[2019] IEHC 666

THE HIGH COURT

[2018 No. 1096 S]

BETWEEN

K&J TOWNMORE CONSTRUCTION LIMITED

PLAINTIFF

AND

KILDARE AND WICKLOW EDUCATION AND TRAINING BOARD

DEFENDANT

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

Introduction

1. This is my judgment on an application by the defendant, Kildare and Wicklow Education and Training Board, for an order pursuant to Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended, 2006) (the "Model Law") referring the parties to arbitration in respect of the disputes the subject of these proceedings under the terms of an arbitration agreement which the defendant contends is in existence and binds the parties. The plaintiff resists the application.

2. This judgment is not to be confused with the judgment I delivered in proceedings between the same parties on 21st December, 2018, (K&J Townmore Construction Ltd v. Kildare and Wicklow Education and Training Board [2018] IEHC 770 (unreported, High Court, 21st December, 2018); "Townmore No. 1"), which concerned a different dispute in respect of a different agreement.

Overview

3. The plaintiff, a building contractor, and the defendant, a statutory board, are parties to a building contract dated 28th October, 2015, under which the defendant engaged the plaintiff to carry out construction works at St. Conleth's Community College in Newbridge, Co. Kildare (the "contract"). The contract is in the form of the "Public Works Contract for Building Works Designed by the Employer" (the "PWC form").

4. The parties have been in dispute in relation to a whole range of issues concerning the contract since 2016. Various dispute resolution procedures and processes have been put in place and pursued by the parties since then. They include an expert determination procedure and an unsuccessful conciliation. The expert determination procedure led to a number of determinations being issued in favour of the plaintiff who has relied on those determinations in these proceedings, which the plaintiff is seeking to have entered in the commercial list and in which the plaintiff seeks summary judgment for just under €3 million. The defendant has opposed the plaintiff's application for entry of the proceedings in the commercial list and, in the present application, has sought an order under Article 8(1) of the Model Law referring the dispute between the parties which is the subject of these proceedings to arbitration in reliance on a provision of the contract (Clause 13.2). The plaintiff opposes that application.

5. There is a dispute between the parties as to the impact and effect of the expert determination procedure on the dispute resolution procedures provided for in the contract. A further complicating factor which arises in this case is that during the course

of the proceedings, and while the defendant's application for an order under Article 8(1) of the Model Law was awaiting a hearing, the parties engaged in a conciliation procedure on certain agreed terms. That conciliation procedure encompassed the disputes between the parties which were the subject of the expert determination procedure and are the subject of these proceedings as well as other disputes between the parties which are not.

6. In summary, the defendant contends that the court should make an order under Article 8(1) of the Model Law referring the disputes the subject of the proceedings to arbitration under Clause 13.2 of the contract. The defendant argues that the expert determination procedure initially agreed between the parties in August 2016, and expanded in January 2017, disapplied, supplanted or replaced the conciliation provisions in Clause 13.1 of the contract with respect to the issues the subject of the proceedings but left intact and enforceable the arbitration provisions contained in Clause 13.2. The defendant contends, therefore, that there is an "arbitration agreement" between the parties for the purposes of Article 8(1) of the Model Law which covers the disputes the subject of the expert determination procedure and these proceedings, which should be enforced by the Court.

7. The plaintiff resists the defendant's application on a number of grounds. Essentially, it contends that the arbitration agreement contained in Clause 13.2 is "inoperative" under Article 8(1) of the Model Law as the expert determination procedure was intended to, and did, replace not only the conciliation provisions in Clause 13.1 of the contract but also the arbitration provisions contained in Clause 13.2. The plaintiff says, therefore, that there is no operative arbitration agreement in respect of the disputes the subject of the proceedings. The plaintiff also relies on the terms of the parties' agreement in August 2018 to engage in the conciliation procedure encompassing the issues in the proceedings as precluding the defendant from relying on the arbitration agreement in Clause 13.2 of the contract. The defendant contends that the conciliation agreement does not preclude it from relying on the arbitration agreement but rather expressly preserved the parties' respective positions including the defendant's entitlement to seek recourse to arbitration under Clause 13.2.

8. I have concluded, for the reasons set out in detail in this judgment, that the defendant has failed to establish that the arbitration agreement in Clause 13.2 of the contract applies to the disputes the subject of these proceedings. Therefore, the requirements of Article 8(1) of the Model Law have not been satisfied by the defendant. Furthermore, insofar as any burden rests on the plaintiff, I have concluded that the plaintiff has demonstrated that the arbitration agreement in Clause 13.2 of the contract is "inoperative" with respect to the disputes the subject of the proceedings by reason of the agreement for expert determination entered into between the parties in August 2016, and expanded in January 2017. In my view, the effect of that agreement was to disapply or supplant both the conciliation provisions contained in Clause 13.1 and the arbitration provisions in Clause 13.2 with respect to the disputes the subject of the proceedings (leaving those provisions applicable to disputes not covered by the proceedings). That, in my view, is the correct interpretation of the agreement for expert determination and its impact and effect on the provisions of Clause 13.1 and Clause 13.2 of the contract.

9. In light of that conclusion, it is strictly speaking unnecessary for me to consider the proper interpretation of the conciliation agreement and its impact on the defendant's entitlement to have recourse to the arbitration provisions in Clause 13.2 of the contract. However, in my view, there is nothing in that conciliation agreement which undermines the conclusion I have reached in relation to the interpretation and impact of the agreement for expert determination. On the contrary, the terms of the conciliation agreement are inconsistent with the defendant's entitlement to rely on Clause 13.2 of the contract in relation to the issues which are the subject of these proceedings. In those circumstances, I must refuse the defendant's application.

Factual background

10. I set out in this section of my judgment the relevant factual background which is taken from the affidavits sworn in connection with the defendant's application. I have also had regard to the affidavits sworn in connection with the plaintiff's application for summary judgment and its application to enter the proceedings in the commercial list. There is no real dispute between the parties on the relevant facts.

11. The plaintiff and the defendant entered into the contract on 28th October, 2015, under which the plaintiff, as contractor, agreed to carry out construction works at St. Conleth's Community College for the defendant, as employer. The contract was in the PWC form and contained certain dispute resolution procedures in Clause 13. Clause 13.1 provided for conciliation. Clause 13.2 provided for arbitration. While the plaintiff and the defendant agreed in their submissions to the Court that the conciliation provisions in Clause 13.1 are optional whereas the arbitration provisions in Clause 13.2 are mandatory, I do not wish to be taken as agreeing with or endorsing that consensus, as I explain below.

12. Disputes arose between the plaintiff and the defendant during the course of 2016. The plaintiff sought to invoke the conciliation provisions in Clause 13.1 of the contract. However, the plaintiff claims that its attempts to do so were ignored by the employer's representative (the "ER") under the contract. Ultimately, however, agreement was reached between the parties in August 2016 to enter into an expert determination process under which LEA Consulting Limited was appointed as what was termed a "*mediator/expert*" (the "expert") on certain agreed terms. The initial terms of engagement of the expert were set out in a letter dated 12th August, 2016, and were agreed by the parties. A draft determination was issued by the expert in December 2016, following which it was agreed between the plaintiff and the defendant that the terms of engagement of the expert would be revised and expanded. Revised terms of engagement were issued by the expert and signed by the parties on 23rd January, 2017, (the "agreement for expert determination"). Both the initial terms of engagement and the revised terms of engagement were set out in the agreement for expert determination.

Revised Terms of Engagement

13. Under that agreement, the parties agreed to refer certain disputes and differences to the expert for expert determination. Initially, it was agreed that the expert would seek to arrive at a determination of the "contractual position of the parties". In the revised terms

of engagement, however, it was agreed to confer an expanded jurisdiction and powers on the expert. Under Clause 2, the plaintiff and the defendant agreed to "take up and consider Binding any Determination, or series of Determinations, within [10] working days of receipt by the Parties of a Notice of Publication of such Determination or series of Determinations" (underlining in original). The revised terms of engagement then repeated the contents of paras. A, B and C of the original terms and added a series of new provisions in relation to the jurisdiction and powers of the expert at para. D.

14. At para. A, it was agreed between the parties that by submitting to expert determination on the terms agreed, the parties were taken to have conferred on the expert the jurisdiction and powers set out "to be exercised insofar as the Law allows and in [the expert's] discretion as they may judge expedient for the purpose of ensuring the just and expeditious economical and final determination of the dispute referred to [the expert]".

15. Paragraph B provided that the expert should have jurisdiction to:-

> *"1. Determine any matter pertaining to the Agreement [including any matter of Quantum] or any question of Law pertaining to the Agreement. Determine any question as to their jurisdiction, or any question of good faith or dishonesty arising from the dispute and order any party to furnish such further details of its case, in fact or in Law, as the [expert] may require…."*

16. Paragraph D provided as follows:-

> *"For the avoidance of doubt, and without limiting in any way the Jurisdiction and powers of the [expert] as noted above, [the expert] will have the jurisdiction and power to:*
>
> *1. Direct the parties as to how the process of the Determination of Quantum is to be administered, including the timetabling of submission of information, responses, periods for issuing of Determinations and any other matter necessary to allow Determinations to be Notified and become Binding on the Parties.*
>
> *2. Direct the Parties, so as to ensure that the process of the Determination of Quantum is administered in an economical and efficient manner.*
>
> *3. Expand their jurisdiction to incorporate new items raised by the Parties, should either party desire to have such items determined under these Revised Terms of Engagement.*
>
> *4. Direct the Parties as to the payment of/or deduction of monies accruing to either of the Parties on foot of any Notice of a Determination, or series of Determinations.*
>
> *5. Decide matters which are the subject matter of 'stale' referrals to Conciliation by the Parties under Clause 13 of the [contract].*

6. *Decide any matter necessary to regularize the Agreement, in order to allow for all matters falling within the jurisdiction of [the expert] to be Determined.*

7. *Assume the powers (but not the obligations or liabilities) [of] the ER for the purposes of administering the Agreement and/or to regularize any matter which is as a result of a failure of the ER on behalf of the [defendant] to administer the Agreement."*

17. The revised terms of engagement evidencing the agreement for expert determination recorded the parties' agreement to be bound by the terms and conditions set out in the revised terms and by any determination or series of determinations issued by the expert in accordance with the jurisdiction and powers given to it by the parties as set out in those revised terms. It was also agreed by the parties that such determinations would be "*documents which are in the contemplation of the Agreement formed between the Parties on the 28th October, 2015*" (i.e. the contract).

Defendant's dissatisfaction with expert

18. In the period following his appointment in early 2017, the expert issued a number of determinations. The defendant was not satisfied with the manner in which the expert determination process was proceeding and sought unilaterally to withdraw from the process in a letter sent to the expert on 15th September, 2017. In that letter it was indicated that the defendant wished to withdraw from the process and to terminate the engagement of the expert. The letter indicated that as a result of the purported termination, the defendant did not accept the expert's jurisdiction to make any further determinations from the date of the letter.

19. The plaintiff informed the expert, by letter dated 29th September, 2017, that it wished the expert determination process to continue in accordance with the agreement between the parties. The expert took the view that it was not open to one party to terminate the expert determination process on a unilateral basis and so informed the defendant in a letter dated 2nd October, 2017.

