[2019] IEHC 161

THE HIGH COURT

JUDICIAL REVIEW

2018/848JR

BETWEEN

CAVANAGHS OF CHARLEVILLE LIMITED

AND

HENRY FORD & SON LIMITED

APPLICANTS

AND

JAMES FITZPATRICK

RESPONDENT

JUDGMENT of Mr. Justice Quinn delivered on the 14th day of March, 2019

1. This is an application for an order of certiorari quashing an order of the Circuit Court made on 26th July 2018 which refused an application by the Applicants to stay the Respondent's proceedings against them in the Circuit Court and refused to refer same to arbitration pursuant to Article 8.1. of the Uncitral Model Law on International Commercial Arbitration as it applies in the State pursuant to s.6 of the Arbitration Act 2010.

2. The Applicants seek also an order of mandamus requiring the Circuit Court to refer the proceedings to arbitration pursuant to Article 8.

3. In the Circuit Court proceedings the Respondent claims, inter alia, rescission of a contract entered into with the First Applicant for the purchase of a new Ford

Transit Connector motor vehicle on 1/9/2015. The Respondent claims that the vehicle is defective and also claims against both Applicants damages for breach of contract and negligence and against the Second Applicant damages for negligence.

4. The contract between the Respondent and the First Respondent is in the standard form issued by the Society of the Irish Motor Industry ("SIMI"). It contains an arbitration provision in clause 13 in the following terms:-

> *"Disputes as between the parties to this Agreement shall be referred to Arbitration under the rules of the Chartered Institute of Arbitrators of Ireland and in accordance with the provisions of the Arbitration Act 2010 in the event that:*
>
> *(a) The customer does not refer the dispute to the SIMI pursuant to clause 12; or*
>
> *(b) the customer does not accept the recommendation of the SIMI Retail Motor Industry Standards Tribunal; or*
>
> *(c) the dispute relates to a new vehicle under manufacturer's warranty.*
>
> *In the event that the dispute involves a claim for an amount not exceeding €5,000 then, in accordance with the provisions of the Arbitration Act 2010, the customer shall not be bound (unless he or she otherwise agrees that any time after the dispute has arisen) into arbitration".*

5. The respondent claims that on various dates, stated to include 4/10/2016, 31/03/2017 and/or 5/04/2017 he travelled to the First Applicant's premises in Charleville, County Cork to have parts replaced, with no success in relation to the driver's door, which continued to allow leakage of water in wet weather. He states that the vehicle was purchased so that it met the requirements for transporting a relative who has a medical condition and that it is unfit for that purpose. He claims

that, pending the resolution of the proceedings, he is without a suitable motor vehicle, particularly having regard to his family requirements.

6. On a date unknown in August 2017, the Respondents then solicitors, Carmody & Company, delivered a letter to the Applicants described as "a Letter Commencing Arbitration" and entitled "In the matter of the Arbitration Act 2010 in the matter of an Arbitration between James Fitzpatrick Claimant and Cavanaghs of Charleville Limited and Henry Ford and Son Limited Respondents".

7. The letter recited the defects complained of and that the driver's door had not been rectified notwithstanding their client making multiple trips to Charleville. It continued: " According to the terms and conditions of the contract and in particular Clause 13 thereof, we write to put you on notice that we are now referring the matter to arbitration pursuant to the provisions of the Arbitration Act, 2010". The letter requested that the Applicants concur in the appointment of an arbitrator and nominated three proposed arbitrators.

8. On 29th August, 2017 the respondent issued proceedings in the Circuit Court against the applicants. They were not served until February 2018.

9. On 30th August, 2017 Messrs James Riordan and Partners Solicitors replied to Messrs Carmody indicating that their clients Henry Ford and Son Limited were taking over the defence of this matter on behalf of themselves and the dealer. They said that their clients were currently investigating the matter and wish to have the vehicle inspected and requested inspection facilities.

10. Messrs Riordan also indicated that they would revert "under separate cover in relation to your proposed arbitrators".

