No Redaction Needed

HIGH COURT

[2019] IEHC 665

[2018 No. 541 S.]

BETWEEN

XPL ENGINEERING LIMITED

Approved Judgment

APPLICANT

AND

K & J TOWNMORE CONSTRUCTION LIMITED

RESPONDENT

JUDGMENT of Mr. Justice David Barniville delivered on the 11th day of October, 2019

Introduction

1. This is my judgment on an application by the defendant, K & J Townmore Construction Ltd, for an order under Article 8 (1) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") as incorporated into Irish law by s. 6 of the Arbitration Act, 2010 (the "2010 Act") referring the parties to arbitration in respect of the issues the subject of the proceedings. The defendant contends that there are two arbitration agreements between the parties which apply to the issues raised in the proceedings. While certain concessions have been made by the plaintiff, XPL Engineering Ltd, in respect of parts of the claims made by it in the proceedings, it has opposed the defendant's application to refer the parties to arbitration in respect of a substantial part of its claim and does so on a number of grounds.

2. For reasons set out in greater detail in this judgment, I have concluded that, in respect of that part of its claim which the plaintiff has sought to pursue in the proceedings, there is a dispute between the parties which is the subject of an arbitration agreement to which the plaintiff and the defendant are parties and, as a

consequence, I am required to accede to the defendant's application and to make an order under Article 8 (1) of the Model Law referring the parties to arbitration in respect of that part of the plaintiff's claim.

3. As regards the balance of the claims which the plaintiff initially sought to maintain in the proceedings, it seems to me that Article 8 (1) of the Model Law also requires that they should be referred to arbitration having regard to the terms of the relevant arbitration agreements. While the plaintiff has not formally consented to those claims being referred to arbitration under the relevant agreements, and has raised the possibility of the parties mediating in respect of those claims, it seems to me that Article 8 (1) of the Model Law requires the parties to be referred to arbitration in respect of them. However, I will discuss with counsel the terms of any order which might be made in that regard. I wish to make clear, however, that I am in no way precluding the parties from seeking to mediate those claims or indeed any of the plaintiff's claims. On the contrary, I would positively encourage mediation.

Factual background

4. The plaintiff is an engineering company. The defendant is a construction company. In 2014, the defendant engaged the plaintiff as a subcontractor to provide mechanical works on two contracts under which the defendant was the main contractor. The first subcontract was entered into between the parties on 8th May, 2014 and was in respect of a construction project which the defendant was carrying out, as main contractor, at Stanhope Green in Smithfield, Dublin 7. That subcontract was in the RIAI form of subcontract issued by the Construction Industry Federation in 1989 (the "Stanhope subcontract"). The second subcontract was in respect of a construction project which the defendant was carrying out, as main contractor, at St. Etchen's National School in Kinnegad, County Westmeath. The plaintiff was

appointed as the subcontractor responsible for mechanical works on the project on 23rd May, 2014. The parties entered into subcontract in respect of those mechanical works (in the form issued by the CIF in 2008 for use in conjunction with the forms of main contract for public works issued by the Department of Finance in 2007) on 5th June, 2014 (the "St. Etchen's subcontract" or the "subcontract", where appropriate). The Stanhope subcontract and the St. Etchen's subcontract each contain an arbitration clause.

Differences between the parties: commencement and progress of proceedings

5. Differences arose between the plaintiff and the defendant in the course of both of the subcontracts shortly after they commenced. The plaintiff claims that monies are due to it under both subcontracts which the defendant has not paid. The plaintiff issued plenary proceedings against the defendant in 2014 seeking payment of the sums which it claimed were due and owing to it by the defendant under the two subcontracts (the "plenary proceedings"). Having entered an appearance to those proceedings in September 2014, the defendant's then solicitors, Nash McDermott & Co., wrote to the plaintiff's then solicitors, Dore & Co., on 9th September, 2014 asserting that the plenary proceedings arose out of a dispute or disputes between the parties in relation to the two subcontracts and that those subcontracts required such disputes to be dealt with by way of conciliation or arbitration under the relevant subcontracts. They further stated that the defendant was "*now invoking the process as set out in the contractual documentation requiring the matters in dispute to be referred to conciliation/arbitration*". They warned that if the plaintiff sought to continue the plenary proceedings, an application would be made to the High Court to prevent the plaintiff from doing so having regard to the terms of the two subcontracts. Around the same time, further correspondence was sent to the plaintiff's then

solicitors by a firm of dispute resolution professionals, Quigg Golden, acting on behalf of the defendant disputing the plaintiff's claims and referring to the dispute resolution provisions contained in the two subcontracts. I refer later in this judgment to contents of some of those letters.

6. It appears that, for whatever reason (and none has been offered by the plaintiff in any of the affidavits on which it has sought to rely for the purposes of the defendant's application), the plaintiff did not pursue the plenary proceedings. Rather, the plaintiff issued a summary summons almost four years later, on 2nd May, 2018, seeking to recover from the defendant the sum of €187,194.91 allegedly due and owing to the plaintiff under the two subcontracts (the "summary proceedings"). The plaintiff claimed the sum of €108,083.87 under the St. Etchen's subcontract and the sum of €79,111.04 under the Stanhope subcontract.

7. The plaintiff brought a motion for liberty to enter final judgment in the total sum of €187,194.91 in the summary proceedings on 20th September, 2018. That motion was returnable before the Master on 4th December, 2018. The plaintiff's motion was grounded on an affidavit sworn by David McEnroe, a director of the plaintiff company, on 18th September, 2018. Mr. McEnroe has also sworn an affidavit for the purpose of opposing the defendant's application under Article 8 (1) of the Model Law.

8. With respect to the sum of €108,083.87 which the plaintiff was claiming in respect of the St. Etchen's subcontract, Mr. McEnroe referred to certain payments which were made to the plaintiff by the defendant under that subcontract in June and July 2014 and referred to one payment certificate (in the sum of €47,856.36) dated 14th July, 2014 in respect of which payment had not been made by the defendant. Mr. McEnroe also referred to the minutes of a site meeting held on 18th July, 2014 (the

"site minutes") which he contended recorded Keith Screeney, the defendant's managing director, confirming the percentage of work completed on the site by the plaintiff. He maintained that the total sum due by the defendant to the plaintiff under the St. Etchen's subcontract was €108,083.87.

9. In a subsequent replying affidavit sworn by Mr. McEnroe on 5th March, 2019, a calculation prepared by Mr. McEnroe was exhibited showing the total value of the works completed by the plaintiff in accordance with the defendant's alleged acknowledgment in the site minutes as being €92,011.02. Mr. McEnroe extrapolated from the site minutes an acknowledgement by the defendant that of the required works 72% had been completed by the plaintiff for which it had only been paid 17% of the total value due to it. Mr. McEnroe accepted in that affidavit (and accepted in response to the defendant's application under Article 8 (1) of the Model Law) that there is a dispute between the parties in relation to €16,072.75 of the total sum claimed by the plaintiff under the St. Etchen's subcontract. With respect to the Stanhope subcontract, Mr. McEnroe explained the basis on which the plaintiff was claiming the sum of €79,111.04 from the defendant. It is unnecessary to consider the basis on which that figure was arrived at as, in his replying affidavit, Mr. McEnroe accepted that there is a dispute between the parties in relation to that sum.

10. Ultimately, the plaintiff sought liberty to enter final judgment against the defendant in the total sum of €92,011.12 which represented a substantial part of its claim against the defendant under the St. Etchen's subcontract. The plaintiff accepted that there was a dispute in respect of part of its claim under that contract and the entirety of its claim under the Stanhope subcontract. The basis on which the plaintiff sought liberty to enter final judgment against the defendant in the sum of €92,011.12 was that it was contended by the plaintiff that that sum represented the value of the

works which the defendant had acknowledged had been completed by the plaintiff under the St. Etchen's subcontract.

11. The plaintiff's motion for liberty to enter final judgment was adjourned on consent on the return date (4th December, 2018) to 29th January, 2019 to enable the defendant to provide its replying affidavit. A replying affidavit was sworn by Denis Lahart, a director of the defendant, on the adjourned date, 29th January, 2019. That affidavit contained a preliminary objection to the proceedings by reference to the arbitration agreements contained in the two subcontracts under which it was contended that any dispute between the parties had to be referred to arbitration. Mr. Lahart stated that it was the defendant's intention to bring an application seeking to refer the proceedings to arbitration under Article 8 (1) of the Model Law having regard to the terms of those arbitration agreements. Mr. Lahart asserted that it was not appropriate for any statement to be made on the substance of the defendant's defence to the proceedings at that point in time having regard to the provisions of Article 8 (1) of the Model Law. Therefore, while Mr. Lahart explained that it was the defendant's intention to bring an application under Article 8 (1) of the Model Law in respect of the dispute or disputes between the parties he did not provide any detail on the substance of the defendant's defence to the proceedings at that point in time. Mr. Lahart made a further preliminary objection alleging an abuse process by the plaintiff in bringing the summary proceedings in circumstances where the plenary proceedings had previously been issued but not pursued. He purported to do so without prejudice to the defendant's preliminary objection based on the arbitration agreements between the parties.