20. The defendant sent a more detailed letter to the expert on 21st November, 2017, setting out various issues which it had with the revised terms of engagement of the expert and with the manner in which the expert had conducted the process. The defendant contended that the expert determination process had extended beyond what was intended or what the defendant expected and that the expert had no jurisdiction to proceed with the process. In the same letter, the defendant contended that the agreement for expert determination could not have given rise to any amendment to the contract (a point not now pursued by the defendant which contends that the expert determination agreement did amend Clause 13.1 of the contract, but only that provision, with respect to the issues which were the subject of the expert determination process).

Determinations in relation to payment

21. Notwithstanding that exchange of correspondence, the expert did not cease acting and issued a number of further determinations in the course of 2017 and 2018, some of which determined sums in respect of "*fair valuation*" of claims made by the plaintiff and directed

that sums contained in the determinations be included in the next interim payment certificate in respect of the works carried out under the contract. The plaintiff included the sums so determined by the expert in its applications for payment by the defendant. However, the ER did not certify the sums as a result of which the plaintiff was unable to issue invoices to the defendant for payment of those sums.

22. In a letter dated 18th May, 2018, the plaintiff requested the expert to exercise the power contained in para. D.7 of the agreement for expert determination (as set out in the revised terms of engagement) to assume the power of the ER to certify the payments referred to in the determinations or, alternatively, to direct the defendant to pay the sums allegedly due. The expert issued a further determination on 22nd May, 2018, to the effect that the relevant determinations could be considered as a "*certificate*" within the meaning of the relevant provisions of the contract. On 24th May, 2018, the plaintiff sent a series of invoices to the defendant seeking payment of the sums referred to in the determinations. The invoices totalled €2,954,147.22. They were not paid by the defendant.

23. The plaintiff's solicitors wrote to the defendant on 25th June, 2018, seeking payment and, in default of payment, threatening proceedings. In the absence of a response from the defendant, the plaintiff's solicitors wrote again on 12th July, 2018, seeking payment and threatening proceedings.

24. The defendant's solicitors replied on 13th July, 2018. In that letter, the defendant's solicitors made express reference to the dispute resolution provisions in Clause 13 of the contract under which, they contended, the parties were required to refer disputed matters to conciliation and, if the issues were not resolved at conciliation, the parties were obliged to refer them to arbitration. It was contended that the terms of the contract were compulsory and could not be amended. It was indicated, therefore, that the defendant would seek to rely on the arbitration provisions contained in Clause 13 (Clause 13.2) and, in the event that the plaintiff issued proceedings, the defendant would bring an application seeking an order referring the parties to arbitration under Article 8(1) of the Model Law. The defendant's solicitors referred to the expert determination process as being an alternative to the conciliation process under the contract which was entered into by the parties in the hope of resolving the disputed issues. They stated that the defendant was not satisfied with how the expert process was conducted and withdrew from that process in September 2017, in the hope that matters could be settled directly between the parties. The defendant's solicitors then referred to the fact that a number of determinations were issued by the expert following the defendant's withdrawal from the process and without its input. They described the process as being "*flawed*" and asserted that the determinations were not valid. Finally, the defendant's solicitors contended that although the agreement for expert determination provided that the determinations issued by the expert would be "*binding*" on the parties, they were not stated to be "*final*". They asserted that the expert determination procedure was designed to replace the conciliation process under the contract and not the arbitration agreement.

25. The plaintiff's solicitors replied on 13th July, 2018, rejecting those various contentions and asserting that the agreement for expert determination did constitute an amendment of the contract (as permitted under Clause 1.9.3 of the contract) and disapplied the conciliation and arbitration provisions in Clause 13.1 and Clause 13.2 of the contract. In those circumstances, it was contended that there was no arbitration agreement in existence in respect of the issues between the parties which were the subject of the expert determination procedure and that the defendant, therefore, had no entitlement to seek to have those issues referred to arbitration.

Conciliation Agreement

26. Prior to the issue of proceedings by the plaintiff, the plaintiff and the defendant, who were already engaged in a conciliation process in respect of different disputes and in which Ciaran Fahy had been appointed conciliator in March 2018, agreed to expand that conciliation process to include the disputes between the parties which were the subject of the expert determination procedure. I should note, however, that it is not entirely clear whether the conciliation process was taking place under provisions of Clause 13.1 of the contract or on some other basis. In any event, the parties agreed to expand that process and did so on certain terms which were set out in a letter sent by Mr. Fahy to the parties on 16th August, 2018, which was signed by both parties (the "conciliation agreement").

27. The plaintiff relies on the terms of the conciliation agreement in support of its contention that the defendant has no entitlement to rely on the arbitration agreement contained in Clause 13.2 of the contract with respect to the disputes the subject of these proceedings. I should, therefore, refer to the relevant provisions of the conciliation agreement.

28. It was agreed between the parties in the conciliation agreement that the conciliation was intended to encompass "*all claims arising under the contract in an effort to achieve agreement on a final account figure*" (para. 1).

29. At para. 2, the conciliation agreement provided as follows:-

> *"This increase in the scope of the conciliation is without prejudice to the expert determination process engaged in by the 2 parties and which has resulted in [the plaintiff's] claim for payment of the sum of €2,954,147.22 on foot of invoices submitted to the [defendant] under cover of letter dated 24th May 2018 (the 'Determination Claim'). The Parties agree to reserve their rights in respect of the Determination Claim which shall remain, in all respects, unaffected by the Conciliation save to the extent provided in this agreement."*

30. It was envisaged under para. 3 of the conciliation agreement that the plaintiff would issue and serve High Court proceedings in respect of the sums claimed by it which were the subject of the determination claim (i.e. which were the subject of the expert determination process). It was agreed that those proceedings would be discontinued if agreement was reached on all matters in dispute (para. 4).

31. Paragraph 5 provided as follows:-

"If a recommendation is made and either party issues a notice of dissatisfaction under subclause 13.1.9, the following shall then apply:

a. [The plaintiff] may choose to refer all matters to arbitration under subclause 13.2 or

b. [The plaintiff] may, alternatively, continue with the Proceedings, in respect of the expert determinations, while referring the balance of claims to arbitration.

c. If any Court refuses to enforce the expert determinations, [the plaintiff] at that stage may refer the claims in question to arbitration under subclause 13.2 and

d. For purpose of subclause 13.1.11, [the conciliator] will determine the sum of money payable under 13.1.11 (1)."

32. A timetable was then set out. The conciliation agreement was signed by both parties.

Commencement of proceedings and application for entry into the Commercial List

33. As envisaged in the conciliation agreement, the plaintiff issued these proceedings on 29th August, 2018, seeking payment of the sum of €2,954,147.22 on foot of the invoices submitted following the determination by the expert. The plaintiff then sought to enter the proceedings in the commercial list and sought summary judgment in that amount.

34. The defendant opposed the application to enter the proceedings in the commercial list on various grounds, including on the ground that the agreement for expert determination amended the conciliation provisions of the contract and not the arbitration provisions and that, therefore, the defendant was entitled to have the matter referred to arbitration. Dr. Deirdre Keyes, who swore the affidavit on behalf of the defendant for the purpose of opposing the plaintiff's application for entry into the commercial list, made it clear that she was not commenting on the substance of the dispute between the parties. For that reason, she did not outline the reasons for the defendant's view that the expert determination process had been conducted in an unsatisfactory manner.

35. The plaintiff's application for summary judgment and to enter the proceedings in the commercial list was adjourned from time to time to enable the defendant to bring the present application for an order under Article 8(1) of the Model Law referring the parties to arbitration in respect of the issues the subject of the proceedings.

Application for order under Article 8(1) of the Model Law

36. The defendant brought the present application on 5th October, 2018. The application was grounded upon another affidavit of Dr. Keyes sworn on 4th October, 2018. In very brief summary, Dr. Keyes asserted that the agreement for expert determination amended Clause 13.1 and replaced conciliation with the expert determination procedure agreed. She asserted that the agreement for expert determination did not amend or replace the arbitration provisions contained in Clause 13.1, which subsisted. In short, however, Dr.

Keyes contended that the arbitration agreement between the parties contained in Clause 13.2 of the contract continued to exist notwithstanding the agreement for expert determination and that the court should, therefore, make an order referring the parties to arbitration in respect of the disputes the subject of the proceedings.

37. A replying affidavit was sworn by Denis Lahart on behalf of the plaintiff on 21st November, 2018, for the purpose of resisting the defendant's application. Mr. Lahart asserted that the agreement for expert determination replaced both the conciliation provisions in Clause 13.1 and the arbitration provisions contained in Clause 13.2 for various reasons. Mr. Lahart also sought to rely on the conciliation agreement and contended that the terms of that agreement precluded the defendant from seeking to refer the dispute the subject of the proceedings to arbitration. He explained that the conciliation process conducted under the terms of the conciliation agreement was unsuccessful and did not lead to a resolution of the issues between the parties.

The Issues

38. The parties agree that the agreement for expert determination (the terms of which were recorded in the revised terms of engagement) did amend, replace or supplant part of Clause 13 of the contract insofar as the disputes which were the subject the expert determination procedure were concerned. The difference between the parties is the extent to which it did. The defendant contends that the agreement for expert determination amended, supplanted or replaced only the conciliation provisions contained in Clause 13.1 in respect of those disputes but left intact the arbitration provisions contained in Clause 13.2.

39. The plaintiff, however, contends that the agreement for expert determination amended, supplanted or replaced both the conciliation provisions in Clause 13.1 and the arbitration provisions in Clause 13.2 with respect to those disputes. The essential issue which I have to decide on this application is which of those respective contentions is correct.

40. A further issue which requires consideration is whether the conciliation agreement made between the parties in August 2018, in any way affects the defendant's entitlement to seek to rely on the arbitration provisions contained in Clause 13.2

41. In addressing those issues, I will first refer briefly to the approach which the court is required to take in considering an application for an order under Article 8(1) of the Model law. I will then proceed to consider the provisions of Clauses 13.1 and 13.2 of the contract and the extent to which either or both of those provisions may have been affected by the agreement for expert determination. That will involve a consideration of the proper interpretation of the expert determination agreement and of Clause 13.2 of the contract in accordance with established principles of Irish law governing contractual interpretation. Having set out my conclusions on the proper interpretation of the expert determination agreement and its effect on the provisions of Clause 13 of the contract, I will then turn to consider the conciliation agreement and whether it has any relevance to the defendant's application.

Article 8(1) of Model Law

42. The defendant seeks an order under Article 8(1) of the Model Law referring the parties to arbitration in respect of the dispute the subject of the proceedings. Article 8(1) 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."*

43. 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 (s. 6 of the Arbitration Act 2010) (the "2010 Act"). As I observed in *Ocean Point Development Company Ltd (In Receivership) v. Patterson Bannon Architects Ltd & ors* [2019] IEHC 311 (unreported, High Court, 10th May, 2019) ("Ocean Point"), a judgment delivered after the present application was heard,:-

> *"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).*

44. As I further observed in Ocean Point (at para. 27, p. 13), the Irish Courts have consistently held that where the requirements of Article 8(1) of the Model Law are met, the court is subject to a mandatory obligation to refer. That principle and the complementary approach taken by the Irish courts to support the arbitral process was previously stressed and applied by me *in Townmore No. 1*. In that case, I endorsed the observations previously made by the High Court (McGovern J.) in *BAM Building Ltd v. UCD Property Development Company Ltd* [2016] IEHC 582 (unreported, High Court, 20th October, 2016) ("*BAM*"), *Go Code Ltd v. Capita Business Services Ltd* [2015] IEHC 673 (unreported, High Court, 27th October, 2015) and *Kellys of Fantane (Concrete) Ltd (In Receivership) v. Bowen Construction Ltd (In Receivership) & anor* [2017] IEHC 357 (unreported, High Court, 1st June, 2017) ("*Kellys of Fantane*").

