that is brought into being under the contract. If the builder's defence is that it took the steps that allegedly brought about the defects and the plaintiff's loss by reason of instructions given by the architect and succeeds thereby in defending the claim, that is a quite separate issue from the litigation by the plaintiff of its case against the architect that he was guilty of negligence in issuing certificates to the builder or for any other reason. The fact is

that if this matter went to hearing in the High Court with all the defendants present, as the plaintiff wishes it to be, there would still be separate consideration by the court in deciding as to the various liabilities. There is nothing to stop the other parties from making their claims in the existing High Court proceedings as against the building contractor because those matters will not be referred to arbitration. In any case, specific mention and provision can be made for the hearing of any such inter-defendant claims involving the building contractor when the court is making its order as to referring the plaintiff's claim against the builder to arbitration. It seems to me that the cases support this position. The cases opened are not directly on point and are not binding because they are *obiter* for various reasons.

17. Counsel for the applicant cited *Lucky-Goldstar International (H.K.) Limited v. Ng Moo Kee Engineering Limited* (10th May, 1993, Kaplan J.) in support of their claim. The difficulty there was that an entity was identified in the arbitration clause which had ceased to exist. The entity's rules were no longer applicable and it was therefore argued that this rendered the agreement inoperative or incapable of being performed. At para. 8 Kaplan J held:-

> "I cannot accept this argument. It is perfectly clear that the parties, by this clause, intended to arbitrate any disputes that might arise under this contract. This agreement is not nullified because they chose the rules of a non-existent organisation...."

18. As noted above in *Furey & Anor. v. Lurgan-ville Construction Company Limited and Ors.* [2012] IESC 38, Clarke J distinguished *Taunton-Collins v. Crombie & Ors.* [1964] 1 W.L.R. 633, in which Lord Denning M.R. said that it was "most undesirable that there should be two proceedings in two separate tribunals – one before the official referee, the other before an arbitrator – to decide the same questions

of fact" because such a general discretion did not apply in this jurisdiction. Mr Dillon Malone also referred to *Mount Juliet v. Mount Kennedy Developments* [2013] IEHC 286 where, despite a multiplicity of claims and the fact that notices of indemnity were served on both the third and fourth defendants, Laffoy J opted to refer the case to arbitration.

19. It seems to me that there is a more fundamental problem with the plaintiff's opposition to the reference to arbitration. Mr. Collins emphasised the practical inconveniences and difficulties which he says make the arbitration incapable of being performed with only the plaintiff and the first defendant as parties. I do not agree, as I have said. However, it seems to me that Mr. Collins' reading of the exceptions on which an arbitration may be refused under Article 8(1) is incorrect. The party is entitled to an order referring the matter to arbitration unless the court finds "that the agreement is null and void, inoperative or incapable of being performed". It is not that the court finds that the arbitration is inconvenient or even incapable of being performed but, rather, that the agreement for arbitration is so incapacitated.

20. It is indeed very difficult to see in what circumstances an arbitration that is otherwise legitimate could be null and void or inoperative or incapable of being performed because it will be complex or difficult or inconvenient.

21. In my opinion, there are no features of this case that make the agreement to arbitrate incapable of being performed within the meaning of Article 8. Neither do I agree that the matter is so complex or difficult that it would make an arbitration impracticable. If one were to adopt the meaning of Article 8 that is offered by the plaintiff, namely, that it is the difficulty of the arbitration that is relevant as a consideration, it is impossible to accept that the mere fact that the architect is also sued in the litigation and will be a certain or probable witness in the arbitration in the

claim between plaintiff and builder is a bar to referring the matter. Neither is that a reason for thinking that the matter could not be decided by an arbitrator.

22. It is also to be borne in mind that if this case proceeds to a hearing in court and is not referred to arbitration, it will be heard and determined by a judge sitting alone on the basis of distinguishing between the different discrete causes of action against the participating defendants. Although it is true that there is a certain obvious convenience in having all of the relevant parties before the court in the one proceeding, it does not follow that that is the only way of dissolving the disputes.

23. My conclusion accordingly is that there is no basis in Article 8(1) of the Model law on which to refuse the reference sought by the first defendant building contractor. In all the circumstances, therefore, I propose to accede to the application in the notice of motion and refer the matter to arbitration in accordance with clause 38(b) of the contract and Article 8 of the Model Law.