THE HIGH COURT

[2023] IEHC 368

Record No. 2019/3181P

BETWEEN

ALAN KENNY and EMMA CLAIRE MULLALLY

PLAINTIFFS

AND

BGM ENGINEERING LIMITED AND CREEDON CONSTRUCTION LIMITED

DEFENDANTS

Judgment of Ms Justice Bolger delivered on the 28th day of April 2023

1. The second named defendant seeks an order staying the within proceedings against it pursuant to Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") as adopted by section 6-of the Arbitration Act 2010.

2. For the reasons set out below, I am refusing this application.

Background

3. The plaintiffs will be referred to as "the respondents", and the second named defendant as "the applicant".

4. The applicant is a contractor who was engaged by the respondents in October 2012 in relation to the construction of their house at Silken Vale, Maynooth, County Kildare. The applicant was last on site on 29 March 2013 when its contract was terminated by the respondents, and at which stage the works were incomplete.

5. The agreement between the parties is a written agreement dated 12 October 2012 (the Building Agreement"), clause 23 of which contains an arbitration agreement which stipulates that if a dispute arises between the parties with regard to any of the provisions of the contract, such dispute shall be referred to conciliation in accordance with the Conciliation Procedures published by the Royal Institute of Architects of Ireland. If settlement is not reached by way of conciliation, then either party may refer the dispute to arbitration in accordance with Clause 23(b).

6. Article 8(1) of the Model Law provides as follows:

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

Applicant's submissions

7. The applicant emphasised the mandatory nature of the court's obligations pursuant to Article 8(1) to refer a matter to arbitration, relying on Barniville J at para 26 of *Ocean*

Point Development Company Ltd (In Receivership) v. Patterson Bannon Architects Lid & ors [2019] IEHC 311 ("Ocean Point") as follows:

> "In order for the provisions of Article 8(1) of the Model Law to be engaged, various requirements must be satisfied. First, an action must have been brought before the court in respect of a dispute between the parties. Second, the action must concern a "matter which is the subject of an arbitration agreement". Third, one of the parties must request the reference to arbitration "not later than when submitting his first statement on the substance of the dispute". If those requirements are satisfied, the court must refer the parties to arbitration (the word "shall" is used). The only circumstances in which the court's obligation to refer the parties to arbitration does not arise is where the court finds that the arbitration agreement is (i) "null and void" or (ii) "inoperative" or (iii) "incapable of being performed". The onus of establishing the existence of one or more of these disapplying factors rests on the party who seeks to rely on them." (para. 26)

8. The applicant asserts that they meet the three requirements set out by Barniville J. in that firstly, an action has been brought before the court in respect of a dispute between the parties – namely a claim against the applicant for damages in relation to alleged defective construction works; secondly, the action concerns a matter which is the subject of an arbitration agreement – it is not disputed that the dispute falls within the arbitration agreement contained at clause 23 of the Building Agreement and thirdly, the applicant has requested that the dispute be referred for arbitration before submitting any statement on the substance of the dispute

9. In light of *Ocean Point,* the applicant says it is entitled to the order that it seeks in the within application unless the respondents met their onus of establishing that the arbitration agreement is (i) null and void or (ii) inoperative or (iii) incapable of being performed.

<u>Respondent's submissions</u>

10. The respondents do not dispute the existence of an arbitration agreement between the parties but assert that the agreement is inoperative within the meaning of Article 8 of the Model Law by reason of the applicant having previously issued Summary Summons proceedings in May 2013, which the respondents understood as the applicant waiving its entitlements under clause 23. The respondents also allege that the delay on the part of the applicant in relying on clause 23 in these proceedings renders the clause inoperative by virtue of estoppel.

11. The Summary Summons proceedings were the subject of a written judgment of Barrett J. dated 1 April 2014 (*Creedon Construction Limited-v-Kenny & Anor* [2014] IEHC 188) (the "2014 Judgment") which referred to clause 23 of the Building Agreement and stated;

> "notwithstanding this clause, it appears that all of the issues arising between the parties to these proceedings are being litigated, or are being threatened to be litigated, in court, and no objection appears to have been raised by either side to this fact. Given that this is so, the court infers that the parties should be considered, despite the arbitration clause in the building agreement, to have agreed subsequently, whether expressly or impliedly, that the matters raised in the instant proceedings should go to litigation" (para. 3)

12. In relation to delay and estoppel, the respondents refer to *Furey v Lurgan-ville Construction Co Ltd & Ors* [2012] IESC 38, [2012] 4 .I.R. 655 (regarding the pre- Arbitration Act 2010 regime), where Clarke J. (as he then was) acknowledged at para. 35 that a party relying on an arbitration clause could, by conduct, create an estoppel preventing reliance on the arbitration clause even if no step had been taken by that party in the proceedings. This would require a clear and unequivocal promise or representation that the arbitration clause would not be relied on, as well as reliance by the plaintiff.