45. There is no dispute between the parties as to the mandatory obligation imposed on the court under Article 8(1) of the Model Law. The question which arises, however, on this application is whether the matters the subject of the proceedings are the subject of an arbitration agreement, being one of the requirements which must be met before Article 8(1) of the Model Law is engaged. The defendant's case is that Article 8(1) applies in that the proceedings do concern a "*matter which is the subject of an arbitration agreement*" namely, Clause 13.2 of the contract. The plaintiff disputes the application of Clause 13.2 as it contends that that clause was disapplied by the agreement for expert determination and that, therefore, there is no applicable arbitration agreement. Thus, it asserts that one of the essential requirements for the application of Article 8(1) has not been satisfied. In the alternative. the plaintiff argues that the arbitration agreement (in Clause 13.2 of the contract) is "*inoperative*" within the meaning of that term in Article 8(1) and that, therefore, the mandatory obligation contained in Article 8(1) to refer the parties to arbitration does not apply.

46. As the party seeking to invoke the court's jurisdiction under Article 8(1) of the Model Law, the defendant bears the initial burden of establishing that the various requirements for the application of Article 8(1) are satisfied. In particular, it bears the burden of establishing that the proceedings concern a matter or matters which is or are the subject of an arbitration agreement. If the defendant discharges that initial burden, the burden then shifts to the plaintiff to establish that the arbitration agreement is "*inoperative*" under Article 8(1).

47. The parties are in agreement that the approach which the court is required to take in determining whether an arbitration agreement exists is to give full judicial consideration to the issue rather than approaching the question on a prima facie basis. It is now well established that that is the correct approach for the court to adopt in determining whether an arbitration agreement exists: *Lisheen Mine v. Mullock & Sons (Shipbrokers) Ltd* [2015] IEHC 50 (unreported, High Court Cregan J., 12th January, 2015) and *Sterimed Technologies International Ltd v. Schivo Precision Ltd* [2017] IEHC 35 (unreported, High Court McGovern J., 27th January, 2017). Therefore, that is the approach which I will adopt in determining whether an arbitration agreement exists between the parties for the purposes of Article 8(1) of the Model Law.

48. The exercise which the court is required to undertake in considering the present application is somewhat different to that which often arises in applications to refer parties to arbitration under Article 8(1) of the Model Law or in applications to stay proceedings under the pre-existing legislative regime, where the dispute concerns the scope of an admitted arbitration agreement. In such cases, the issue is often whether the dispute between the parties which is the subject of the litigation falls within the scope of the arbitration agreement and the court is required to interpret the arbitration agreement in order to resolve that dispute. In undertaking that exercise, the courts have developed principles for the interpretation of an arbitration agreement. Those principles are derived from the decision of the House of Lords in *Fiona Trust & Holding Corporation & ors v. Privalov & ors* [2007] 4 All ER 951; [2007] UKHL 40 ("*Fiona Trust*") which has been

followed and applied in several Irish decisions (including *O'Meara v. The Commissioners of Public Works in Ireland and Ors* [2012] IEHC 317 (unreported, High Court Charleton J., 25th July, 2012); *BAM; Kellys of Fantane;* and *Achill Sheltered Housing Association CLG v. Dooniver Plant Hire Ltd* [2018] IEHC 6 (unreported, High Court McGovern J., 12th January, 2018). I endeavoured to summarise those principles in my judgment in *Townmore No. 1* as follows:-

> *"(1) In construing an arbitration agreement, the court must give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration agreement.*
>
> *(2) The construction of an arbitration agreement should start from an assumption or presumption that the parties are likely to have intended any dispute arising out of the relationship which they entered into to be decided by the same body or tribunal. In other words, there is a presumption that they intended a 'one-stop' method of adjudication for their disputes.*
>
> *(3) The arbitration agreement should be construed in accordance with that assumption or presumption unless the terms of the agreement make clear that certain questions or issues were intended by the parties to be excluded from the jurisdiction of the arbitrator.*
>
> *(4) A liberal or broad construction of an arbitration agreement promotes legal certainty and gives effect to the presumption that the parties intended a 'one-stop' method of adjudication for the determination of all disputes.*
>
> *(5) The court should construe the words 'arising under' a contract and the words 'arising out of' a contract when used in an arbitration agreement broadly or liberally so as to give effect to the presumption of a 'one-stop' adjudication and the former words should not be given a narrower meaning than the latter words. Fine or 'fussy' distinctions between the two phrases are generally not appropriate." (para. 53, pp. 22-23).*

49. However, these principles are of limited assistance in the context of the present application as the parties accept that the presumption of a "*one-stop*" method of adjudication of disputes which underlies those principles has been displaced on the facts. Both parties accept that the dispute resolution provisions in Clause 13 of the contract have been amended, supplanted or replaced as regards the disputes which were the subject of the expert determination procedure. On the defendant's case there are two stops. The first is expert determination in accordance with the agreement for such determination. The second is arbitration under Clause 13.2 of the contract. On the plaintiff's case, there is a "*one-stop*" place for the adjudication and resolution of the relevant disputes but it is not by arbitration in accordance with the arbitration agreement contained in Clause 13.2 of the contract. Rather, it is under the expert determination procedure agreed between the parties with the parties then being free to litigate to enforce their claims.

50. The crux of the issue between the parties is the impact and effect of the agreement for expert determination on the provisions of Clauses 13.1 and 13.2 of the contract. The resolution of that issue turns on the proper interpretation of the agreement for expert determination. Whether or not the court approaches the interpretation of that agreement by reference to the burden on the defendant to establish that there is in existence an arbitration agreement between the parties covering the dispute the subject of the proceedings or by reference to the burden on the plaintiff of establishing that an otherwise applicable arbitration agreement is "*inoperative*" under Article 8(1) of the Model Law makes little practical difference in the context of the present application.

Interpretation of expert determination agreement

51. Before looking again at the terms of the agreement for expert determination and the respective contentions of the parties as to the effect of that agreement on the provisions of Clauses 13.1 and 13.2 of the contract, I should draw attention to some of the relevant parts of those provisions.

Clauses 13.1 and 13.2 of the contract

52. Clause 13.1 of the contract contains detailed provisions providing for the conciliation of disputes between the parties to the contract. I do not propose to set out the provisions of Clause 13.1 in full, not least because the parties agree that the provisions of Clause 13.1 have been disapplied by the agreement for expert determination with respect to the disputes the subject of the expert determination procedure. However, the scheme provided for under Clause 13.1 is relevant as it bears upon the interrelationship between Clause 13.1 and Clause 13.2 and on the question of whether Clause 13.2 can survive in circumstances where Clause 13.1 has been disapplied by the agreement for expert determination with respect to the disputes encompassed by that procedure.

53. Under Clause 13.1.1, if a dispute arises under the contract, either party "*may, by notice to the other, refer the dispute for conciliation under this sub-clause 13.1…*". Clause 13.1 then provides for a structure and timetable for the conduct of the conciliation. There is a time limit for the appointment of a conciliator and provision for the appointment of such a conciliator in default of agreement within that period. There is then provision for the furnishing of information and material to the conciliator and for the conciliator to consult with the parties in an attempt to resolve the dispute by agreement. It is expressly provided that the conciliator is not an arbitrator and that the 2010 Act and the law relating to arbitration does not apply to the conciliation. There is then provision for what is to happen if the dispute is not resolved by agreement within the specified period (42 days or longer, if agreed). In such a situation, the conciliator is required to give both parties a written recommendation. If either party is dissatisfied with the recommendation, it may (within 42 days of receipt of the recommendation) notify the other party, setting out various matters. If the conciliator has not given a recommendation within 42 days following appointment, either party may give notice of dissatisfaction. In either case either party "*may*" refer the dispute to arbitration under Clause 13.2 (Clause 13.1.9).

54. There is then provision for what happens if the conciliator gives a written recommendation and neither party gives notice of dissatisfaction within 42 days of receipt of the recommendation. In such circumstances, the recommendation is stated to be "*conclusive and binding on the parties, and the parties agree to comply with it*". In such a situation, if a party fails to comply with the recommendation, the other party "*may… refer the failure itself to arbitration under sub-clause 13.2*" (Clause 13.1.10). It is expressly provided that this may be done without limiting that party's "*other rights*" and it is also provided that it is not necessary to go through the conciliation procedure again before the party is permitted to refer the matter to arbitration.

55. There are then detailed provisions for what is to happen in circumstances where the conciliator has recommended the payment of money and a notice of dissatisfaction is given. The party must make the payment recommended by the conciliator provided certain conditions are satisfied: the other party must refer the dispute to arbitration and provide a bond for payment (Clause 13.1.11). There is then provision for what is to occur when the dispute is "*finally resolved*" if it is found that an overpayment has been made.

56. It can seen, therefore, that Clause 13.1 contains quite a detailed and prescribed structure for the conduct of conciliation under its provisions and provides for the entitlement of one or more of the parties to refer the dispute to arbitration under Clause 13.2 at various stages of the process. It is agreed between the parties that the agreement for expert determination disapplied the conciliation provisions in Clause 13.1 with respect to the matters referred to the expert for determination.

57. Clause 13.2 provides as follows:-

"Arbitration

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

Key question and legal principles

58. In considering the respective contentions of the parties as to the interpretation and scope of application of the agreement for expert determination, one of the questions to consider is whether, notwithstanding the various references in Clause 13.2 to Clause 13.1, which the parties agree has been disapplied in respect of the relevant disputes, Clause 13.2 continues to subsist and to have effect in respect of the disputes the subject of the proceedings.

59. As noted earlier, while the parties are in agreement that where Clause 13.1 and Clause 13.2 subsist, recourse to conciliation is optional and it is open to a party to decide to skip conciliation and to proceed straight to arbitration if it wishes. While this is not an issue which arises directly in this application, I should indicate that I do not wish to be taken as

endorsing this agreed position. It seems to me that it is much more likely having regard to the language used in Clauses 13.1 and 13.2 and to other provisions of the contract (such as Clause 10.5.4) that, in the absence of agreement between the parties, it is mandatory to invoke the conciliation procedure in Clause 13.1 before being in a position to proceed to arbitration under Clause 13.2. I note that is the view taken by Tom Wren in *Public Works in Ireland: Procurement and Contracting* (Clarus Press, 2014 at paras. 17–10 and 17–41, pp. 716 and 729).

60. The parties are in agreement as to the legal principles to be applied to the interpretation of the agreement for expert determination. They both agree that the applicable principles are those set out by Lord Hoffman in Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 W.L.R. 896 ("ICS") and in the many judgments of the Superior Courts in Ireland which have approved and applied those principles. There is, however, a dispute between the parties as to the application of those principles in the interpretation of the agreement for expert determination.