12. The plaintiff's motion for liberty to enter final judgment was again adjourned on consent to enable the plaintiff to provide a replying affidavit. A replying affidavit

was sworn by Mr. McEnroe on 5th March, 2019. It was in that affidavit that the plaintiff indicated that it was pursuing summary judgment in the sum of €92,011.12 on the basis of the alleged acknowledgment by the defendant of the works completed by the plaintiff and the plaintiff's valuation of those works. The plaintiff sought summary judgment in that amount and suggested that the balance of its claims under the two subcontracts (approximately €95,000), which it is accepted were in dispute between the parties and subject to the arbitration agreements contained in the two subcontracts, be referred to arbitration or mediation.

13. The plaintiff's motion for liberty to enter final judgment was adjourned on consent by the parties to the common law motion list and has been adjourned from time to time pending the determination of the application which the defendant subsequently brought under Article 8 (1) of the Model Law.

Defendant's application to refer to arbitration under Article 8(1) of the Model Law

14. The defendant brought its application for an order under Article 8(1) of the Model Law referring the parties to arbitration in respect of the matters the subject of the summary proceedings by a motion issued on 26th March, 2019. The defendant's application was grounded on an affidavit sworn by Mr. Lahart on the same date. The defendant's motion seeks a referral to arbitration under the provisions of both subcontracts although, as noted earlier, it is now accepted by the plaintiff that part of the claim made by it in the summary proceedings in respect of the St Etchen's subcontract falls under the arbitration provisions contained in clause 13 of that subcontract and that all of its claim in respect of the Stanhope subcontract falls within the arbitration provisions contained in clause 26 of that subcontract,

15. Having referred to and exhibited the two subcontracts and having highlighted the arbitration provisions in those subcontracts, Mr. Lahart then asserted at paras. 9 and 10 of his affidavit as follows:

> *"9. As is apparent from the summary summons and affidavits herein, a dispute has arisen between the parties concerning payments claimed to be owing to the plaintiff by the defendant under the St. Etchen's Sub-Contract.*
>
> *10. The plaintiff's entitlement to payment under both Sub-Contracts is denied by the defendant, and further the defendant's suffered loss, damage, inconvenience and expense as a result of the plaintiff's actions, and inaction, on the said projects and has a counterclaim in that regard".*

16. Mr. Lahart referred to the replying affidavit which he swore on behalf of the defendant in response to the plaintiff's application in the summary proceedings and made the point that that affidavit did not address the substance of the dispute between the parties and merely referred to the existence of the arbitration agreements in the subcontracts (as well as the previous plenary proceedings issued by the plaintiff). Mr. Lahart further asserted that his grounding affidavit did not purport to be a *"statement on the substance of the dispute"* between the parties for the purposes of Article 8(1) of the Model Law. Mr. Lahart sought to rely on the arbitration provisions contained in the two subcontracts and referred to and exhibited some of the correspondence between the party's respective advisors in August and September, 2014 which I referred to earlier.

17. In one of the letters exhibited, Quigg Golden, on behalf of the defendant, wrote to the plaintiff's then solicitors on 1st August, 2014 reiterating the defendant's

stance on the plaintiff's claim as set out in an earlier letter from Quigg Golden dated 31st July, 2014 (which was not exhibited) and asserted that the amounts claimed by the plaintiff were *"both unsubstantiated and, more importantly, in dispute."* Reference was made to the dispute resolution provisions contained in the two subcontracts.

18. In their subsequent letter of 11th September, 2014, Quigg Golden stated:

> *"It appears that your client failed to comply with the terms of its contract with K&J Townmore, despite been afforded every opportunity to do so. It now appears that your client is trying to attribute its failure to perform its obligations under this contract, giving rise to their termination (sic)".*

19. While the second sentence just quoted is not entirely clear, the quotation does suggest that the defendant was asserting a failure by the plaintiff to comply with its contractual obligations and an attempt by the plaintiff to attribute responsibility for that failure to the defendant. The same letter went on to remind the plaintiff that the defendant was reserving its right *"to recover the damages this termination* [of the contracts] *has cost them ...".*

20. Mr. McEnroe swore a replying affidavit on behalf of the plaintiff on 2nd May, 2019. He referred back to the affidavits which he swore in the summary proceedings and contended that no dispute had arisen between the parties in relation to the sum of €92,011.12 which the plaintiff was seeking by way of summary judgment. In the absence of a dispute, it was contended, the arbitration agreements contained in the two subcontracts were not engaged. In support of his contention that no dispute existed between the parties in relation to the sum claimed by the plaintiff, Mr. McEnroe referred again to and exhibited the site minutes. He contended that the defendant had expressly acknowledged in those minutes that a very substantial amount of works had

been completed by the plaintiff under the St. Etchen's subcontract. He also referred to and exhibited again the calculation made by the plaintiff of the value of the percentage of works which the defendant acknowledged was completed by the plaintiff. On that basis, Mr. McEnroe contended that the defendant had acknowledged that it was indebted to the plaintiff in the sum of €92,011.12. He asserted that both the extent of and the value of the agreed completed works was not in dispute under the two subcontracts. Mr. McEnroe asserted that the defendant's contention that the sum claimed was in dispute was unsustainable and did not bear any objective scrutiny. He sought to criticise the manner in which the defendant suggested that a dispute arose and asserted that this was done by way of a bald assertion and in a manner artificially to create a dispute under the subcontracts. Mr. McEnroe also pointed out that the defendant had not taken issue with the replying affidavit which he had sworn on 5th March, 2019 in the summary proceedings. Consequently, he contended that the defendant had not disputed what was said in that affidavit. Mr. McEnroe further asserted that the defendant had not itself complied the provisions of Article 8(1) of the Model Law in light of the delay by the defendant in bringing its application following the defendant's replying affidavit in the summary proceedings.

21. Mr. Lahart contended, therefore, that the parties were not in dispute in respect of the €92,011.12 claimed by the plaintiff in the summary proceedings and that the plaintiff was entitled to proceed to seek summary judgment in respect of that amount, while accepting that the balance of the sums claimed by the plaintiff in the summary proceedings could be referred to arbitration or mediation.

22. There was no replying affidavit from the defendant to Mr. McEnroe's replying affidavit

Apparent to determination of the issues

23. The parties exchanged detailed written submissions in advance of the hearing of the defendant's application and made very helpful oral submissions at the hearing. As we shall see, there are a couple of significant issues between the parties which require determination. Those issues concern the extent of the court's mandatory obligation under Article 8 (1) of the Model Law to refer parties to arbitration when the requirements of that provision are satisfied.

24. The plaintiff contends that for various reasons the requirements of Article 8 (1) have not been complied with by the defendant and that, therefore, the court does not have a mandatory obligation to refer the parties to arbitration in respect of the claim which it has sought to maintain in the summary proceedings. It will be necessary, therefore, for me to consider the terms of Article 8 (1) of the Model Law and the extent of the court's obligation under that provision. In the event that the plaintiff is correct in its contention that the requirements of Article 8 (1) have not been complied with by the defendant, it may be necessary for me to consider whether there remains, as the plaintiff contends, a residual discretionary jurisdiction to stay the summary proceedings having regard to the arbitration agreements in the two subcontracts but, particularly, in the St. Etchen's subcontract.

25. While those are issues which I will have to address, the main issue between the parties is whether, as the defendant contends, there is a "*dispute between the parties*" for the purposes of the arbitration agreement contained in Clause 13(a) of the St. Etchen's subcontract and Article 8 (1) of the Model Law or whether, as the plaintiff contends, there is no dispute between the parties with respect to the sum for which the plaintiff now seeks summary judgment under the St. Etchen's subcontract in light of the alleged acknowledgement by the defendant of the extent of the works

completed by the plaintiff under that subcontract. The consideration of that issue will require a review and analysis of the legal issue as to whether, and in what circumstances, a dispute exists as well as an analysis of the factual material put forward by the parties in support of their respective contentions on that issue.

26. Before considering those various issues, I will set out the relevant provisions of Clause 13 of the St. Etchen's subcontract (which contains the relevant arbitration agreement between the parties insofar as that subcontract is concerned). I will then look at the provisions of Article 8 (1) of the Model Law and summarise the approach which the court is required to take in considering an application for an order under that provision. Having done so, I will turn to consider the respective contentions of the parties on the issues which I have to consider before setting out my decision on those contentions and my conclusions on the application.

St. Etchen's subcontract

27. In light of the plaintiff's acceptance that there is a dispute between the parties in relation to the entirety of its claim against the defendant under the Stanhope subcontract and that such dispute falls under the arbitration agreement between the parties under that subcontract which is contained in Clause 26 of the Stanhope subcontract, it is unnecessary for me to consider further the terms of that arbitration agreement. While the plaintiff has conceded that part of its claim against the defendant under the St. Etchen's subcontract is the subject of a dispute between the parties which falls within the terms of the arbitration agreement between the parties under that subcontract, which is contained in Clause 13 (a) of the subcontract, it contends that there is no such dispute in respect of most of its claim under that subcontract. Before considering the basis on which the plaintiff seeks to advance that

contention, it is appropriate to set out the terms of the arbitration agreement between the parties contained in Clause 13 (a) of the St. Etchen's subcontract.

28. Clause 13 of the St. Etchen's subcontract is headed "*Disputes*". Clause 13 contains various dispute resolution procedures including arbitration, mediation and conciliation. This case is concerned only with the arbitration provisions contained in Clause 13 (a).