11. On 21st February, 2018 Messrs Caroline Fanning Solicitors, wrote to JRAP O'Meara Solicitors (formerly James Riordan & Partners) notifying them that they had

been instructed to take this matter over and enclosing a Notice of Change of Solicitor. They stated that their instructions were "to proceed to litigate the matter now through the courts".

12. Under cover of letters dated 27th February, 2018 Messrs Fanning served the Civil Bill on the Applicants.

13. On 5th April, 2018 Messrs JRAP O'Meara wrote to Messrs Fanning enclosing an Entry of Appearance and confirming again that their client Henry Ford and Son Limited are taking over the defence of this case on behalf of themselves and the dealer.

14. Messrs JRAP O'Meara referred to the letter of August, 2017 invoking the arbitration clause, and accepted the nomination of Louise O'Reilly B.L., one of the three arbitrators nominated in the August letter.

15. Messrs O'Meara stated that they were furnishing the Appearance only on the basis that the plaintiffs would agree to stay the proceedings and allow the case to proceed to arbitration as originally requested by the Respondent. They also put Messrs Fanning on notice that unless this was agreed they would apply in the Circuit Court proceedings for a stay of the proceedings and an order to have Louise O'Reilly B.L. appointed as Arbitrator.

16. Further correspondence was exchanged between the solicitors in which there was no agreement as to arbitration. On the 25th May, 2018 the Applicants issued a motion before the Circuit Court seeking to remit the dispute to arbitration and staying the Circuit Court proceedings pending the arbitration.

17. On 26th July, 2018 the Circuit Court heard and refused the Applicant's application to stay the proceedings and refer them to arbitration.

18. On 17th October, 2018 the Applicants issued an application for leave to apply for judicial review and on 22nd October, 2018 Mr. Justice Noonan granted leave to apply for an order of certiorari quashing the order of the Circuit Court made on 26th July, 2018 and for other orders.

Arbitration Act 2010 and Uncitral Model Law

19. Section 6 of the Arbitration Act 2010 adopts into Irish domestic arbitration law, with certain exceptions, the provisions of the Uncitral Model Law on International Commercial Arbitration. Article 8(1) of the Model Law provides as follows:

> *"(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests no 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".*

20. Section 11 of the Arbitration Act 2010 provides as follows:-

> *"11. There shall be no appeal from –*
>
> *(a) Any court determination of a stay application, pursuant to Article 8(1) of the Model Law".*

21. In K & J Townhouse Construction Limited v Kildare & Wicklow Education and Training Board [2018] IEHC 770 Barniville J. emphasised the mandatory nature of Article 8 (1) of the Model Law, stating:

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

He cited with approval the following statement of McGovern J. in BAM Building Limited v UCD Property Development Company Limited [2018] IEHC 582, when he stated as follows:

> *"The courts in this jurisdiction have long been supportive of the arbital 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 a matter 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 & Company Limited (In Receivership and in Liquidation) v FCC Elliot Construction Limited [2012] IEHC 361; and Go Code Limited v. Capita Business Services Limited [2015] IEHC 673."*

Grounds of this Application

22. The grounds for this application may be summarised as follows:-

(1) That the Circuit Court Order was based on an error of law and the court failed to apply the correct legal test to the facts before it, in that it did not base its decision on a consideration of whether the arbitration agreement entered into by the parties was null and void, inoperative or incapable of being performed as it was required to do by Article 8(1) of the Model Law.

(2) That in failing to apply the mandatory provisions of Article 8(1) the Circuit Court failed to perform a duty that it was obliged by statute to fulfil.

(3) That in refusing the application the Circuit Court noted and appeared to base its decision upon a claim that the Respondent had been without a car for some time and had a disabled relative to accommodate. It is said that the decision of the Circuit Court was therefore irrational and based on irrelevant consideration.

(4) The Circuit Court's failure to apply or incorrectly interpret the relevant statutory test for the referral of disputes to arbitration was an error of law so fundamental to the Circuit Court's consideration of the application before it that it deprived the Circuit Court of jurisdiction to make the order.