Defendant's submissions

61. In summary, the defendant contends that on its proper interpretation, the agreement for expert determination does not provide for a "*final*" and "*binding*" determination of the issues by the expert. Rather, the agreement describes the determinations of the expert as merely being "*binding*", which the defendant contends is analogous to a decision of an adjudicator on a dispute relating to payment under a construction contract as provided by the Construction Contracts Act 2013 (the "2013 Act"). Under s. 6(10) of the 2013 Act, the decision of the adjudicator is "*binding*" until the payment dispute is "*finally settled*" by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in court proceedings. The defendant contends that the absence in the agreement of a provision that the expert's determinations are to be "*final and binding*" is significant as that term is commonplace in the construction industry where the parties intend that a determination be definitive. The defendant submits that a determination which is stated to be "*binding*" (Clause 2 of the agreement) is less definitive than one which is stated to be "*final and binding*".

62. The defendant points to the provisions of Clause 13.1.10 of the contract where it is stated that a recommendation of a conciliator is "*conclusive and binding*" on the parties if no notice of disatisfaction is given within the requisite period. The defendant also draws attention to the terms of Clause 13.2 where reference is made to a dispute which may be referred to conciliation under Clause 13.1 being "finally settled" by arbitration in accordance with Clause 13.2. The defendant argues that if a conciliator's recommendation is "*conclusive and binding*" and yet can only be "*finally settled*" by arbitration under Clause 13.2, it would not make sense for the parties to agree that an expert's determination, which is merely stated to be "*binding*", could have more definitive consequences. It argues that under the scheme of Clause 13.1 and Clause 13.2, arbitration is always intended to be the ultimate dispute resolution process under the contract, including where it is sought to enforce a "*conclusive and binding*" recommendation by a conciliator (under Clause 13.1.10). The defendant, therefore,

submits that on its terms the agreement for expert determination did not provide for the expert's determination to be final and binding and to preclude the parties' entitlement to have recourse to the arbitration provisions in Clause 13.2.

63. In support of its interpretation of the scope of application of the agreement for expert determination, the defendant seeks to rely on a letter from the plaintiff to the defendant dated 11th September, 2017, in which it was asserted by the plaintiff that the defendant had suggested that the parties "*should waive their rights to conciliation…*" and that this indicates that it was only the conciliation provisions in Clause 13.1 which were being disapplied by the agreement for expert determination and not the arbitration provisions in Clause 13.2.

64. In support of its contention that Clause 13.2 subsists notwithstanding the agreement for expert determination, the defendant submits that Clause 13.2 survived that agreement and continues to subsist notwithstanding the disapplication of Clause 13.1. It contends that Clause 13.2 does not require the continued existence of Clause 13.1. The defendant submits that the references to Clause 13.1 in Clause 13.2 mean only that there must have been a dispute which could at one stage have been referred to conciliation. It says that the disputes which the parties agreed would be dealt with by expert determination were disputes which could have been referred to conciliation under Clause 13.1 and a conciliation could have taken place (had the parties not agreed to disapply the provisions of Clause 13.1 in respect of those disputes). The defendant submits that at the time the contract was entered into, Clause 13.1 was in the contract and the disputes which subsequently arose between the parties could have been referred to conciliation under that provision. It asserts that notwithstanding the disapplication of Clause 13.1, the disputes which were agreed to be dealt with by expert determination were disputes which could have been referred to conciliation. As part of this aspect of its submission, the defendant places some stress on its contention that the referral of disputes to conciliation under Clause 13.1 is in any event optional whereas the referral to arbitration under Clause 13.2 is mandatory. As I have indicated earlier, while I do not believe that it is necessary conclusively to determine that issue on this application, I do not believe that a proper interpretation of Clauses 13.1 and 13.2 supports such a contention.

65. Finally, the defendant rejects the contention that the conciliation agreement precludes it from seeking to refer the relevant disputes to arbitration under Clause 13.2. It submits that a proper interpretation of the conciliation agreement is that the parties' respective positions were reserved under the conciliation agreement and that nothing in that agreement precludes it from seeking to refer the disputes to arbitration.

Plaintiff's submissions

66. The plaintiff contends that on the proper application of the principles set out in ICS and approved by the Irish courts, the correct interpretation of the agreement for expert determination is that the agreement had the effect of disapplying the conciliation provisions in Clause 13.1 and the arbitration provisions in Clause 13.2 with respect to the disputes which were dealt with by the expert. It submits that, contrary to the defendant's contention, the agreement for expert determination does expressly provide for the

determinations of the expert to be both "*final*" and "*binding*". However, even if the agreement only expressly provided that the determinations of the expert were "*binding*" rather than "*final and binding*", that would not undermine its case. This is due to the status of a determination of an expert under Irish law, where the default position is that such a determination is final and binding and only open to challenge on certain very limited grounds. The plaintiff accepts that the default position can be altered by agreement between the parties but contends that there was no such agreement in the present case. The plaintiff relies on a series of cases in support of its contention as to the status of a determination of an expert. The plaintiff says, therefore, that on its proper interpretation the agreement for expert determination encompasses the entirety of the dispute resolution procedures agreed between the parties in place of those contained in Clauses 13.1 and 13.2 of the contract.

67. The plaintiff objects to the admissibility in evidence of its letter to the defendant of 11th September, 2017, as an aid to the interpretation of the agreement for expert determination. It contends that the letter is inadmissible by virtue of the third principle set out by Lord Hoffman in ICS, as amounting in effect to a declaration of subjective intent which is inadmissible as an aid to interpretation of a contract.

68. The plaintiff further submits that once Clause 13.1 of the contract is disapplied (as the defendant accepts is the case), Clause 13.2 cannot survive on a standalone basis. In particular, the plaintiff submits that Clause 13.2 cannot survive in circumstances where none of the disputes between the parties which were the subject of the expert determination could be referred to conciliation under Clause 13.1 as the effect of the agreement for expert determination was to disapply the application of that sub-Clause. Once Clause 13.1 was disapplied then there was no dispute which could be referred to conciliation and, therefore, no dispute to be "finally settled" by arbitration under Clause 13.2. The plaintiff disagrees with the defendant's contention that all that is necessary is that it was at one point open to the parties to refer the relevant disputes to conciliation under Clause 13.1. The plaintiff's position is that once the parties agreed to expert determination in respect of the relevant disputes, those disputes could not be referred to conciliation under Clause 13.1. Once the relevant disputes could not be referred to conciliation under Clause 13.1, the plaintiff contends that it is not possible for them to be referred to arbitration under Clause 13.2. The plaintiff goes further and suggests that if the defendant wished to rely on Clause 13.2 in respect of those disputes, it ought to have sought rectification of Clause 13.2 in order to substitute references to the agreement for expert determination in place of the references to Clause 13.1 in Clause 13.2.

69. Finally, the plaintiff seeks to rely on the conciliation agreement as precluding the defendant from seeking to invoke the arbitration provisions contained in Clause 13.2 in respect of the disputes which were the subject of the expert determination process. It argues that a proper interpretation of the conciliation agreement is that the parties' respective positions with regard to the disputes the subject of the expert determination process were reserved or preserved save to the extent provided for in the conciliation agreement and that the conciliation agreement does in fact make express provision for an

alteration of the parties' rights in that regard. In particular, the plaintiff contends that the conciliation agreement entitles it, in certain circumstances, to refer matters to arbitration or to continue its proceedings but does not entitle the defendant to do so.

Substance and defendant's complaint about the expert determination process

70. Before setting out my conclusions on the proper interpretation and application of the agreement for expert determination, I must deal with an incidental point made by the plaintiff. The plaintiff has taken issue with the failure by the defendant to set out in any detail the basis on which the defendant claims to be entitled to impugn the relevant expert determinations. It points to the fact that the defendant has referred in only very general terms to its dissatisfaction with the expert determination process and merely states that it regarded that process as being "*unsatisfactory*".

71. While the plaintiff did not press the point, it was obviously advanced in an attempt to undermine the defendant's application. I am not satisfied that the point has any merit. It is clear from the affidavit evidence and from all of the correspondence that there is a dispute between the parties in relation to expert determination process. The essential issue in this application is whether that dispute or those disputes will be resolved by an arbitrator under Clause 13.2 or by a court in the course of these proceedings. It is not for the court to get into or comment upon the detail or merits of that dispute or those disputes. I completely agree with the following observations of McGovern J. in *BAM*:-

> *"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, para. 24, p. 12).*

72. In the context of the present case, the decision on the merits of the parties' disputes in relation to the expert determination process will be for an arbitrator under Clause 13.2 of the contract (if the defendant is correct) or the court in the context of these proceedings (if the plaintiff is correct). I should add that the correspondence sent by the defendant to the expert following its purported unilateral withdrawal from the expert determination process does set out in a little more detail the nature of the defendant's dissatisfaction with the expert determination process. It is evident from that correspondence and, in particular, the defendant's letter to the expert of 21st November, 2017, that the defendant will seek to make the case, for example, that the expert exceeded his jurisdiction in performing his role under the expert determination procedure.

Decision on interpretation of expert determination agreement

Legal Principles

73. It is well established, and the parties are in agreement on this, that the principles to be applied in the interpretation of a contract are those set out by Lord Hoffman in ICS which have been endorsed and applied in several decisions of the Supreme Court such as *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274; [2005] IESC 12 ("Analog Devices"), *ICDL v. European Computer Driving Licence Foundation Ltd* [2012] 3 I.R. 327; [2012] IESC 55 ("*ICDL*") and *Law Society of Ireland v. Motor Insurers' Bureau*

of Ireland [2017] IESC 31 (unreported, Supreme Court, 25th May, 2017) ("*MIBI*"). It is unnecessary to set out the *ICS* principles in this judgment. However, I have applied them in interpreting the agreement for expert determination and in considering the extent of the impact of that agreement on Clauses 13.1 and 13.2 of the contract. The parties are in dispute about the application of one of the *ICS* principles, namely, the third principle. That principle, as set out by Lord Hoffman in *ICS*, is as follows:-

> *"(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them." (p. 913)*

74. The dispute between the parties concerning the application of this principle is relevant to the defendant's reliance on the terms of the plaintiff's letter of 11th September, 2017, and I consider it in that context below.

75. In addition to the *ICS* principles, I should also make reference to two further statements of the approach which the court should take in interpreting a contract. The first statement is to be found in the judgment of Griffin J. in the Supreme Court in *Rohan Construction Ltd v. Insurance Corporation of Ireland Plc* [1988] I.L.R.M. 373 (quoted with approval by the Supreme Court in several subsequent decisions such as *Analog Devices* and *ICDL*), a case concerning an insurance policy, where he said:-

> *"It is well settled that in construing the terms of a policy the cardinal rule is that the intention of the parties must prevail, but the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning. The Court must not speculate as to their intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances. The whole of the policy must be looked at, and not merely a particular clause." (p. 377) (emphasis added).*

The observations made by Griffin J. in relation to the interpretation of an insurance policy apply equally to the interpretation of a non-insurance contract.

76. The second statement is that made by Keane J. in the Supreme Court in *Kramer v. Arnold* [1997] 3 I.R. 43, where he said:-

> *"… in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances." (p. 55).*

77. I will apply those principles in interpreting the agreement for expert determination in order to determine the extent of the effect of that agreement on the provisions of Clauses 13.1 and 13.2 of the contract.