29. Clause 13 (a) is headed "*Notice to Refer*" and provides as follows:

> *"(1) If a dispute arises between the parties in connection with or arising out of the Sub-Contract, either party may, by notice to the other, refer the dispute for arbitration by serving on the other a Notice to Refer. The Notice to Refer shall state the issues in dispute. The service of the Notice to Refer will be deemed to be the commencement of arbitration proceedings. Either party may within a period of 21 days of the Notice to Refer give notice to the other of further disputes and, if such notice is given, those further disputes will be deemed to be included in the reference to arbitration.*
>
> *(2) ...*
>
> *(3)..."*

30. Clause 13 (e) provides for the procedure for the appointment of the arbitrator and the procedure applicable to any arbitration under the provisions of the subcontract. No issues arises between the parties in relation to this sub-clause.

31. What is relevant for present purposes is the requirement in clause 13(a) for there to be a *"dispute"* between the parties *"in connection with or arising out of the Sub-Contract"*. The plaintiff contends that there is no such *"dispute"* between the parties in relation to that part of its claim under the St. Etchen's subcontract for which it continues to seek judgment in the summary proceedings. As we shall see Article 8

(1) of the Model Law also requires there to be a *"dispute"* between the parties before the parties can be referred to arbitration under that provision. I consider later in this judgment the approach to be adopted in determining whether a "*dispute*" can properly be held to exist between the parties for the purposes of Clause 13 (a) of the St. Etchen's subcontract and Article 8 (1) of the Model Law. Before doing so, however, I consider Article 8 (1) and the approach which the court is required to take in considering an application for an order under that provision.

Article 8 (1) of Model Law: required approach

32. Article 8 (1) of the Model Law 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."*

33. The Model Law has force of law in the State and applies to both international commercial arbitrations and domestic arbitrations where the seat of the arbitration is Ireland by virtue of s. 6 of the 2010 Act. I have had cause to consider the provisions of Article 8 (1) in a number of previous judgments including *K & J Townmore Construction Ltd v. Kildare and Wicklow Education and Training Board* [2018] IEHC 770 (*"Townmore (No.1), Ocean Point Development Company Ltd (In Receivership) v. Patterson Bannon Architects Ltd & Ors* [2019] IEHC 311 (*"Ocean Point"*) and *K & J Townmore Construction Ltd v. Kildare and Wicklow Education and Training Board* (judgment delivered on 11th October, 2019) (*"Townmore (No. 2)"*).

34. In *Ocean Point,* I stated as follows:

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

(*Ocean Point*, para. 26, p. 12)

35. As has been consistently held by the Irish courts that where the requirements of Article 8 (1) are satisfied the court is under a mandatory obligation to make the reference to arbitration and does not have a discretion whether to refer or not. In *Townmore (No. 1)* and in *Ocean Point,* I approved the following statement made by the High Court (McGovern J.) in *BAM Building Ltd v. UCD Property Development Co. Ltd [2016] IEHC 582 ("BAM")*:

"The courts in this jurisdiction have long been supportive of the arbitral process and there is a line of recent authority which clearly establishes that Article 8 of the Model Law does not create a discretion to refer or not to refer matters to arbitration. If there is an arbitration clause and the dispute is

within the scope of the arbitration agreement and there is no finding that the agreement is null and void, inoperative or incapable of being performed, then a stay must be granted. See P. Elliott and Company Limited (In Receivership and In Liquidation) v. F.C.C. Elliott Construction Limited [2012] IEHC 361; and, Go Code Limited v. Capita Business Services Limited [2015] IEHC 673." (*BAM*, at para. 6, p. 3 per McGovern J.)

36. There is no issue between the parties as to the mandatory nature of the obligation on the court to refer the parties to arbitration once the requirements of Article 8(1) are satisfied. As we shall see, the defendant contends that those requirements are satisfied and that the mandatory obligation to refer to arbitration arises. The plaintiff, however, contends that, for various reasons, the requirements of Article 8 (1) have not been satisfied and that, therefore, there is no mandatory obligation to refer the parties to arbitration. It should be noted however that the plaintiff does not contend that the arbitration agreement contained in Clause 13 (a) of the St. Etchen's subcontract is *"null and void"* or *"inoperative"* or *"incapable of being performed"*. It contends that the defendant has not complied with the requirements of Article 8 (1) and also that there is no *"dispute"* between the parties so as to engage the provisions of the Article.

Respective contentions of the parties

The defendant

37. The defendant's position is that there is an arbitration agreement between the parties in clause 13(e) of the St. Etchen's subcontract. The defendant contends that all of the requirements in Article 8(1) of the Model Law have been satisfied: it says that the plaintiff's claim in the summary proceedings which is disputed, is the subject of an arbitration agreement between the parties contained in clause 13(e) of the St.

Etchen's subcontract. It contends it has requested the court to refer the parties to arbitration under Article 8(1) "*not later than when submitting* [its] *first statement on the substance of the dispute*". The defendant's position is that it did not submit its "*first statement on the substance of the dispute*" in the affidavit sworn by Mr. Lahart on 29th January, 2019 in response to the plaintiff's application for liberty to enter final judgment. It asserts in the summary proceedings that it has at all times made clear its intention to seek a reference to arbitration.

38. On the question as to whether there is a dispute between the parties in relation to the plaintiff's claimed entitlement to judgment for the monies allegedly outstanding under the St. Etchen's subcontract, the defendant submits that as a matter of fact it has disputed the plaintiff's entitlement to judgment in the sum claimed on affidavit and in correspondence and that, as a matter of law, there is a dispute between the parties. The defendant has relied on a substantial body of case law from England and Wales and one Irish case in support of its contention that a dispute does exist between the parties.

39. In the circumstances the defendant submits that where all of the requirements in Article 8(1) have been satisfied, where a dispute does exist between the parties and where the plaintiff is not claiming that the arbitration agreement contained in clause 13(a) of the St. Etchen's subcontract is "*null and void, inoperative or incapable of being performed*", the court is obliged to refer the parties to arbitration in respect of the matters the subject of the summary proceedings.

The Plaintiff

40. It is the plaintiff's contention that the court is not subject to a mandatory obligation to make a reference to arbitration in this case as the defendant has not

complied with the requirements in Article 8(1) of the Model Law. The plaintiff puts forward the following reasons for that contention.

41. First, the plaintiff asserts that the defendant failed to comply with the requirement to request the reference to arbitration *"not later than when submitting* [its] *first statement on the substance of the dispute"* as required under Article 8(1). The plaintiff asserts that the defendant submitted its *"first statement on the substance of the dispute"* when Mr. Lahart swore his replying affidavit on 29th January, 2019 in response to the plaintiff's application for liberty to enter final judgment in the summary proceedings. The defendant did not request the reference to arbitration at that stage but merely indicated an intention to do so at a later stage. The plaintiff contends that this requirement must be strictly complied with in order to engage the mandatory obligation on the court under Article 8(1) and that, as a consequence of the defendant's failure to comply with the requirement, the court is no longer subject to a mandatory obligation to refer. The plaintiff relies in this regard on cases including *Townmore (1)* and *Ocean Point.*

42. The plaintiff also advances an additional, but related, argument based on the alleged delay on the part of the defendant in bringing its application for a reference to arbitration almost three months after its replying affidavit was delivered in the summary proceedings.

43. The plaintiff argues that in the absence of a mandatory requirement to refer under Article 8(1) of the Model Law, the court has a discretion as to whether to stay the proceedings to enable an arbitration to take place under the relevant subcontract. It submits that the court should exercise its discretion by refusing to grant the stay in circumstances where it says that is no dispute between the parties as to the plaintiff's entitlement to recover the sum of just over €92,000 in the summary proceedings.

44. Second, the plaintiff contends that there is in fact and in law no dispute between the parties in relation to its entitlement to recover the sum it claims in the summary proceedings. While accepting that it does not contend that the arbitration agreement contained in Clause 13(a) of the St. Etchen's sub-contract is *"null and void, inoperative or incapable of being performed"*, it does contend that the provisions of Article 8(1) are not engaged at all in circumstances where there is no dispute between the parties on its entitlement to recover the sum claimed in the summary proceedings as a matter of fact and law. It argues that in order to engage the provisions of Article 8(1) of the Model Law there must be a dispute between the parties. It further argues that on the proper interpretation of the term *"dispute"* as used in Clause 13(a) of the subcontract the court must conclude that no dispute exists between the parties. The basis for this contention is the alleged acceptance by the defendant of the percentage of the works completed by the plaintiff in the site minutes and the plaintiff's calculation of the value of those completed works. The plaintiff relies on the site minutes to demonstrate the defendant's acceptance of the percentage of works completed on the project (to which the plaintiff has ascribed a value) as well as the defendant's failure to dispute, in its replying affidavit in the summary proceedings, and in its affidavit grounding the application to refer to arbitration under Article 8(1) of the Model Law, the percentage of works completed by the plaintiff under the subcontract and the value of those works, as calculated by the plaintiff. The plaintiff contends that the defendant has sought artificially to create a dispute by making bald assertions of a dispute and a counterclaim with no supporting evidence.

45. The plaintiff suggests that the approach which the court should adopt in determining whether a dispute exists between the parties is the same as the approach which the court adopts in determining whether an application for summary judgment

should be adjourned to plenary hearing. On that basis, the plaintiff contends, the defendant has failed to put forward a stateable or credible basis for defending the plaintiff's claim and its application for summary judgment. It says, therefore, that the court should determine that, as a matter of fact and as a matter of law, no dispute exists between the parties under Clause 13(a) the St. Etchen's sub-contract or under Article 8(1) of the Model Law.