23. The applicant refers the court to the chronology of events, both substantive and procedural. The digital audio recording transcript has been exhibited in these proceedings. The DAR runs only to eight pages, and the decision of the judge is recorded at page 7 thereof in one paragraph (the Decision Paragraph):-

"Judge: I am refusing the application to transfer it to arbitration in circumstances where there is - - these people are without a car since 2015, it's now three years and what I'll do is I'll give it a date in November".

24. The DAR records that at the hearing submissions were made regarding the application of Article 8.1. It was relied on by the Applicants in contending that the proceedings against the First Applicant must be remitted to arbitration. The Respondent submitted that the arbitration clause in the contract was inoperable against him because it had not been brought to the attention of the Respondent. He also submitted that in circumstances where the contract does not govern the determination of the claim against the Second Applicant, the Court should have regard to the fact that a referral to arbitration of the claim against the First Applicant would lead to two

separate forums dealing with the same matter, and that the effect would be to lead to further delays.

25. The Respondent also submitted that under Section 32(5) of the Arbitration Act, the court has a discretion to make certain orders as to discontinuance in a case where there exists an arbitration agreement which relates only to part of the matters in dispute.

26. The Applicants submit that although the above and other submissions were made to the Circuit Court judge, the Decision Paragraph, which is the only record of the Court's reasoning, contains no finding that the arbitration clause was "null and void, inoperative or incapable of being performed". It submits that the judge therefore had no discretion to refuse to observe the mandatory provision in Article 8(1) to refer the parties to arbitration. The applicant submits that it is clear from the Decision Paragraph that the judge took into account the fact that "these people are without a car since 2015" and thus he was having regard to extraneous matters and not applying the test contained in Article 8.1.

27. The applicant submits that the court in doing so committed an error of law so fundamental to its consideration that it deprived the Circuit Court of jurisdiction to make the order it made.

Opposition Grounds

28. The respondent submits the following:-

(1) That the court acted within jurisdiction and accordingly its decision is not amendable to judicial review.

(2) That the Applicant is not prejudiced or disadvantaged by the Order.

(3) That the court did not make an error of law but considered and applied the correct statutory test. It submits:

(a) that Article 8.1 was opened in court and that the Respondent agreed it was the correct test, so the Court was appraised of and applied the test;

(b) that the Respondent's affidavit had given a reason why the test was satisfied, being that arbitration had been abandoned by the Applicant by reason of delay;

(c) That *"In making his decision the learned Circuit Court judge referred to the fact that the matter had been ongoing for a long time which points to him having accepted the plaintiff's point that the right to invoke arbitration had been waived or abandoned by reason of delay, thereby causing the arbitration clause to have become null and void, inoperative or incapable of being performed (being the test criteria)".*

29. The Applicant submits that the Respondent is in effect inviting this Court to read into the Decision Paragraph that the Circuit Court in fact made a finding that there was delay on the part of the Applicant of such a degree that it amounted to a finding that the conduct of the Applicant rendered the arbitration clause "null and void, inoperative or incapable of being performed".

30. The Respondent says that this submission is to require too much of the record of the Circuit Court decision. Its submits that decisions are made every day of the week by judges in the Circuit Court in which they do not give extensive reasoned to judgments and accordingly that the appropriate approach for this court is to take account of the entire of the DAR and note that submissions were made by reference to the Article 8.1 test, and treat the judge as having applied that test, applying also a presumption that the judge did not err.

31. While there is some force in this submission this is not a case in which the learned judge gave no reason at all. The DAR records that the decision was made *"in circumstances where there is -- these people are without a car since 2015"*.

Judgment

32. In O'Mahony v Ballagh [2002] I.R. 410 at p. 416 this question was considered by the Supreme Court where Murphy J. said the following:

> *"I would be very far from suggesting that judges of the District Court should compose extensive judgments to meet some academic standard of excellence. In practice it would be undesirable- and perhaps impossible – to reserve decisions even for a brief period. On the other hand it does seem, and in my view this case illustrates, that every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as it is practicable in the time available his reasoning for so doing. As I have already said, there is no suggestion that Judge Ballagh conducted the case otherwise than with dignity and propriety. It does seem to me however, that in failing to rule on the arguments made in support of the application for a non-suit he fell "into an unconstitutionality to use the words of Henchy J. in The State (Holland) v Kennedy [1977] I.R. 193 at P. 201."*

33. Whilst in this case the decision was made on a Motion, no doubt in the course of a busy motion list, there was only one test which under Article 8.1. the Court

was obliged to apply and it is clear from the DAR that no finding was made by the learned judge by reference to that test. I accept the Applicants' submission that to read such a finding into the record of the decision is a step too far. In particular no finding was made apportioning as between the parties blame for the delay, let alone that such delay had the effect of triggering the application of the Article 8.1. test. Therefore the Court failed to consider and apply the correct test.