78. As I noted earlier, there are a number of other principles which apply to the interpretation of an arbitration agreement and which are derived from the decision of the House of Lords in *Fiona Trust* and several Irish cases which apply those principles. The gist of those principles is that where the parties have agreed that disputes be referred to arbitration, there is an assumption or presumption, unless the contrary is clear in the agreement, that the parties intended that arbitration would be a "*one-stop*" procedure to resolve or determine their disputes. As I indicated earlier, those principles are of limited application or assistance to the defendant in the present case in circumstances where the defendant accepts that there is no "*one-stop*" procedure to resolve or determine the relevant disputes between the parties under the contract. On its case, there will be two stops, namely, expert determination and then arbitration. In those circumstances, when it comes to interpreting Clause 13.2 of the contract, those principles for interpreting an arbitration agreement (which were summarised by me in *Townmore No. 1*) are of limited, if any, application in the present case.

Terms of Expert Determination Agreement

79. Turning to the agreement for expert determination itself, it will be recalled that the terms of the agreement are set out in the revised terms of engagement. I identified earlier what appear to me to be the relevant provisions of that agreement. The agreement for expert determination does not expressly state the effect that it is intended to have on the contract and, in particular, on the dispute resolution provisions of the contract contained in Clause 13. The only express references in the agreement for expert determination to the contract between the parties are:-

(i) in the introduction (where the contract is referred to);

(ii) in the operative part of the agreement (under the heading "*It is hereby agreed*" where reference is made to the plaintiff and the defendant as being parties to the contract);

(iii) in para. D of the schedule setting out the jurisdiction and powers of the expert (as expanded in January 2017) where it is provided, at D5, that the expert was to have power to decide matters which were the subject of "*stale*" referrals to conciliation by the parties under Clause 13 of the contract;

(iv) at D6, where the expert was given the jurisdiction and power to decide any matter necessary to "*regularise*" the contract;

(v) at D7, where the expert was given the jurisdiction and power to "*assume the powers (but not the obligations or liabilities) [of] the ER for the purpose of administering the [contract] and/or to regularize any matter which is as a result of a failure of the ER on behalf of the [defendant] to administer the [contract*]"); and

(vi) in the attestation paragraph at the end of the agreement for expert determination, where the parties agreed that determinations made by the expert would be "*documents … in the contemplation of the [contract]*".

80. However, given that the defendant accepts that the agreement was intended to disapply the conciliation provisions contained in Clause 13.1 with respect to the disputes referred for expert determination, it is necessary to proceed on the basis that, at the very least, the parties intended the agreement for expert determination to have that effect. The critical issue in the case is whether it had the more extensive effect of also disapplying the arbitration provisions contained in Clause 13.2 of the contract with respect to the relevant disputes, as the plaintiff contends. Whichever version is correct, it is unfortunate, to say the least, that neither the parties nor the expert, when preparing and signing the agreement, made express reference to the intended effect of the agreement on Clauses 13.1 and 13.2 of the contract.

81. The defendant has advanced various reasons in support of its contention that the agreement for expert determination merely disapplied the conciliation provisions contained in Clause 13.1 of the contract. The plaintiff, in turn, has advanced various reasons in support of its contention that the agreement was intended also to disapply the arbitration provisions contained in Clause 13.2. I am satisfied, for the various reasons set out below, that the case advanced by the plaintiff is to be preferred than that advanced by the defendant and that, on its proper interpretation, the agreement for expert determination did have the effect of disapplying the Clause 13.2 as well as Clause 13.1 with respect to the disputes referred by the parties for expert determination.

Final and Binding

82. The first reason advanced by the defendant was that the agreement for expert determination provided that the determinations issued by the expert would be "*binding*" but did not provide that they would be "*final and binding*". The defendant contends that this indicates that the agreement was intended to replace only the conciliation provisions of the contract. The plaintiff disagrees and submits that the parties did agree that determinations issued by the expert under the agreement would be "*final*" and "*binding*". I agree with that submission. When construing the agreement, it is necessary to construe the agreement as a whole and not to focus unduly on particular terms in isolation. As observed earlier, that point was made clear by Griffin J. in the Supreme Court in *Rohan Construction* and expressly endorsed by the Supreme Court in *Analog Devices* and *ICDL*. The construction put forward by the defendant, in my view, fails to recognise the importance of construing the contract as a whole. The defendant has unduly focused on one provision of the agreement for expert determination, namely, Clause 2, and has, in my view, failed properly to take into account other provisions of the agreement. It is true that Clause 2 of the agreement when setting out the initial terms of reference for the expert determination stated that the parties considered that the determination to be issued by the expert would be "*binding*". Clause 2 of the agreement, incorporating the revised terms of engagement of the expert, again recorded the parties' agreement that any determination or series of determinations to be issued by the expert would be

"*binding*". However, it is wrong in principle merely to focus on the provisions of Clause 2. Paragraph A of the schedule setting out the jurisdiction and powers of the expert (in both the original terms of engagement of the expert and in the revised terms of arrangement) is in the following terms:-

> *"By submitting to Expert Determination under the foregoing rules, the Parties shall be taken to have conferred on [the expert] the following jurisdiction and powers to be exercised insofar as the Law allows and in [the expert's] discretion as they may judge expedient for the purpose of ensuring the just and expeditious, economical and final determination of the dispute referred to [the expert]." (emphasis added).*

83. It is necessary to read Clause 2 of the agreement for expert determination with para. A of the schedule to that agreement. When read together, and construing the agreement as a whole, it is clear that the parties intended that determinations issued by the expert would be both "*final*" and "*binding*".

84. The defendant seeks to argue that the reference in para. A of the schedule setting out the jurisdiction and powers of the expert must be read subject to the earlier reference to the determination being "*binding*" in Clause 2 of the agreement. The defendant argues this by reference to the words "*under the foregoing rules*" in para. A. However, I do not agree with that argument. There is nothing at all inconsistent, in my view, between the reference in para. A of the schedule to the determination being "*final*" and what is stated earlier in Clause 2 to the effect that the determination is "*binding*". This is not a case, therefore, of construing what is said in para. A by reference to what is said earlier in Clause 2 where there is an inconsistency between the two provisions. There is no such inconsistency. In my view, therefore, the reference to "*final*" in para. A of the schedule is not qualified, restricted or limited by the earlier reference in Clause 2 to the determinations of the expert being "*binding*". The two provisions must be read together in light of the court's obligation to construe the agreement as a whole.

85. While the defendant submits (in its written submissions and in oral submissions to the court) that the phrase "*final and binding*" is commonplace in the construction industry (and elsewhere) and is used where parties intend to provide for a definitive determination (in contrast to the use merely of the term "*final*"), no evidence to that effect was put before the court. This argument is not dealt with in the affidavit sworn by Dr. Keyes for the purpose of grounding the defendant's application to refer the parties to arbitration. Nor is it dealt with in any of the other affidavits sworn on behalf of the defendant in resisting the plaintiff's application to enter the proceedings in the commercial list. If it had been, it would have been open to the plaintiff to deal with the issue by way of responding evidence. However, the plaintiff did not have the opportunity of doing so. In those circumstances, I cannot accept that there is any evidence before the court of a particular practice in the construction industry or elsewhere under which participants in that industry use a particular form of words when they intend the outcome of a process to be more definitive than merely "*binding*".

86. However, even if there were admissible evidence before the court on which to make such a finding of fact nonetheless I would not have regarded such evidence as being sufficient to displace the intention of the parties as appears from the words used by them in the agreement for expert determination. The agreement uses the words "final" and "*binding*", albeit not in the same paragraph. Despite that, however, it seems to me that having regard to the requirement to construe the agreement as a whole, the fact that the parties have used both words indicates quite clearly to me that it was their intention that determinations to be issued by the expert under the procedure set up by the agreement for expert determination would be both "*final*" and "*binding*". The failure to use those words in the same paragraph or as part of the same phrase does not, in my view, afford any support for the defendant's contention that the parties did not intend such determinations to have a "*final*" and "*binding*" consequence for the parties.

87. However, even if the parties had not used the words "*final*" and "*binding*" in the agreement for expert determination, that would not, in itself, undermine the finality or conclusiveness of the determinations issued by the expert under the agreement. Both parties accept that the default position, in the case of any expert determination, is that the determination will be final and binding (subject, as we will see, to the very limited potential for challenge). Indeed, that point was quite properly accepted by the defendant having regard to the observations of Hogan J. in the Court of Appeal in *Dunnes Stores v. McCann* [2018] IECA 238 (unreported, Court of Appeal, 23rd July, 2018) ("*Dunnes Stores*").

88. Having referred to a short description of the process of expert determination in a leading text in that area (John Kendall's Expert Determination (London, 1996)), Hogan J. stated that:-

> *"Determination by expert can thus be regarded as a 'simple, informal, cost-effective, confidential and final form of dispute resolution': see Brown and Marriott, ADR Principles and Practice (London, 3rd ed.) at 141…" (para. 3, p. 2) (emphasis added).*

89. Hogan J. continued:-

> *"While adjudication by expert is quite common in the context of commercial adjudication in this jurisdiction – and, indeed, has been common for some time – what is, perhaps, surprising is that this would appear to be the first occasion in which the scope of this jurisdiction has been explored in any reserved judgment by any Irish appellate court. It is perhaps idle to consider why this is so, but it possibly reflects a traditional understanding as to the finality of the slightly rough and ready character of the adjudication by expert jurisdiction and the general futility of any legal challenge to the outcome of any such adjudication." (para. 4, p. 2) (emphasis added).*

90. Hogan J. was even more explicit on the point later in his judgment where he stated:-

"As I have already hinted elsewhere in this judgment, the entire object of adjudication by expert is to achieve a speedy and final resolution of the dispute, even if the ultimate conclusions and the reasoning contained in the expert's adjudication is not always perfect or completely justified on the evidence…" (para. 44, p. 16) (emphasis added).

91. These observations are particularly relevant to the present case. Even if the parties had not made express provision in the agreement for the determinations of the expert to be "*final*" and "*binding*", the default position would, in any event, have been that they were final and binding. It would have been open to the parties to agree in their agreement that the determinations of the expert did not have such final and binding effect. However, it seems to me that the agreement would have to make that clear in light of the default position that expert determinations have such effect. I do not believe that the agreement for expert determination at issue in this case can properly be construed as displacing or altering the default position, as I have described it. On the contrary, I am satisfied that on its express terms, the agreement does provide for the determinations issued by the expert to be both "*final*" and "*binding*".

92. In any event, I do not see any real or substantial distinction, at least on the facts of this case, between a term in an agreement which provides that an expert determination is to be "*binding*" and one which provides that it is to be "*final and binding*". I am not saying that there may never be distinction between those two terms, in different circumstances. However, I do not see that any such distinction exists in the context of the present case. Some examples can be given where there is no real or substantial difference between the two terms. Prior to the enactment of the 2010 Act, the law on arbitration in Ireland was governed by the Arbitration Acts 1954-1998. Under s. 27 of the Arbitration Act 1954 (the "1954 Act") it was provided that, unless a contrary contention was expressed in the arbitration agreement, the agreement was deemed to contain a provision that the award would be "*final and binding*" on the parties and persons claiming under them. Notwithstanding this, it was open to the parties to challenge an award on the particular grounds set out in the 1954 Act.