46. Third, the plaintiff advances an additional point arising from the provisions of Clause 13(a) of the subcontract. It says that the defendant has not complied with the terms of Clause 13(a) in that the defendant has not served a *"notice to refer"* as required under Clause 13(a) stating the issues in dispute. The plaintiff contends that the defendant cannot do so at this stage in light of the requirement in Article 8(1) that a request for arbitration must be made no later than when the defendant submitted its *"first statement on the substance of the dispute"*.

Issues requiring consideration

47. It seems to me that there are really two main and related issues requiring to be determined. The first is whether the defendant complied with the requirements in Article 8(1) of the Model Law in its request for the reference to arbitration. The second, and related, issue is whether there is a dispute between the parties in relation to the plaintiff's entitlement to payment of the sum of just over €92,000 claimed by it in the summary proceedings. There are some subsidiary issues which need also to be considered, such as the alleged delay on the part of the defendant in bringing its application and its alleged failure to comply with the provisions of Clause 13(a) of the sub-contract. Those subsidiary issues can be dealt with as part of my consideration of the two main issues.

(1) Whether Article 8 requirements complied with

48. As pointed out earlier, if the requirements contained in Article 8(1) are satisfied, the court is obliged to refer the parties to arbitration. Leaving aside for the moment the plaintiff's contention that no dispute exists between the parties so that Article 8(1) is not engaged at all, the only requirement in Article 8(1) which the plaintiff claims has not been complied with is the requirement to request the reference to arbitration *"not later than when submitting* [its] *first statement on the substance of the dispute"*. The plaintiff asserts that the defendant submitted its *"first statement on the substance of the dispute"* when Mr. Lahart swore his replying affidavit on 29th January, 2019 in response to the plaintiff's application for liberty to enter final judgment in the summary proceedings. The plaintiff contends that the defendant was required to request the reference to arbitration, by making an application to court, no later than when that replying affidavit was provided. I do not agree.

49. Article 8(1) is clear in its terms. A request for a reference to arbitration under that provision must be made *"not later"* than when the requesting party submits its *"first statement"* on the *"substance of the dispute"*. As observed in Mansfield *Arbitration in Ireland: Arbitration Act, 2010 and Model Law: A Commentary* ((2nd Ed.) (2018)) ("Mansfield"), the international case law under the Model Law has strictly enforced the requirement that the request for arbitration must be no later than when the *"first statement on the substance of the dispute"* is submitted and that where such a statement is submitted without a request for arbitration, the right to obtain the reference to arbitration will be lost (see: Mansfield at p. 129 and the cases quoted there, namely, CLOUT Case 181 – Canada/British Columbia Supreme Court: *Queensland Sugar Corp v. The Hanjin Jedda* (24th March, 1995) and CLOUT Case 621 – Canada/British Columbia Supreme Court: *Robert Wall & ors v. Scott's Hospitality (BC) Inc* (6th March, 1990)). I agree with Mansfield that in plenary

proceedings, if a party serves its defence without that defence containing a request for arbitration, that party will lose its right to the reference to arbitration under Article 8. I also agree with Mansfield that in summary proceedings, if a party files an affidavit in response to an application for summary judgment which deals with the substance of the dispute between the parties and does not make clear that the affidavit is being filed without prejudice to that party's entitlement to refer the dispute to arbitration, that party will lose its entitlement to do so. Indeed, in such a situation, Article 8 probably requires the requesting party to request the reference to arbitration, by issuing its application for the reference, either before or at the same time as it delivers its replying affidavit in the summary proceedings where that affidavit addresses the "*substance of the dispute*" between the parties.

50. I note that the authors of Dowling-Hussey and Dunne: *Arbitration Law* ((3rd Ed.) (2010)) express the view at para 7.63 (p.408), based on two Canadian cases, that it may be open to a party to reserve its right to seek a reference to arbitration or to indicate that it intends to seek such a reference, when submitting its "*first statement on the substance of the dispute*" and that such will be sufficient to preserve its entitlement to seek an order of reference to arbitration under Article 8(1). The cases mentioned by the authors are *Seine River Resources Inc v. Pensa Inc* [1999] Can LII 6579 (Supreme Court of British Columbia, 15th June, 1999) and *Canada (Attorney General) v. Marineserve MG Inc* [2002] NSSC 147 (Supreme Court of Nova Scotia, 24th May, 2002). While I have not heard any submissions based on those cases and am, therefore, reluctant to offer a concluded view on the point, it does seem to me that it could well be inconsistent with the requirement in Article 8(1) for the request for the reference to arbitration to be made "*not later than*" when the "*first statement on the substance of the dispute*" is submitted, to permit such a request for reference to be

made subsequent to the submission of that first statement, even where a party has expressly reserved its right to make such a request in the future or has indicated its intention to do so. However, I will leave that issue open for consideration in a case in which the point actually arises.

51. The question which does arise, however, on this application is whether the defendant's replying affidavit in the summary proceedings amounted to its *"first statement on the substance of the dispute"*. If it did, the next question is whether the defendant, in the course of that replying affidavit, did request the reference to arbitration no later than at that time.

52. To answer these questions, it is necessary to refer again to the replying affidavit sworn by Mr. Lahart on behalf of the defendant on 29th January, 2019 in response to the plaintiff's application for liberty to enter final judgement. As I noted earlier, the replying affidavit made two preliminary objections. The first was made on the basis of the arbitration agreements contained in the two subcontracts between the parties. The second concerned an alleged abuse of process arising from the commencement of the plenary proceedings in 2014 and is not relevant here.

53. Paragraph 6 of Mr. Lahart's replying affidavit makes very clear that it was not his intention to make any statement on the substance of the defence which the defendant may have to the summary proceedings. Indeed, Mr. Lahart expressly so states in that paragraph of his affidavit. The affidavit does not set out what the plaintiff's claim is and what the defendant's defence is to that claim. It does not contain any discussion at all on the merits or otherwise of the plaintiff's claim or of the defendant's defence to that claim.

54. Can it be said, therefore, that Mr. Lahart's replying affidavit amounts to the defendant's *"first statement on the substance of the dispute"* between the parties? I do

not believe that it can. In order to constitute a statement on the *"substance of the dispute"*, the particular document relied upon, in this case a replying affidavit, would have to at least refer to the nature of the claim being made and the nature of the defence to that claim, with some discussion as to the claim and defence. A mere reference to the fact of a dispute could not, in my view, amount to a *"statement"* on the *"substance"* of that dispute. The defendant's replying affidavit in the summary proceedings does not refer at all to or engage with the *"substance"* of the dispute between the parties. It refers in a rather indirect way to the existence of a dispute by referring to the existence of an arbitration agreement in each of the two subcontracts and to the alleged attempt by the plaintiff to circumvent those provisions by commencing the summary proceedings. The affidavit further refers to the defendant's intention, without prejudice to its abuse of process preliminary objection, to bring an application seeking a reference to arbitration under Article 8(1) of the Model law having regard to the arbitration agreements contained in the two subcontracts.

55. It seems to me that in contending that the defendant's replying affidavit amounted to a *"statement on the substance of the dispute"*, the plaintiff is ignoring the fact that the particular statement must address the *"substance"* of the dispute and not merely refer to the fact of a dispute. I am satisfied that the defendant's replying affidavit in the summary proceedings does not amount to its *"first statement on the substance of the dispute"* between the parties. Nor did that affidavit contain a request for a reference to arbitration. Rather, it signposted the defendant's intention to bring an application seeking a reference to arbitration under Article 8(1).

56. The actual request for the reference to arbitration was made by the defendant when it issued its motion seeking an order under Article 8(1) on 26th March, 2019. Mr. Lahart swore the grounding affidavit for that application on the same date. As

noted earlier, in that grounding affidavit, Mr. Lahart asserted that the replying affidavit which he had sworn in the summary proceedings did not address the substance of the dispute and did not purport to be a statement on the substance of that dispute having regard to the provisions of Article 8(1) of the Model Law. As I understand it, para. 11 of the grounding affidavit is referring in its entirety to the replying affidavit sworn in the summary proceedings and not to the grounding affidavit itself. As I have already determined, the replying affidavit did not amount to a *"statement on the substance of the dispute"* between the parties. However, in my view, the grounding affidavit does amount to such a statement and is the *"first statement on the substance of the dispute"* provided by the defendant.

57. The grounding affidavit goes much further than the replying affidavit in the summary proceedings. I have referred earlier to the terms at paras. 9 and 10 of the grounding affidavit in which reference is made to the dispute between the parties concerning the alleged entitlement of the plaintiff to the paid monies under the St. Etchen's subcontract, to the defendant's denial of that alleged entitlement on the part of the plaintiff and to the counterclaim which the defendant claims to have in respect of the loss and damage allegedly sustained by it as a result of the plaintiff's alleged actions and inaction. In addition to those averments, the grounding affidavit also exhibits some of the correspondence exchanged between the parties' respective advisors and representatives in 2014 in which some further detail was provided in relation to the nature of the dispute between the parties. In my view, the grounding affidavit does amount to a *"statement"* by the defendant on the *"substance of the dispute"* between the parties and is the first such statement submitted by the plaintiff in the summary proceedings. That statement was submitted as part of, and at the same time as, the plaintiff's request for the reference to arbitration under Article 8(1) of the

Model Law. A request for the reference to arbitration was, therefore, made *"not later than"* when the defendant submitted its *"first statement on the substance of the dispute"* as required under Article 8(1). The defendant, therefore, complied with the timing requirement for a request for a reference to arbitration under Article 8(1).