34. The respondent has referred the Court to Section 11(a) of the Arbitration Act, 2010 which provides that there shall be no appeal from any court determination of a stay application under Article 8.1 of the Model Law. It submits that this application is in substance an appeal which Section 11(a) prohibits.

35. The policy of this section is to ensure that matters concerning arbitration do not become protracted within the court system and that after a judge has made a decision under Article 8.1 the dispute should immediately progress to hearing either before an arbitrator or a court as the judge may have decided. The Applicants submit a judicial review is not an appeal. They submit that the prohibition in s. 11 renders it all the more important that a judge considering an application under Article 8.1. must act within his jurisdiction and apply himself to the test contained in Article 8.1. They submit that unless the judge has made a clear finding that the relevant arbitration agreement has become *"null and void, inoperative or incapable of being performed"*, he must, if he was to continue acting within his jurisdiction, remit the matter to arbitration.

36. I do not believe that Section 11 (a) of the Act of 2010 can be applied to preclude judicial review. It is precisely because there is no remedy of appeal that this court must be vigilant to ascertain whether the judge made an error so fundamental

that, as it was put by Henchy J. in the *State (Holland) v. Kennedy* (26th April, 1977) where the court may:-

> *"fail to stay within the bounds of the jurisdiction conferred on it by statute. It is an error of the latter kind that prevents the impugned order in this case from being held to have been made within jurisdiction."*

37. In *Clare County Council v. Kenny* [2008] IEHC 177 MacMenamin J. adopted with approval the judgment of McMahon J. in *the State (Cork Council Council) v. Fawsitt* in which it was stated:-

> *"A court or tribunal exceeds its jurisdiction if it addresses itself to the wrong question, takes irrelevant considerations into account or if it makes an Order without deciding the issues which it is required to decide before an Order can validly be made."*

38. In this case the learned Circuit Court judge did not address himself to the test in Article 8.1. and took into account the extraneous consideration that the Respondent was without a car for a period of 3 years. In so doing he clearly failed to remain within jurisdiction, in the sense considered in The State (Holland) v Kennedy and in The State (Cork City Council) v Fawsitt.

39. The Applicant seeks also an order of mandamus requiring the Circuit Court to refer the matter to arbitration pursuant to Artilce 8.1. In my view that is not an appropriate order for this court to make, as to do so would be to substitute its own finding on the merits of the application, applying the statutory test to the facts of this case. A determination of the application to remit to arbitration will require full consideration by the Circuit Court of the evidence before it in that context. For example, the Respondent swore in his replying affidavit to the motion to remit, that he had no recollection of signing the SIMI standard form contract. At the hearing of the

motion, his counsel submitted that whilst no allegation of fraud was being made, the fact that the arbitration clause was not drawn to the attention of the Respondent had the consequence of rendering the clause "inoperative". Similarly, if any question of delay is to inform the court in its application of the statutory test, submission and possibly evidence will need to be presented. These are only some of the considerations which may inform the court as to the application of the Article 8.1. test. In these circumstances the appropriate course now is for the application to remit to be determined by the Circuit Court applying the statutory test. This should be capable of determination at the earliest available occasion in the Circuit Court.

40. I shall therefore make an order of certiorari quashing the order of the Circuit Court made on the 26th of July, 2018 and remit the matter to the Circuit Court for determination of the application to refer the proceedings to arbitration.. Subject to that application being heard and pending its determination, I shall extend the stay on the Circuit Court proceedings ordered by Noonan J. on the 22nd of October, 2018.

Michael Quinn

14 March 2019