93. Under s. 7 of the Arbitration Act 1980 (the "1980 Act"), a New York Convention award (an award made in pursuance of an arbitration agreement in the territory of a state which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958), which was enforceable under the 1980 Act, was required by s. 7 to be treated as "*binding*" for all purposes on the persons between whom it was made. The section did not state that the award was to be "*final and binding*" and yet it had that effect.

94. Under s. 23 of the 2010 Act, an award made by an arbitral tribunal under an arbitration agreement is, unless otherwise agreed by the parties, to be treated as "*binding*" for all purposes on the parties between whom it was made. Section 23 does not refer to such awards as being "*final and binding*" and yet they are (subject to the very limited grounds on which such awards can be disturbed under the 2010 Act and the Model Law). Article 35 of the Model Law also expressly provides for (foreign) awards to be recognised as

"*binding*" (see s. 23(4) of the 2010 Act and Article 35 of the Model Law). Article 35 does not provide that such awards are "*final and binding*". However, they have that effect (subject to the limited grounds on which recognition or enforcement may be refused).

95. In passing, I note that under s. 58 of the Arbitration Act 1996 (which governs the position in England and Wales), unless otherwise agreed by the parties, an award made by a tribunal pursuant to an arbitration agreement is stated to be "*final and binding*" on the parties and on any persons claiming through or under them (similar to s. 27 of the 1954 Act in Ireland).

96. These statutory provisions, in my view, demonstrate that there is no difference in substance between an award which is stated to be "*final*" and one which is stated to be "*final and binding*" under the relevant legislation. In each case, the effect of the award is that it is final and binding, subject to whatever provisions in the relevant legislation allow for challenges to be brought to such awards. A similar conclusion can, in my view, be drawn between an expert determination which is stated to be "*final*" and one which is stated to be "*final and binding*". In either case, the determination may be open to challenge on very limited grounds (as we shall see shortly).

97. That leads me to a further point made by the defendant in support of its position as to the effect of the expert determination agreement. The defendant argues that the status of a determination made by the expert under the agreement for expert determination is analogous to the decision of an adjudicator in the case of construction contracts under s. 6 of the 2013 Act. Under s. 6(10) of the 2013 Act, the decision of an adjudicator is stated to be "*binding until the payment dispute is finally settled by the parties*" or a different decision is reached at arbitration or in proceedings in relation to the adjudicator's decision. The defendant contends that the expert's determination under the agreement has a similar status. I do not agree. Section 6(10) of the 2013 Act provides expressly for the status of a decision of an adjudicator under that statutory regime. The binding nature of the adjudicator's decision is expressly qualified or conditioned by the words used in the subsection. The decision is "*binding*" but only binding "*until*" the payment dispute is "*finally settled*" by the party or a different decision is reached either at an arbitration or in court proceedings. There is no such qualification in the agreement for expert determination in relation to the "*binding*" nature of the expert's determination. I do not agree, therefore, that the status of the expert's determination under the agreement is analogous to the status of an adjudicator's decision under the 2013 Act.

Status in Law of Expert Determinations

98. Whether or not an agreement which provides for expert determination expressly provides that the determination made by the expert under that agreement is "*final and binding*" or simply "*binding*", the determination will still be open to challenge, albeit on very limited terms (unless those grounds have been expressly excluded by the agreement of the parties). This is clear from the authorities on expert determination which were drawn to my attention by the parties. The position was helpfully summarised in G. Brian Hutchinson's *Arbitration and ADR in Construction Disputes* (Roundhall, Dublin, 2010) as follows:-

"It is decidedly difficult, however, to challenge a determination made by an expert acting fairly and within the scope of his or her jurisdiction. … Only in cases where the expert has acted manifestly unfairly – e.g. where there has been fraud or collusion – or where the expert has exceeded the terms of reference, will the court intervene: see: O'Mahony v Patrick O'Connor Builders (Waterford) Ltd & ors [2005] I.E.H.C. 248; Jones v Sherwood Computer Services plc [1992] 1 W.L.R. 277." (para. 18–14, p. 136)

99. In one of the cases cited by Hutchinson, *O'Mahony v. O'Connor* [2005] 3 I.R. 167; [2005] IEHC 248 ("*O'Mahony*"), Clarke J. in the High Court stated:-

"10.2 There is no doubt that there is ample authority for the proposition that where parties agree to be bound by the report of an expert, such report cannot be challenged in the courts on the ground that mistakes have been made in its preparation unless it can be shown that the expert had departed from the instructions given to him in a material respect or had in some way acted in bad faith, see Jones v. Sherwood Services Plc [1992] 1 W.L.R. 277…." (para. 51, p. 184; para. 10.2)

100. Later in his judgment, Clarke J. stated:-

"I agree that that passage [from John Kendall: Expert Determination (3rd ed., London, 2001)] represents the law in this jurisdiction. Ultimately the process which the expert is to engage in is the one specified in the agreement between the parties. However the default position is that the expert is free to initiate his own lines of enquiry and use his own expertise. He is only limited in that regard by express terms in the contract between the parties which conferred jurisdiction upon him and which may limit the extent of that freedom…." (para. 53, p. 185; para. 10.3).

101. As it happened, in that case, the court held that the valuation of the expert was not binding on the parties as the expert had failed to give the plaintiff any notice of his intention to make his report final in the absence of representations from the plaintiff. The court held that an expert, before proceeding to give a final determination, had to give a defaulting party notice of this intention to do so. *O'Mahony* does, however, indicate the limited circumstances in which an expert's determination can be challenged. This is similarly demonstrated by the decision of the Court of Appeal in *Dunnes Stores* where Hogan J. expressly endorsed what was said in Brown and Marriott *ADR Principles and Practice* (London, 3rd ed.) that the circumstances in which an adjudication by an expert can be challenged are "*very limited*" and that in practice "*only fraud or excess of jurisdiction will cause the expert's decision to be set aside*" (Brown and Marriott at 144, quoted by Hogan J. in *Dunnes Stores* at para. 3, p. 2).

102. Similar statements on the limited extent to which an expert's determination is reviewable by a court can be seen in the decision of the Court of Appeal of New South Wales in *Australian Vintage Ltd v. Belvino Investments (No. 2) pty Ltd* [2015] NSWCA 275 (24th June, 2015). In that case, the court held that the question of whether an expert's

determination was reviewable depended on whether the determination was made in accordance with the contract, i.e., whether or not the expert carried out the task which he or she was contractually required to undertake. If the expert in fact carried out that task, the fact that he or she made errors or took irrelevant matters into account would not render the determination open to challenge. However, if the expert did not perform that task, but rather performed some different task, or carried out the task in a way which was not within the contemplation of the parties to the contract, objectively ascertained, then the determination would be liable to be set aside. That was so notwithstanding that the relevant contract contained a provision to the effect that the expert's decision was to be "*final and binding*". The court accepted that such a clause made very little difference to the question. Bathurst CJ. stated:-

> *"To the extent that the decision was made in accordance with the terms of the contract, it will be final and binding. To the extent that it is not, it will be subject to review." (at para. 85).*

103. In *Re Benfield Greig Group plc* [2000] 2 BCLC 488, one of the issues concerned whether a valuation carried out under the terms of a company's articles of association which provided that the valuer's decision was to be "*final and binding*" was open to challenge. The articles also expressly provided that the valuer would be acting as expert and not as arbitrator. In her judgment in the High Court of England and Wales, Arden J. held that the effect of the articles was that the determination of the expert was final and binding. Those words were actually used in the articles of association at issue in that case. However, Arden J. referred to an earlier decision of the Court of Appeal in *Baber v. Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Rep 175 where there was no express provision that the valuation was to be final and binding but the Court of Appeal treated it as such on the basis that the valuers were expressly stated to be acting as experts and not as arbitrators.

104. It can be seen, therefore, that even where a determination of an expert is not stated to be "*final*" and "*binding*" it will be treated as such by virtue of the expert's status as expert rather than arbitrator and the decision of the expert will only be open to challenge on the very limited circumstances demonstrated by the case law to which I have referred. Ultimately, therefore, once the expert is acting as expert and not in some other capacity such as an arbitrator, unless the relevant agreement provides otherwise, the decision or determination of the expert will be treated as final and binding and will only be subject to challenge on the very limited grounds referred to in the cases. That is so irrespective of whether the decision or determination of the expert is expressly stated to be "final" or "*final and binding*".

105. Consequently, even if the agreement for expert determination did not make express provision for the expert's determinations to be both "*final*" and "*binding*" they would be treated as such by law (unless the agreement otherwise made clear, which it does not in the present case). In my view, therefore, even if the agreement had merely provided that the determinations of the expert were to be "*binding*" and not "*final*" and "*binding*"

(contrary to my earlier conclusion), that would be of no assistance to the defendant and would not support its contention that the determinations were not intended to be both final and binding.

Defendant's reliance on Clause 13.1.10

106. Another argument advanced by the defendant is to compare what is said in Clause 13.1.10 of the contract in relation to a conciliator's recommendation with what the agreement for expert determination says in relation to the determinations of the expert. Clause 13.1.10 of the contract provides that in the circumstances addressed in that sub-clause the conciliator's recommendation will be "*conclusive and binding*" and yet, the defendant submits, a dispute in relation to such recommendation may be referred to arbitration under Clause 13.2. The defendant argues that a recommendation which is stated to be "*conclusive and binding*" but which can still be referred to arbitration under the contract, must be more robust than a determination of an expert which is merely stated to be "*binding*" in the agreement for expert determination. However, that does not follow. First of all, I have already concluded that, construed as a whole, the agreement for expert determination provides that the determinations of the expert are both "*final*" and "*binding*". Second, the circumstances in which the conciliator's recommendation is "*conclusive and binding*" under Clause 13.1.0 of the contract is where the conciliator issues a recommendation and neither party gives notice of dissatisfaction within the required time period. In those circumstances the recommendation will be *"conclusive and binding*" on the parties and a failure to comply with it may be referred by the other party to arbitration under Clause 13.2. That provision is of no application in the present case where, on the defendant's own case, Clause 13.1 has been dis-applied in respect of the disputes referred for expert determination. Third, this argument ignores the status in law of an expert's determination as discussed in the cases referred to earlier.

Plaintiff's Letter of 11th September, 2017

107. In further support of its contention that the agreement for expert determination should be construed as applying only to the conciliation provisions contained in Clause 13.1 of the contract and not to the arbitration provisions in Clause 13.2, the defendant has sought to rely on the terms of a letter from the plaintiff's managing director, Keith Screeney, to the defendant's then chief executive officer, Sean Ashe, dated 11th September, 2017. The defendant contends that this letter amounts to a piece of contemporaneous correspondence between the parties in which it is said that the plaintiff conceded that the agreement for expert determination was intended to replace only the conciliation provisions of the contract. The defendant relies on a portion of that letter in which Mr. Screeney, on behalf of the plaintiff, stated as follows:-

> *"As the Employer, and conscious of the potential exposure of your offices under the Contract, you suggested that the Parties should waive their rights to Conciliation with a view to engaging in alternative process which would be more cost efficient and definitive." (emphasis added).*

108. The defendant relies on this letter and, in particular, on this portion of the letter as demonstrating that the parties agreed in the agreement for expert determination to displace only the conciliation provisions of the contract and not the arbitration provisions.