58. Accordingly, I reject the plaintiff's contention that the defendant failed to comply with this requirement and that, as a consequence, the mandatory obligation on the court under Article 8(1) to make a reference to arbitration does not arise. The mandatory obligation to refer under Article 8(1) has not been disapplied by reason of any failure by the defendant to comply with the requirement to request the reference to arbitration *"no later than"* when submitting its *"first statement on the substance of the dispute"*.

59. In addition to arguing that the defendant failed to comply with the requirement in Article 8(1) in terms of the making of a request for a reference to arbitration no later than when the first statement on the substance of the dispute is submitted, the plaintiff also contends that the defendant has unreasonably delayed in bringing this application for a reference to arbitration. The plaintiff relies on the chronology summarised earlier and, in particular, on the fact that having obtained an adjournment of the plaintiff's application for liberty to enter final judgment on 4th December, 2018 to 29th January, 2019, the defendant's replying affidavit was only provided that day. While indicating the defendant's intention to bring an application for an order referring the parties to arbitration under Article 8(1), the defendant's replying affidavit did not contain such a reference. The plaintiff submits that it ought to have done so but instead of that the defendant waited a further period of almost three months before bringing this application.

60. The defendant rejects any suggestion of delay and I agree with the defendant on that issue. I am not satisfied that the defendant did unreasonably delay in bringing this application. It is true that the defendant obtained an adjournment of the plaintiff's application for liberty to enter final judgment and only furnished its replying affidavit on the adjourned date and even then did not request a reference to arbitration but waited a further period of three months before doing so. However, I do not believe that it was unreasonable for the defendant to have awaited receipt of the plaintiff's replying affidavit in the summary proceedings before bringing its application. The defendant received the plaintiff's replying affidavit in the summary proceedings on 5th March, 2019 and brought its application for an order referring the parties to arbitration under Article 8(1) three weeks later. That does not seem to me to be an unreasonable delay on the part of the defendant.

61. However, more importantly, Article 8(1) of the Model Law does not impose any particular time limit within which an application for an order under that provision must be made. It does, of course, require that the request for the reference to arbitration be made no later than when submitting the *"first statement on the substance of the dispute"*. However, it does not go further than that by specifying that the application for the reference to arbitration must be made within any particular time period or without any particular delay. It seems to me that that is a matter which must be governed by the procedural law and rules of the jurisdiction in which the application for the order under Article 8(1) is made. If the applicant for an order under Article 8(1) has unreasonably delayed in bringing its application (while nonetheless complying with the timing requirement in Article 8(1)) and if that delay has caused prejudice to the other party or amounted in effect to an abuse of the process of the court, it may be open to an Irish court to refuse to make the order referring the parties

to arbitration under Article 8(1). That is so notwithstanding the fact that Article 8(1) imposes a mandatory obligation on the court to refer. It may at least be implicit in that article that an unreasonable delay of that nature, and particularly one which causes prejudice, could preclude an applicant from obtaining the order of reference to arbitration sought just as a party may be estopped from relying on the provisions of an arbitration agreement and obtaining an order under Article 8(1) in certain very limited circumstances (see: *Furey v. Lurgan-ville Construction Company Ltd* [2012] 4 IR 655; *Go Code Ltd v. Capita Business Services Ltd* [2015] IEHC 673; *Townmore (No. 1)* (at para. 72, p. 31) and *Ocean Point* (paras. 30 and 31, p. 14)). However, again that is not an issue that I have definitively to decide in this case as I am satisfied that not only did the defendant comply with the requirement in Article 8(1) by making its request for the reference to arbitration no later than when submitting its first statement on the *"substance of the dispute"* between the parties but it also did not unreasonably delay in bringing its application for the order under Article 8(1).

62. This is an appropriate time to deal briefly with a point which has raised by the plaintiff in the course of its oral submissions at the hearing but not addressed in its written submissions, concerning the alleged failure by the defendant to comply with the provisions of Clause 13(a) of the St. Etchen's subcontract in seeking this reference to arbitration. As noted earlier, Clause 13(a) of the subcontract entitles either party to refer a dispute which has arisen between them *"in connection with or arising out of the sub-contract"* for arbitration by serving a *"Notice to Refer"*. Clause 13(a) further provides that such a notice *"shall state the issues in dispute"* and that the service of the notice is *"deemed to be the commencement of arbitration proceedings"*. Various steps must be taken within certain time periods following the service of the *"Notice to Refer"*. In the course of its oral submissions at the hearing, the plaintiff's counsel

submitted that the defendant did not serve such a *"Notice to Refer"* on the plaintiff as required by Clause 13(a). However, I think it is fair to say that this point was not strenuously pursued by the plaintiff and, quite properly so. I do not believe that there is anything in the point. The defendant has brought this application for an order referring the parties to arbitration under Article 8(1) of the Model Law on the basis that the matters in issue in the proceedings are the subject of an arbitration agreement, namely, Clause 13(a). The plaintiff does not accept that such an order should be made on the basis that there is no dispute between the parties in respect of the sum now claimed by it in the summary proceedings. Until the plaintiff's counsel's submissions at the hearing, it was never part of the plaintiff's objection to the order being sought by the defendant that the defendant did not comply with the provisions of Clause 13(a) of the relevant subcontract by reason of its failure to serve a *"Notice to Refer"* under the clause.

63. In any event, Clause 13(a) does not impose any time limit for the service of a *"Notice to Refer"* on a party who wishes to serve such a document. While time limits are provided for in Clause 13(a) and elsewhere in Clause 13, those time limits all commence running after the service of the *"Notice to Refer"*. Clause 13(a) imposes no time limit for the service of that notice. In those circumstances, it seems to me that if the court were otherwise disposed to making the order under Article 8(1) of the Model Law referring the parties to arbitration, it would be open to the defendant at that stage to serve the *"Notice to Refer"* and to state in that notice the *"issues in dispute"* as required under Clause 13(a). The failure to serve such a notice at this stage, would not, in my view, preclude the court from making an order under Article 8(1), assuming that it was otherwise appropriate to do so.

64. I am satisfied that, subject to there being a dispute between the parties which falls within the scope of the arbitration agreement contained in Clause 13(a) of the subcontract, Article 8(1) imposes a mandatory obligation on the court to make an order referring the parties to arbitration in respect of the matters the subject of the summary proceedings.

65. Before considering the issue as to whether there is dispute between the parties, I should address briefly the point made by the plaintiff that if the defendant had not complied with the requirements in Article 8(1) and if, therefore, there was no mandatory obligation on the court to make the order referring the parties to arbitration, the court nonetheless has a discretion whether or not to grant a stay of the proceedings to enable an arbitration to take place under the terms of the arbitration agreement between the parties.

66. Having regard to my conclusion that the defendant did comply with the requirements in Article 8(1) and that, therefore, the court is subject to a mandatory obligation under Article 8(1) to make an order referring the parties to arbitration, provided that a dispute exists between the parties, it is unnecessary for me to reach a concluded view on whether, in the circumstances outlined by the plaintiff, a discretionary jurisdiction to grant a stay or not exists. I would observe, however, that in a number of judgments following the enactment of the 2010 Act, the High Court has confirmed that the court has an inherent jurisdiction to stay proceedings, including cases where an arbitration agreement exists. Mac Eochaidh J. accepted in *P Elliott & Company Ltd (In Receivership and in Liquidation) v. FCC Elliott Construction Ltd* [2002] IEHC 361 that the court did have an inherent jurisdiction to stay proceedings where there was an arbitration agreement between the parties. He reached that conclusion in reliance upon a judgement of Clarke J. in the High Court in *Kalix Fund*

Ltd v. HSBC Institutional Trust Services (Ireland) Ltd [2010] 2 I.R. 581 ("*Kalix*"). A similar conclusion was reached by Cregan J. in *The Lisheen Mine v. Mullock & Sons (Shipbrokers) Ltd* [2015] IEHC 50, again in reliance upon the judgment of Clarke J. in *Kalix*. However, in both cases the court found that there was no arbitration agreement between the parties and that, therefore, there was no basis on which the court's inherent jurisdiction could be exercised to stay the proceedings.

67. It may well be the case, therefore, that in circumstances where the mandatory obligation to refer under Article 8(1) does not arise (whether by reason of a failure to comply with one of the requirements in Article 8(1) or otherwise), the court may nonetheless have an inherent jurisdiction to grant a stay where an arbitration agreement is in existence between the parties. However, the question does not require to be decided on this application in light of my conclusion on the application of the mandatory obligation to refer under Article 8(1) of the Model Law.