109. The plaintiff disputes the admissibility in evidence of this letter as an aid to interpretation of the agreement for expert determination. It says that the agreement should be interpreted by reference to the words used in the agreement and not by reference to what one of the parties (in this case, the plaintiff itself) may have said in subsequent correspondence. The plaintiff's objection to the admissibility of the letter is stated to be based on the parol evidence rule, under which verbal evidence may not be admitted in order to add to, subtract from or vary or qualify the terms of a contract which has been reduced to writing. The plaintiff's objection appears also to be based on the third of Lord Hoffman's principles in *ICS*, which precludes the admissibility in evidence of declarations of the subjective intent of one of the parties (except in an action for rectification). By way of an alternative submission, the plaintiff argues that if the letter is admissible in evidence, then the entirety of the letter must be looked at and construed as a whole rather than one selective part of it.

110. To counter the plaintiff's objection to admissibility, the defendant argues that the part of the letter on which it seeks to rely amounts to an admission against interest which, the defendant contends, renders the letter admissible in evidence.

111. I have had some difficulty in understanding the precise basis on which the defendant argues for the admissibility of the letter and the precise basis on which the plaintiff argues against its admissibility. It seems to me that the parties may have confused different legal concepts in addressing this issue. It is well established, and is apparent from the third of Lord Hoffman's principles, that previous negotiations of the parties and declarations of subjective intent (made prior to the conclusion of the contract) are inadmissible in the interpretation of the contract. That is so whether the prior declaration of intent amounts to an admission against interest in order to defeat a hearsay objection or not. However, the plaintiff's does not make a hearsay objection. The plaintiff's objection appears to be based on the parol evidence rule and on the third of Lord Hoffman's principles in *ICS*.

112. However, I do not think that the parol evidence rule is engaged. Under that rule, extrinsic evidence, such as correspondence predating the conclusion of a contract, would not be admissible provided that the contract was reduced to writing (as the agreement for expert determination was here) (see, for example, *Ulster Bank v. Deane* [2012] IEHC 248 (unreported, High Court McGovern J., 20th June, 2012) (at p. 6); *Promontoria (Arrow) Ltd v. Mallon* [2018] IEHC 145 (unreported, High Court McGovern J., 22nd March, 2018) (at p. 16)). Further, the parol evidence rule does not apply where what is sought by the admission of the extrinsic evidence is to assist in the interpretation of the written agreement as opposed to an amendment or variation of the agreement.

113. Nor, in my view, does the third of Lord Hoffman's principles in *ICS*, necessarily preclude the admissibility in evidence of the plaintiff's letter of 11th September, 2017. Prior

declarations of subjective intent would be inadmissible under that principle. However, subsequent declarations of intent would not necessarily be inadmissible, although the weight to be attached to any such subsequent declaration of subjective intent is another question altogether. There is recent support for the admissibility in evidence of a subsequent declaration of subjective intent. The issue arose in the *MIBI* case. In that case, the Supreme Court considered relevant to the interpretation of the agreement at issue in that case (the 2009 MIBI agreement) a letter from September 2014, sent on behalf of the Minister for Transport (one of the parties to the relevant agreement) to the MIBI (the other party to the agreement) which set out the Minister's position as to the interpretation and application of the relevant MIBI agreement. In the course of his judgment for the majority of the Supreme Court, O'Donnell J. held that the court had to take the letter as a representation of the position of the Minister, with the qualification that it had not been tested in court. Taking the letter in that way, O'Donnell J. stated that the letter offered *"further important support for the interpretation advanced by the MIBI"* (para. 48). Having done so, O'Donnell J. stated that it was difficult to see how it could be said that the agreement could interpreted "*more broadly than the parties to the Agreement itself [contended]*".

114. It seems to me, therefore, that it is open to me to consider the terms of the plaintiff's letter of 11th September, 2017. However, the weight to be attached to the letter must necessarily be of a significantly lower order than the letter in the *MIBI* case. In that case, the relevant letter set out the views of one of the parties to the relevant MIBI agreement which was precisely the same as the view held by the other party to that agreement. The views of both parties to the letter were, therefore, identical. That is not the case with the plaintiff's letter of 11th September, 2017 as there is a dispute between the parties as to the scope of application of the agreement for expert determination. Nonetheless, I have had regard to the letter.

115. It is true, as the defendant contends, that in the part of the letter relied upon by the defendant, Mr. Screeney, on behalf of the plaintiff, refers to the defendant having suggested that the parties "*should waive their rights to Conciliation with a view to engaging in alternative process which would be more cost efficient and definitive*". However, that statement itself is equivocal and not determinative of the issue as to the scope of application of the agreement for expert determination. The letter did not expressly state that the parties agreed only to waive their rights to conciliation. Indeed, the rest of the sentence on which the defendant mainly relies suggests that a wider form of waiver was being referred to. The waiver referred to in the letter, while referring to conciliation, was "*with a view to engaging in alternative process which would be more cost efficient and definitive*". I agree with the plaintiff that this suggests a wider form of waiver than merely conciliation and is at least consistent with a waiver also of the arbitration provisions in the contract. The next paragraph of the letter is also consistent with such a conclusion in that reference is made to the process of expert determination being suggested which "*would allow both parties to put forward their respective cases in a non-adversarial manner, with the findings of the Expert being accepted as Binding on the Parties*" (emphasis added). The next paragraph refers to the plaintiff consulting with its

legal advisers to confirm that the parties "*with due regard to the contract in place, could engage in, and be bound by the process proposed*" (emphasis added). This is also consistent with the process of expert determination being binding on the parties. So too is a paragraph later in the letter where, referring to the expansion of the expert's role in the January 2017, it is said that the plaintiff was prepared to agree to that expansion on the understanding that the parties "*would formally attest to [the] Agreement and their intention to [be] bound by the findings of the Expert*". There are several further references in the letter to the "binding nature" of the process of expert determination under the agreement between the parties. These references are all consistent at least with the position adopted by the plaintiff concerning the effect of the agreement for expert determination on the dispute resolution provisions of the contract.

116. However, ultimately, it seems to me that the plaintiff's letter of 11th September, 2017, is pretty equivocal on the issue I have to decide. While there is a reference to a conciliation, the other references appear to support the binding nature of the expert determination process. All of those references are in correspondence which post-dated the agreement and, while the letter is probably admissible for the reasons I have mentioned earlier, little enough weight should, I believe, be given to it. To my mind, the better way of approaching the interpretation of the agreement for expert determination is to interpret that agreement by reference to its actual terms. I place little weight, therefore, on the terms of the plaintiff's letter of 11th September, 2017, one way or the other.

Whether Clause 13.2 can survive disapplication of Clause 13.1

117. Another issue between the parties is if the defendant is correct in its case as to the application of the agreement for expert determination to the conciliation provisions in Clause 13.1 of the contract only and not to the arbitration provisions in Clause 13.2, whether Clause 13.2 can survive. The defendant says that it can, in that the references in Clause 13.2 to Clause 13.1 must be treated as being disapplied in respect of the disputes the subject of the expert determination process and the court must read in a rider which in turn incorporates by reference the agreement for expert determination.

118. The plaintiff argues that Clause 13.2 cannot survive the removal or disapplication of Clause 13.1 in respect of the relevant disputes. The plaintiff advances two grounds for that contention. First, it says that Clause 13.2 applies to disputes which, under Clause 13.1, "*may be referred to conciliation*". Such disputes can go to arbitration under Clause 13.2. However, the plaintiff contends that the particular disputes which were the subject of the agreement for expert determination do not fall within the category of disputes which "*may be referred to conciliation*" as it was agreed that they would be dealt with by expert determination. The plaintiff does not accept the defendant's argument that all that is required is that there was a dispute which could have been referred to conciliation and all that was required, at the time the contract was entered into, was that there was a possibility of the particular dispute being referred to conciliation. Second, the plaintiff argues that if it is the defendant's case that Clause 13.2 should be read, in the case of the disputes referred for expert determination under the agreement between the parties, as

removing from Clause 13.2 the references to conciliation under Clause 13.1 and replacing them with references to the agreement for expert determination, then the defendant ought to have sought rectification of Clause 13.2.

119. I cannot see how Clause 13.2 can be read in the manner suggested by the defendant. The operation of Clause 13.2 depends on there being a dispute which could be referred to conciliation under Clause 13.1. It will be recalled that Clause 13.2 says:-

> *"Any dispute that, under sub-clause 13.1, may be referred to conciliation shall, subject to sub-clause 13.1 be finally settled by arbitration…"*

120. Clause 13.1.1 refers to a dispute arising under the contract which either party may refer for conciliation under Clause 13.1. However, if the parties have agreed that certain disputes will be dealt with by a different process, namely, expert determination, in place of conciliation, those disputes may not be referred for conciliation under Clause 13.1.1. They may not be referred for conciliation under that provision because the parties have agreed that they will be dealt with in a different way, namely, by expert determination. The defendant's case is that the parties agreed that these particular disputes would be dealt with by expert determination and not by conciliation. In my view, therefore, those particular disputes are not disputes which "*may be referred*" to conciliation under Clause 13.1. If they are not disputes which "*may be referred*" to conciliation under Clause 13.1, then Clause 13.2 does not apply in respect of those disputes.

121. To put it another way, a dispute which is the subject of the agreement for determination is not a "dispute that, under sub-clause 13.1, may be referred to conciliation" *under Clause 13.2. If such a dispute is not a dispute which "may be referred*" to conciliation under Clause 13.1, then it is not a dispute which is required to be "*finally settled by arbitration*" under Clause 13.2. Clause 13.2, therefore, has no application to a dispute which the parties have agreed should be referred to expert determination in lieu of conciliation. If it were intended by the parties that a dispute referred to expert determination in place of conciliation was nonetheless one which the parties could refer to arbitration under Clause 13.2, where it is dissatisfied with the expert's determination, one would have expected the parties to have made express provision for this, having regard to the terms of Clause 13.2. They did not do so. They could have expressly agreed in the agreement for expert determination that a party dissatisfied with the expert's determination of an issue could nonetheless refer that issue to arbitration under Clause 13.2. They did not do that. They could have agreed by some other means that disputes referred to expert determination could nonetheless be subject to the arbitration provisions in Clause 13.2. They did not do that either.

122. It should be recalled that Clause 13.2 does continue to apply in respect of disputes which were not referred for expert determination but which were dealt with in accordance with the conciliation provisions of Clause 13.1. In respect of those disputes, the arbitration provisions in Clause 13.2 continue to subsist and so rectification of Clause 13.2 would not have been appropriate. However, in respect of the disputes which were referred to expert

determination, I cannot see how the provisions of Clause 13.2 can apply for the reasons just mentioned.

123. I have endeavoured to work out how Clause 13.2 might operate if it continued to apply in respect of disputes referred to expert determination under the agreement between the parties. Leaving aside the express references in Clause 13.2 to Clause 13.1 and disputes which could be referred to conciliation under that latter clause, I cannot see how Clause 13.2 would operate. In the case of the conciliation provisions in Clause 13.1, there are detailed procedural rules with time periods for the conciliator to give a written recommendation, procedures for what is to happen if a party is dissatisfied with the recommendation, provisions as to what happens where a recommendation is issued but neither party expresses its dissatisfaction with the recommendation and provisions under which one or other of the parties may be entitled or obliged to refer a dispute to arbitration under Clause 13.2. Clause 13.1 contains a well-worked-out scheme or structure for the conciliation and provides for how the process may move from conciliation to arbitration. None of that is apparent from the agreement of expert determination. I have referred earlier to the references in the agreement for expert determination to Clause 13 of the contract. There is one reference (para. D5) which does not advance matters. So far as I can see, there is nothing in the agreement for expert determination providing for the circumstances in which a party dissatisfied with the expert's determination can seek to proceed to arbitration under Clause 13.2 of the contract. To the extent that the defendant relies, as part of its argument for the co-existence of the agreement for expert determination with Clause 13.2 of the contract, on an assertion that recourse to conciliation under Clause 13.1 is optional whereas recourse to arbitration under Clause 13.2 is mandatory, I have indicated earlier that I do not agree with that argument. However, even if it were correct, it could hardly avail the defendant in circumstances where it is accepted by both parties that the agreement for expert determination did impose an obligation on the parties to refer the disputes the subject of the agreement for expert determination. That is the route which the parties agreed to take in respect of those disputes. That route was not an optional one once the parties entered into the agreement for expert determination. I cannot agree with the defendant that Clause 13.2 can continue to apply to disputes which the parties agreed would be referred for expert determination in lieu of conciliation under Clause 13.1.

Conclusions on interpretation of Expert Determination Agreement

124. Finally, in this context, I am satisfied that the terms of the agreement for expert determination (providing for the revised terms of engagement dated 23rd January, 2017) are wide enough to provide for the final and binding determination by an expert of the disputes the subject of that agreement. I have referred earlier to the provisions of Clause 2 and paras. A, B, C and D of the schedule setting out the jurisdiction and powers of the expert. They do confer on the expert the jurisdiction and power to make binding and final determinations. While this is, of course, subject to a potential challenge on the limited grounds discussed in the case law and authorities to which I have referred, they are not amenable to arbitration under Clause 13.2. The effect of the agreement for expert determination is, in my view, to disapply by necessary implication the arbitration

provisions in Clause 13.2. Further, as indicated earlier, the terms of Clause 13.2 themselves do not appear to me to be capable of accommodating a situation where disputes which the parties agreed were being referred to expert determination could or must nonetheless be referred to arbitration under Clause 13.2. All of these considerations combined have persuaded me that the defendant has failed to discharge its burden of establishing that the disputes which the parties agreed to refer to expert determination are nonetheless the subject of the arbitration agreement contained in Clause 13.2.

125. Alternatively, I am satisfied that the plaintiff has discharged the burden on it (if applicable) of demonstrating that the arbitration agreement contained in Clause 13.2 is "*inoperative*" in the sense of not being capable of being operated or applied to the disputes the subject of the agreement for expert determination.

126. In those circumstances, I must refuse the defendant's application for an order referring the parties to arbitration under Article 8(1) of the Model Law in respect of the particular disputes the subject of the application. In reaching this conclusion, I am giving effect to the parties' agreement and am not in any way undermining or diminishing the supportive approach which the Irish courts take to arbitration and the arbitral process. That approach stems from the respect and support given to the parties' autonomy and their agreement to arbitration as the means of resolving their dispute. Here, the effect of the parties' agreement to expert determination is to disapply the arbitration agreement. In refusing the defendant's application, I am merely giving effect to that agreement. My decision does not mean that Clause 13.2 is not applicable in respect of disputes which were not the subject of the agreement for expert determination.

127. That is sufficient to dispose of the defendant's application. However, since some reliance was also placed by the plaintiff on the provisions of the conciliation agreement in order to preclude the defendant from seeking to refer the disputes to arbitration under Clause 13.2, I should briefly address what the parties have said about that agreement. Strictly speaking, it is unnecessary for me to do so having regard to my conclusions in relation to the interpretation and application of the agreement for expert determination.

Conciliation agreement

128. I have referred earlier to the circumstances in which the parties entered into the conciliation agreement as recorded in the letter from Ciaran Fahy, the conciliator, to the parties dated 16th August, 2018. The conciliation agreement was yet a further effort by the parties to resolve their disputes, this time by way of conciliation. It is common case that the conciliation agreement encompassed not only the disputes which were the subject of the agreement for expert determination but also other disputes between the parties under the contract. The plaintiff contends that the conciliation agreement provides another insurmountable obstacle for the defendant seeking to refer the disputes which were the subject of the expert determination agreement to arbitration under Clause 13.2 of the contract. It argues that the express reservation of rights contained in Clause 2 of the conciliation agreement is qualified by the final sentence of Clause 2 which, it contends, makes clear that the rights of the parties in respect of the claims which were the subject of the agreement for expert determination were being reserved and would be

unaffected by the conciliation agreement *"save to the extent provided in this agreement*". The plaintiff says that the conciliation agreement does in fact affect those rights in the manner envisaged by Clause 2. It contends that this was done by Clause 5 of the conciliation agreement which confers on the plaintiff only the entitlement in the particular circumstances provided for in that clause to refer matters to arbitration under Clause 13.2 of the contract.

129. The defendant, however, submits that the conciliation agreement makes clear that the rights of both parties were being reserved in the event that the conciliation did not successfully resolve their disputes. It contends that among the rights reserved or preserved by the conciliation agreement were the plaintiff's right to maintain the proceedings and the defendant's right to seek to refer the relevant disputes to arbitration. It contends that Clause 5 does not affect that reservation of rights and is permissive only in terms, entitling the plaintiff to pursue claims or to seek to refer them to arbitration under Clause 13.2 in the particular circumstances provided for in Clause 5. It submits that the plaintiff only is mentioned in Clause 5 as it was the party which had a claim to ventilate. The defendant does not accept that Clause 5 gave the plaintiff a unilateral right to decide whether or not the claims the subject of the current proceedings should be litigated or dealt with by arbitration.

130. As I have indicated earlier, having regard to the conclusions I have reached in relation to the interpretation and application of the agreement for expert determination, it is not, strictly speaking, necessary for me to deal with the arguments made by the plaintiff in reliance on the conciliation agreement. However, it is perhaps appropriate that I set out in brief terms my conclusions on this issue.

131. The conciliation agreement covers the disputes which were dealt with in accordance with the agreement for expert determination as well as other disputes between the parties. Insofar as the disputes which were the subject of the expert determination procedure is concerned, I have concluded that the agreement for expert determination disapplies the conciliation provisions in Clause 13.1 and the arbitration provisions in Clause 13.2 with respect to those disputes. The position, therefore, which existed at the time the parties entered into the conciliation agreement in August 2018, was that the parties had already agreed to disapply Clause 13.1 and Clause 13.2 in respect of the disputes which were the subject of the agreement for expert determination. Therefore, when it came to the parties seeking to reserve or preserve their rights in respect of those particular disputes, they were doing so in circumstances where Clause 13.1 and Clause 13.2 were disapplied in respect of those disputes. That being the case, the effect of Clause 2 was not to preserve any right which the defendant had to seek to refer those disputes to arbitration under Clause 13.2 as that provision was already disapplied in respect of those disputes by virtue of the agreement for expert determination. There is nothing in Clause 5 of the conciliation agreement which reinstates or reapplies the provisions of Clause 13.2 so as to confer on the defendant an entitlement to refer those particular disputes to arbitration.

132. The defendant is not mentioned in Clause 5 of the conciliation agreement. It is the plaintiff that is given the various options or entitlements in Clause 5 including the option to refer the claims to arbitration in the event that the court refuses to enforce the expert determinations (Clause 5(c)). Clause 2 of the conciliation agreement provided that the parties' rights were reserved and would remain unaffected "*save to the extent provided in [the conciliation] agreement*". Clause 5 did make provision to affect the rights of the plaintiff but not of the defendant. It would have been open to the parties to make express provision in Clause 5 to reapply or reinstate Clause 13.2 and to confer on the defendant an entitlement to refer the disputes which were the subject of the expert determination procedure to arbitration, if that is what the parties intended. However, they did not include such provision in the conciliation agreement. Therefore, the defendant's position, which was reserved or preserved under Clause 2 of the conciliation agreement and under which the defendant did not have the entitlement to refer the disputes which were the subject of the expert determination procedure to arbitration having regard to the terms of the agreement for expert determination, was not affected or otherwise provided for in subsequent provisions of the conciliation agreement, such as Clause 5. I am satisfied, therefore, that based on my interpretation of the agreement for expert determination, the conciliation agreement does not confer on the defendant an entitlement to refer the disputes the subject of that expert determination procedure to arbitration under Clause 13.2 of the contract. The plaintiff is given the option of making a reference to arbitration in respect of those disputes in the circumstances provided for in Clause 5. Clause 5 does not confer on the defendant the option or entitlement of referring those disputes to arbitration.

133. If I am wrong in my interpretation of the agreement for expert determination, and if, at the time the conciliation agreement was entered into, the defendant did have a right to seek a reference to arbitration under Clause 13.2 of the contract, I would interpret Clause 5 as clearly affecting that right by conferring on the plaintiff only the right to refer matters to arbitration in certain circumstances but not conferring such a right on the defendant. The defendant's position would, therefore, have been altered by Clause 5 of the conciliation agreement as expressly permitted by Clause 2 of that agreement. In either case, therefore, the defendant would not have the right to refer the disputes which were the subject of the expert determination procedure to arbitration.

Summary of conclusions

134. In summary, I have considered in this judgment the various arguments advanced by the parties in support of and against the defendant's contention that it is entitled to refer the disputes the subject of the proceedings to arbitration in accordance with Clause 13.2 of the contract between the parties. I have concluded that the agreement between the parties to refer the disputes which are now the subject of these proceedings for expert determination under an agreement made between the parties (as recorded in revised terms of engagement dated 23rd January, 2017), on its proper construction, had the effect of disapplying not only the conciliation provisions contained in Clause 13.1 of the contract but also the arbitration provisions contained in Clause 13.2 with respect to those disputes.

135. In those circumstances, there is no arbitration agreement between the parties in respect of those disputes. I have concluded, therefore, that the defendant has failed to discharge the burden of establishing the existence of an arbitration agreement in respect of the disputes at issue for the purpose of Article 8(1) of the Model Law. Alternatively, if the burden is on the plaintiff to establish that the arbitration agreement is "*inoperative*" within the meaning of that term in Article 8(1) of the Model Law, I am satisfied that the plaintiff has discharged that burden by demonstrating that by virtue of the agreement for expert determination, the arbitration agreement contained in Clause 13.2 has been disapplied with respect to the disputes which are now the subject of these proceedings.

136. While, strictly speaking, not necessary to do so, I have also set out my views in relation to the subsequent conciliation agreement reached between the parties. My views in respect of that agreement do not affect the conclusions which I have reached in relation to the defendant's entitlement to seek a reference to arbitration in respect of the relevant disputes under Article 8(1) of the Model Law. Rather, they are consistent with those conclusions.

137. In those circumstances, I must refuse the defendant's application for the order sought under Article 8(1) of the Model Law. I will hear the parties in relation to the terms of the order to be made and on any other consequential issues.