(2) Whether a dispute exists between the parties

68. It is the plaintiff's contention that there is no dispute in existence between the parties in relation to its entitlement to be paid the sum of €92,011.12 by the defendant in respect of works done by the plaintiff under the St. Etchen's subcontract. That is the sum which the plaintiff is now seeking to recover from the defendant in the summary proceedings. As, on its case, there is no dispute between the parties in relation to the plaintiff's entitlement to be paid that sum by the defendant, the plaintiff contends that there is no dispute which could be referred to arbitration under Clause 13(a) of the St. Etchen's subcontract and Article 8 of the Model Law. The plaintiff accepts that there is a dispute between the parties in relation to its entitlement to be paid a further amount under the St. Etchen's subcontract and in relation to the entire amount which it is claiming under the Stanhope subcontract. The plaintiff accepts that

the disputes in relation to those sums are subject to the arbitration provisions contained in the two subcontracts and has offered to have those disputes resolved by arbitration or by mediation.

69. The defendant maintains that there is a dispute between the parties in relation to the €92,011.12 which the plaintiff seeks to recover in the summary proceedings as being due under the St. Etchen's subcontract.

70. It is necessary to determine the question as to whether a dispute exists between the parties in relation to that part of the plaintiff's claim under the St. Etchen's subcontract which the plaintiff seeks to pursue in the summary proceedings as a matter of fact and a matter of law. It is first necessary to determine the approach which the court should take as a matter of law in determining whether a dispute exists between the parties.

Dispute as a matter of law

71. The starting point for the exercise is Clause 13(a) of the St. Etchen's contract itself. As noted earlier, the entitlement of a party to that subcontract to invoke the arbitration provisions contained in Clause 13(a) arises where a *"dispute arises between the parties in connection with or arising out of the Sub-Contract"*. As a matter of contract, therefore, there must be a *"dispute"* between the parties before either party can seek to invoke the arbitration provisions contained in Clause 13(a).

72. The existence of a dispute is also necessary before a court is obliged to make a reference to arbitration under Article 8(1) of the Model Law. That is clear from the reference to "*dispute*" in Article 8 where reference is made to the obligation on the party requesting the reference to arbitration to do so *"not later than when submitting his first statement on the substance of the dispute"*.

73. Article 8(1) of the Model Law replaced s. 5 of the 1980 Act. Under s. 5(1) of the 1980 Act, the court's power to stay proceedings where there is an arbitration agreement could be exercised *"unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred"*. The words underlined are not to be found in Article 8(1) of the Model Law. That said, as observed by Mansfield, *"it is... axiomatic that there must be some dispute to resolve before there can be an arbitration over a matter"* (Mansfield, p. 135).

74. The approach taken by the courts under s. 5 of the 1980 Act in determining whether dispute existed between the parties which provided a basis for staying proceedings on foot of an arbitration agreement can be seen in the decision of the High Court (Kelly J.) in *Campus and Stadium Ireland Development Ltd v. Dublin Waterworld Ltd* [2006] 2 I.R. 181 ("*CSID*"). In that case, the court found that in respect of certain of the matters alleged to be in issue between the parties, there was in fact no dispute between the parties which would entitle the court to make an order under s. 5 of the 1980 Act staying the proceedings. In respect of other issues, the court was satisfied that there was a dispute between the parties and did stay the proceedings in relation to those issues.

75. Under the pre-2010 Act regime, the mere denial of an obligation by a party was not sufficient in itself to give rise to a dispute permitting the court to exercise its discretion to stay proceedings on foot of an arbitration agreement. It is the case that prior to the enactment of the 2010 Act and the application of Article 8(1) of the Model Law, the test applied by the courts in determining whether a dispute existed between the parties so as to engage the court's power to stay proceedings on foot of an

arbitration agreement was similar to that which the courts applied in determining whether leave to defend should be granted to a defendant in summary proceedings.

76. The courts of England and Wales had to consider whether that remained the test to be applied following the enactment of s. 9 of the Arbitration Act, 1996 (the "English 1996 Act"). Under s. 9(4) of the English 1996 Act, the court was required to stay proceedings in the case of an applicable arbitration agreement unless the court was satisfied that the *"arbitration agreement is null and void, inoperative, or incapable of being performed"*. Prior to the enactment of s. 9 of the English 1996 Act, the applicable law was contained in s. 1 of the Arbitration Act, 1975 (the "English 1975 Act") which contained a similar qualification to that contained in s. 5 of the 1980 Act, namely, that the court had jurisdiction to stay proceedings *"unless satisfied... that is not in fact any dispute between the parties with regard to the matter agreed to be referred"*. Just as with Article 8(1) of the Model Law, those words were dropped from the relevant section when s. 9(4) of the English 1996 Act was enacted.

77. The significance of that amendment was considered by the Court of Appeal of England and Wales in *Halki Shipping Corporation v. Sopex Oils Ltd* [1998] 1 WLR 726 ("*The Halki*"). In *The Halki*, a majority of the Court of Appeal held that the English 1996 Act had altered the law in that jurisdiction which had previously been that a stay would not be granted under s. 1(1) of the English 1975 Act if the defendant would not have obtained leave to defend summary proceedings. The Court of Appeal held that there was a crucial distinction between s. 1(1) of the English 1975 Act and s. 9(4) of the English 1996 Act in light of the fact that the words *"that there is not in fact any dispute between the parties with regard to the matter agreed to be referred"* no longer appeared in s. 9(4) of the English 1996 Act. In *The Halki*, the Court of Appeal held that it was those words which meant that a stay would be refused if a

defendant had no arguable defence to a claim for summary judgment and that the consequence of the removal of those words was that a stay would be granted whenever there was a dispute between the parties irrespective of whether the defendant had an arguable defence to the plaintiff's claim.

78. In the subsequent decision of the English Court of Appeal in *Collins (Contractors) Limited v. Baltic Quay management (1994) Ltd* [2004] 99 Con LR 1 ("*Collins*"), the Court of Appeal, in commenting on the decision in *The Halki,* stated:-

> *"It thus follows from The Halki that it is no answer to an application for a stay under s. 9 of the* [English 1996 Act] *that the defendant has no arguable defence to the claimant's claim. If there would otherwise be a 'dispute' within s. 9(1), it is no answer to an application for a stay to say that it is not a real dispute because the defendant has no defence to the claim. That was the very point decided in The Halki"* (*Collins*, per Clarke L.J. at para. 37).

79. In *Collins,* in response to an argument advanced on behalf of the contractor who was resisting the stay application to the effect that the employer had no arguable defence to the claim having regard to the terms of another piece of English legislation, s. 111 of the Housing Grants, Construction and Regeneration Act, 1996, the English Court of Appeal stated that that section was concerned only with the substantive rights of the parties and not with the question as to whether the claim for the monies allegedly wrongfully withheld should be determined by the court or by an arbitrator. The Court of Appeal (Clarke L.J.) continued:-

> *"It is in my judgment, plain from The Halki, first, that that depends upon whether there was a 'dispute' within the meaning of the arbitration clause and is thus a matter which is agreed to be referred to arbitration within s. 9(1) of the* [English 1996 Act], *and, second, that whether there is a dispute does not*

depend upon the strength or weakness of the defendant's case on the merits of the 'dispute'". (*Collins*, per Clarke L.J. at para. 38).

80. That position was endorsed by the English Court of Appeal in *AMEC Civil Engineering Ltd v. Secretary of State for Transport* [2005] EWCA Civ 291 ("*AMEC*"). In referring to *The Halki*, Rix L.J. noted that the English Court of Appeal in that case held *"that an unadmitted claim gave rise to a dispute, however unanswerable such a claim might be"* (*AMEC*, per Rix L.J. at para. 66).

81. I am persuaded by the reasoning contained in these cases and am satisfied that the enactment of the 2010 Act and the introduction into Irish law of Article 8(1) of the Model Law had the same effect as the changes effected by s. 9(4) of the English 1996 Act to the law which predated that legislation. In other words, while it may have been the case prior to the enactment of the 2010 Act and Article 8(1) of the Model Law coming into force that the court would have applied a test similar to that applied in determining whether a defendant had established an arguable case and so could obtain leave to defend summary proceedings, that is not the position which now applies under Article 8(1) of the Model Law. In considering whether there is a dispute such as to engage the court's jurisdiction to refer parties to arbitration under Article 8(1) of the Model Law, the court is not concerned with the merits of that dispute in the sense of whether or not the party seeking the reference to arbitration has or has not established an arguable or credible defence such as would entitle that party successfully to resist an application for summary judgment in respect of that claim. The High Court (McGovern J.) reached a similar conclusion in *BAM* where he stated, in the context of a dispute which one of the parties sought to have referred to arbitration under an arbitration agreement pursuant to Article 8(1) of the Model Law:-

> *"It is not for the courts to inquire whether one party's position under the dispute is tenable or not, or whether there is a "real and genuine dispute" to be referred to arbitration. A decision on the merits of the parties' disputes is one for the arbitrator to make."* (*BAM*, per McGovern J. at para. 24, p. 12).

82. I completely agree with these observations. To the extent, therefore, that it is part of the plaintiff's case that the approach which the court should adopt in determining whether there is a dispute between the parties under Clause 13 of the subcontract such as to engage the jurisdiction of the court to refer the parties to arbitration under Article 8(1) is that which the court applies in determining whether to give leave to a defendant to defend summary proceedings, I do not agree. I accept that the position set out in the decisions of the English Court of Appeal in *Collins* and *AMEC* is correct and is consistent with the approach taken by the High Court (McGovern J.) in *BAM*. In my view, once a dispute has arisen between the parties, which is the subject of an arbitration agreement, it is not the role of the court to assess the merits of the parties' respective positions in that dispute. That is the role of the arbitrator. To adopt the position for which the plaintiff contends and to confer upon the court a role in determining the merits or otherwise of the parties' respective positions in the dispute would, in my view, impermissibly usurp the proper role of the arbitrator and fundamentally undermine the arbitral process which the parties signed up to when entering into the relevant subcontract.

83. It follows, therefore, that insofar as the plaintiff seeks to rely on decisions such as *IBRC v. McCaughey* [2014] I.R. 749 (*"McCaughey"),* in which the Supreme Court reviewed and reiterated the test to be applied in determining whether summary judgment or leave to defend should be granted in summary proceedings, I do not accept that that case is relevant or of assistance in the context of the present

application. *McCaughey* was concerned with a summary judgment application. However, I have concluded the test to be applied in such cases is not the appropriate test to be applied in considering whether a dispute has been raised by the parties such as to engage the jurisdiction to refer parties to an arbitration agreement to arbitration under Article 8(1) of the Model Law.

84. How then does the court go about ascertaining whether a dispute exists between the parties for the purposes of Clause 13(a) of the arbitration agreement and Article 8(1) of the Model Law? Once again considerable assistance can be derived from some of the English cases. I will refer only to small number of those cases which seem to me to best represent the approach which a court should adopt in determining whether a dispute exists in this context.

85. The first of the cases is the judgment of Jackson J. in the English High Court in *AMEC (AMEC Civil Engineering Ltd v. Secretary of State for Transport* [2004] EWHC 2339 (TCC)). That case involved a challenge to the jurisdiction of an arbitrator under s. 67 of the English 1996 Act. One of the grounds on which the appointment of the arbitrator was challenged was that, as of the relevant date, no dispute existed between the parties. The court, therefore, had to consider whether there was a dispute as of that date.

86. Jackson J. observed that there was at that point *"a rapidly growing jungle of decisions"* on this issue and he sought to *"distil the effect of the principal authorities"*. Having referred to several cases (including *The Halki),* Jackson J. was able to derive the following seven propositions from those authorities as to how the court should assess whether a dispute existed in any particular case:

> *"1. The word 'dispute' which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal*

meaning. It does not have some special or unusual meaning conferred upon it by lawyers.

2. *Despite the simple meaning of the word 'dispute', there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.*

3. *The mere fact that one party (whom I shall call 'the claimant') notifies the other party (whom I shall call 'the respondent') of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.*

4. *The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.*

5. *The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some*

agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. *If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.*

7. *If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication." (AMEC,* per Jackson J. at para. 68).

87. The decision of Jackson J. in *AMEC* was appealed to the English Court of Appeal. Prior to the hearing of that appeal, the English Court of Appeal gave judgment in *Collins.* The English Court of Appeal in that case endorsed the propositions set out by Jackson J. In his judgment, Clarke L.J. stated:

"63. For my part I would accept those propositions as broadly correct. I entirely accept that all depends on the circumstances of the particular case. I would, in particular, endorse the general approach that while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted. I note that Jackson J. does not endorse the suggestion in

some of the cases, either that a dispute may not arise until negotiation or discussion have been concluded, or that dispute should not be likely (sic) inferred. In my opinion he was right not to do so.

64. It appears to me that negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute, than with an absence of a dispute. It also appears to me that the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication...." (*Collins*, per Clarke L.J. at paras. 63 and 64)

88. In its judgment on the appeal from the decision of Jackson J. in *AMEC,* the English Court of Appeal was broadly in agreement with the propositions set out by Jackson J. and with the additional observations made by Clarke L.J. in *Collins.* In his judgment, May L.J., having referred to the seven propositions set out by Jackson J. and to the approval of those propositions by Clarke L.J. in *Collins,* stated that he was *"broadly content"* to accept those propositions but added certain further observations of his own. Most of those observations were directed to the particular circumstances of the case. However, in one, May L.J. also referred to *"commercial good sense"* and indicated that such *"does not suggest that the clause should be construed with legalistic rigidity so as to impede the parties from starting timely arbitration proceedings" (AMEC,* per May L.J. at para. 31). May L.J. observed that the whole of the arbitration clause at issue should be read in that light and that:

"This leads me to lean in favour of an inclusive interpretation of what amounts to a dispute or difference." (AMEC, per May L.J. at para. 31)

89. In his judgment, having indicated that he was *"broadly content to accept the propositions set out by Jackson J."* and having agreed with the further observations of Clarke L.J. in *Collins* and of May L.J. in *AMEC,* Rix L.J. added some further remarks of his own. Some of what he said is relevant to the issue I have to determine on this application. Rix L.J. made the following further observations:

> "*65. The words 'dispute' and 'difference' are ordinary words of the English language. They are not terms of art. It may be useful in many circumstances to determine the existence of a dispute by reference to a claim which has not been admitted within a reasonable time to respond; but it would be a mistake in my judgment to gloss the word 'dispute' in such a way. I would be very cautious about accepting that either a 'claim' or a "'reasonable time to respond' was in either case a condition precedent to the establishment of a dispute.*
>
> *66. Secondly, however, like most words, 'dispute' takes its flavour from its context. Where arbitration clauses are concerned, the word has on the whole caused little trouble. If arbitration has been claimed and it emerges that there is after all no dispute because the claim is admitted, there is unlikely to be any dispute about the question of whether there had been any dispute to take to arbitration. And if the claim is disputed, any argument that the arbitration had not been justified because at the time it was invoked there had not been any dispute is, it seems to me, unlikely to find a receptive audience .... So it is that in this arbitration context the real challenge to the existence of a 'dispute' has arisen where a party seeking summary judgment in the courts has been met by a request for a stay to arbitration and the*

claimant has wanted to argue that an unanswerable claim cannot be a real dispute.... " [Rix L.J. then referred to a number of cases including *The Halki]*

67. It follows that in the arbitration context it is possible and sensible to give to the word 'dispute' a broad meaning in the sense that a dispute may readily be found or inferred in the absence of an acceptance of liability, a fortiori because the arbitration process itself is the best place to determine whether or not the claim is admitted or not."

(*AMEC*, per Rix L.J. at para. 65 – 67).

90. These further observations made by Rix L.J. in the Court of Appeal in *AMEC* were quoted with approval by the High Court (Hedigan J.) in *Arnold v. Duffy Mitchell O'Donoghue (A Firm)* [2012] IEHC 368 ("*Arnold*")

91. I am satisfied that propositions set out by Jackson J. in *AMEC,* as approved by the English Court of Appeal in that case and in *Collins,* and the further observations of Rix L.J. in the English Court of Appeal in *AMEC* (as approved by the High Court in *Arnold*) reflect the position in Irish law as to whether a dispute can be said to exist between parties in the context of an arbitration agreement and Article 8(1) of the Model Law.

92. I would, however, add to the analysis the fact that as the term "*dispute*" is used in an arbitration agreement, the principles applicable to the interpretation of contracts may also be relevant in interpreting the meaning to be given to that term in the relevant agreement. Those principles are as set out by Lord Hoffman in the House of Lords in *Investor Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 W.L.R. 896 (at pp. 912-93) ("*ICS*") as approved by the Supreme Court in *Analog Devices BV v. Zurich Insurance Company* [2005] 1 I.R. 274, *ICDL v.*

European Computer Driving Licence [2012] 3 I.R. 327 and *The Law Society of Ireland v. The Motor Insurers' Bureau of Ireland* [2017] IESC 31. Those principles are well known and it is unnecessary to set them out in this judgment.

93. Added to those principles, however, must also be the further principles specifically applicable to the interpretation of arbitration agreements derived from the decision of the House of Lords in *Fiona Trust & Holding Corporation & ors v. Privalov & ors* [2007] 4 All ER 951 ("*Fiona Trust*") and the Irish decisions which have cited that case with approval (which were referred to and discussed by me in *Townmore (No. 1)*). I summarised those principles in my judgment in *Townmore (No. 1)* (and repeated them in *Townmore (No. 2)*). It seems to me that they are relevant in the present case on the question of the interpretation of the term "dispute" in Clause 13(a) of the relevant subcontract and so I repeat them here:-

> *"(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."

94. These latter principles are of some relevance in the present context in circumstances where the plaintiff accepts that at least part of its claim under the St. Etchen's subcontract is caught by the provisions of Clause 13(a) of that subcontract and so, unless the parties agree otherwise, that part of the claim will be referred to arbitration under Clause 13(a). While a different arbitration procedure may apply under Clause 26 of the Stanhope subcontract, it is clear that, unless the parties otherwise agree, the entirety of the plaintiff's claim under that subcontract will also be referred to arbitration. It may well be that an agreement can be reached between the parties that the same arbitration procedure will be applied to both arbitrations and that a single arbitration can be conducted in respect of those disputes. After all, the appointing person in each case (in the absence of an agreement on the arbitrator) is the President for the time being of the Construction Industry Federation.

95. It seems to me that consistent with the principles specifically applicable to the interpretation of arbitration agreements, and with the principles identified in the English case law discussed earlier, a liberal or broad imterpretation should be given to

the term "*dispute*" in an arbitration agreement particularly where such an interpretation gives effect to or respects the assumption or presumption that the parties intended a "one-stop" shop for determining their disputes. It would make little sense for part of the plaintiff's claim under the St. Etchen's subcontract to be dealt with by the court in the context of the summary proceedings with another part being dealt with by arbitration under Clause 13 of that subcontract (as well as the entirety of its claim under the Stanhope subcontract also being dealt with perhaps by a different arbitration). However, if the term "*dispute*" properly interpreted has that effect then so be it. As it happens, I do not believe that the term "*dispute*" properly interpreted in accordance with the principles referred to above does have that somewhat anomalous effect.

96. It seems to me that in light of the principles discussed above, the court should approach the interpretation of the term "*dispute*" in an arbitration agreement in accordance with the following principles and propositions:-

(1) It is necessary first to look at the provision of the arbitration agreement in which the term "*dispute*" is to be found and to construe that term in the context of the agreement as a whole.

(2) A broad meaning should be given to the term "*dispute*" having regard to the fact that the parties have chosen to use that term in the context of a dispute resolution provision in their agreement.

(3) The court should interpret the term "*dispute*" in accordance with the principles governing the interpretation of contracts as set out in *ICS* as approved by the Supreme Court and in accordance with the further principles applicable to the interpretation of arbitration agreements as

set out in *Fiona Trust* as approved in several Irish judgments and summarised by me in *Townmore (No. 1)*.

(4) The burden rests on the party seeking the reference to arbitration to provide some basis for the court to hold that a "*dispute*" is in existence between the parties. If that party does so, then the burden shifts to the party opposing the reference on the grounds of the alleged absence of a dispute to persuade the court that no dispute exists.

(5) In the context of an arbitration agreement, the court should be willing readily to infer that a dispute exists and should readily find or infer that such a dispute exists in the absence of an acceptance of liability in respect of the relevant claim. A dispute should readily be found to exist where it is reasonable to infer that the claim is not admitted.

(6) The court should lean in favour of finding that a "*dispute*" exists in circumstances where the parties disagree as to whether a dispute exists at all. As Rix L.J. observed in the English Court of Appeal in *AMEC*, the arbitrator is best placed to determine whether or not a claim is admitted or not.

(5) In determining whether a dispute exists for the purposes of an arbitration agreement and a reference to arbitration under Article 8(1) of the Model law, the court is not carrying out the same sort of exercise which it carries out in determining whether summary judgement or leave to defend should be granted in summary proceedings. The court should not, therefore, get involved in the exercise of deciding whether the position of one party is stateable, credible or tenable.

97. In my view, those are the principles by reference to which the court should ascertain whether a dispute exists between parties to an arbitration agreement in the context of an application to refer the parties to arbitration under Article 8(1) of the Model Law. It is necessary now to consider the relevant facts to determine whether, in accordance with those legal principles, the facts are consistent with a finding that a dispute between the parties exists or not.

Dispute as a matter of fact

98. Turning now to the facts on which the plaintiff relies in support of its contention that there is no dispute between the parties, the plaintiff relies on the site minutes and on the alleged failure by the defendant to contest the averments in the plaintiff's affidavits in relation to the sum allegedly due to the plaintiff under the St. Etchen's subcontract. However, my assessment of the position is that the defendant has put forward sufficient material to establish that there is a dispute between the parties in relation to the sum claimed by the plaintiff in the proceedings. The plaintiff has not persuaded me on the material relied upon that there is no dispute between the parties in relation to its entitlement to the sum claimed. It is true that the replying affidavit sworn by Mr. Lahart in response to the plaintiff's application for liberty to enter final judgment merely identifies, indirectly, the fact of the dispute but does not engage on the detail or substance of the dispute. Somewhat more information is provided in the affidavit Mr. Lahart swore for the purpose of grounding the defendant's application for the reference to arbitration under Article 8(1) of the Model Law. Paragraphs 9 and 10 of that affidavit identify the fact of the dispute and contain a clear statement that the defendant is denying the plaintiff's entitlement to payment under the subcontracts, that it has suffered loss and damage as a result of the alleged

actions and inaction on the part of the plaintiff under the two subcontracts and that it has a counterclaim. In addition to that, Mr. Lahart exhibited some of the correspondence from 2014 between the parties' respective representatives which discloses the existence of a dispute in relation to the monies claimed by the plaintiff as well as an assertion on behalf of the defendant that the plaintiff failed to comply with its contractual obligations to the defendant.

99. I am satisfied that this material is sufficient to establish the existence of a dispute between the parties in relation to the sum claimed by the plaintiff in the summary proceedings in light of the legal principles discussed earlier. I fear that, if more were to be required of the defendant, it would conflict with the undoubtedly correct observation of McGovern J.in *BAM* that is not for the courts to inquire into whether the position of one party to a dispute is *"tenable or not"* and that that is ultimately a matter for the arbitrator.

100. As noted earlier, the plaintiff relies on the site minutes in order to demonstrate that there is no dispute between the parties. It also relies on calculations made by it of the values to be attributed to the works which it says the defendant accepts were completed as of the time of the site minutes in July, 2014. However, I am not persuaded by this. Indeed, I should observe that the plaintiff's affidavits are very short on detail as to the manner in which claims for payment under the St. Etchen's subcontract were made by the plaintiff. There is a procedure provided for in Clause 11 of that subcontract concerning payment and the circumstances in which sums become due and owing under the subcontract to the plaintiff. The plaintiff's affidavits are very short on detail as to how the plaintiff's alleged entitlement to payment arose. However, this will be a matter for the arbitrator to deal with and I make no comment whatsoever on the actual merit of the plaintiff's claim.

101. Mr. McEnroe, on behalf of the plaintiff, made reference to two certificates at para. 5 of his grounding affidavit sworn on 18th September, 2018. The first of the certificates referred to appears to have been honoured by the defendant. The plaintiff claims that the second certificate was not so honoured. However, that certificate was in the sum of €47,856.36 which is considerably less than the sum for which the plaintiff now seeks judgment in the summary proceedings. The explanation advanced by the plaintiff to support its entitlement for the larger sum claimed is the admission by the defendant of the percentage of works completed by the plaintiff on the St. Etchen's subcontract. It is true that the site minutes record percentages in respect of works done on the subcontract and that those minutes were prepared and circulated by the defendant. However, they do not contain any admission as to the value of the completed works. The value of the works has been calculated by the plaintiff and has not been admitted by the defendant. While the defendant has not engaged in detail in the affidavits which it has sworn both in response to the plaintiff's motion for liberty to enter final judgment and in respect of the defendant's application to refer the parties to arbitration under Article 8(1) of the Model Law, the defendant has made clear in its affidavits that there is a dispute between the parties in relation to the sum claimed by the plaintiff in the proceedings. As I have indicated earlier, the test to be applied by the court is not the same as the test which the court applies in dealing with a summary judgment application where it considers whether a *bona fide* or credible defence has been put forward and where mere assertions of such a defence will not be regarded as sufficient. Once it is clear that a dispute exists between the parties, it would, in my view, be inappropriate for the court to get involved in the substance or merits of the dispute or to consider whether the position of one party to the dispute is tenable or not.

102. Both parties have referred to *Townmore (No. 1)*. The plaintiff points to the more extensive material put before the court in that case in order to demonstrate that a dispute existed between the parties. The grounds on which the defendant was disputing the claim were summarised in the defendant's affidavits in that case (and were set out by me at para. 14 of my judgment). However, the fact that more detail was provided as to the nature of the dispute in that case does not mean that such detail is necessarily required in every case. I am satisfied that on the evidence in the present case, there is a dispute between the parties as to the defendant's liability for the sum claimed by the plaintiff under the St. Etchen's subcontract. Having regard to the terms of the arbitration agreement between the parties as contained in Clause 13(a) of that subcontract, the appropriate forum in which that dispute should be resolved is arbitration. I have concluded, therefore, that it is appropriate to make an order under Article 8(1) of the Model Law referring the parties to arbitration in respect of that dispute.

Other disputes

103. The plaintiff has accepted that there is a dispute in respect of the entirety of its claim under the Stanhope subcontract and in respect of part of its claim under the St. Etchen's subcontract and that those disputes are caught by the arbitration agreements between the parties comprised in those subcontracts although it has suggested that the parties might go to mediation in respect of those disputes. As I have indicated earlier, I would certainly encourage mediation but it seems to me that, in the first place, subject to anything further which counsel may have to say, an order should be made referring the disputes under the two subcontracts to arbitration under Article 8(1) of the Model Law having regard to the terms of the arbitration agreements between the parties comprised in those subcontracts.

Conclusions

104. In conclusion, I am satisfied that the defendant has demonstrated that the requirements of Article 8(1) of the Model Law have been satisfied and that a dispute exists between the parties in respect of the plaintiff's entitlement to judgment in the sum now claimed in the summary proceedings. I will, therefore, make an order under Article 8(1) referring the parties to arbitration in respect of that dispute.

105. As regards the other disputes between the parties under the two relevant subcontracts, while encouraging the parties to mediate in respect of all of the disputes between the parties, and subject to hearing further from counsel, it seems to me that I should, in the first place, make an order referring the parties to arbitration in respect of those disputes. In the event that it is not possible for the parties to resolve the disputes by mediation, I would strongly encourage that an effort be made to have all of their disputes dealt with in one arbitration rather than in separate arbitrations under each of the two subcontracts.

106. I will hear counsel further in relation to the terms of the order to be made and on any other related issues.