13. In *Mitchell v. Mulvey Developments Ltd and Others* [2012] IEHC 561, [2012] 4 I.R. 671 ("*Mitchell*"), Hogan J. found that conduct by the applicant for a stay to arbitration (*viz*. significant delay, followed by a request by the defendant's solicitors not to issue a motion for judgment in default of defence along with an assurance there was no intention to delay matters, which led to forbearance on the part of the plaintiff in issuing the motion for judgment) amounted to a representation "that it was going to engage in the proceedings and to defend the case on its merits". In *Mitchell*, it was "the additional factors which were not present in *Furey* that tipped the scales in the opposite direction" (para. 27). These factors were (i) the correspondence requesting a statement of claim; (ii) further requests for forbearance following delivery of the statement of claim and (iii) the fact that the delay was several months longer.

Decision

14. Barniville J. (as he then was) in *Ocean Point Development Company Ltd (In Receivership) v. Patterson Bannon Architects Ltd & ors* [2019] IEHC 311 found that issuing summary proceedings did not repudiate an arbitration agreement. The facts there differ to this case in that the arbitration agreement specified the disputes that fell within its scope and Barniville J. found (at para. 41) that the parties did not intend that arbitration agreement to cover the dispute which formed the subject matter of the earlier summary proceedings. Even if the party attempting to resist going through arbitration was wrong in its belief that the earlier proceedings did not fall within the scope of the arbitration agreement, Barniville J. still refused to accept that the commencement of the summary proceedings amounted to a repudiation of the arbitration agreement as there had been an attempt to invoke the arbitration procedure in connection with a different dispute at the same time as the summary proceedings, which he found to be inconsistent with a repudiation. He set out a useful analysis of what would be required to establish repudiation, at para. 56, where he said;

> "In order to establish that the commencement of the summary proceedings amounted to a repudiation of the arbitration agreement such as would preclude Clancy from relying upon clause 38 to have the disputes the subject of the plenary proceedings referred to arbitration, it would have to be demonstrated that a commencement of the summary proceedings was done in circumstances that showed that Clancy no longer intended to be bound by the arbitration agreement and where such intention cannot lightly be inferred and can only be inferred from conduct which was clear and unequivocal. "

15. The question for this Court is whether the applicant's commencement of the 2013 proceedings comes within those exceptional type circumstances, or whether it is more akin to what was found to have occurred in *Ocean Point* where summary proceedings did not repudiate the arbitration agreement.

16. The court must assess the conduct of both parties in 2013 objectively with reference to the context in which it occurred, as applied by the England & Wales Court of Appeal (Civil Division) in *Downing v. Al Tameer Establishment & anor* [2002] 2 All ER (Comm) 545 and

BEA Hotels NV v. Bellway LLC [2007] 2 Lloyd's Rep 493 (' *BEA Hotels*') and the decision of *Ocean Point* cited above. At para. 35 of *Downing* it states;

> "That being so, we consider (contrary to the view of the judge) that the position of a party issuing a writ following a repudiatory breach of the arbitration agreement is different from that of a person issuing proceedings simply to test the water. The question of whether or not the issue and service of proceedings is an unequivocal acceptance of the repudiation will depend upon the previous communications of the parties and whether or not, on an objective construction of the state of play when the proceedings are commenced, the fact of the issue and service of the writ amounts to an unequivocal communication to the defendant that his earlier repudiatory conduct has been accepted, in the sense that it is clear that the issue of such proceedings (i) is a response to the defendant's refusal to recognise the existence of the arbitration agreement or any obligation thereunder and (ii) reflects a consequent decision on the claimant's part himself to abandon the remedy of arbitration in favour of court proceedings"

17. The respondents highlight a letter sent by their then solicitors on 28 May 2013 after the applicant's solicitors wrote to threaten proceedings arising from non-payment of monies due, which said "proceedings cannot be issued as there is an arbitration clause in the building agreement". On 30 May 2013, the applicant issued the 2013 proceedings seeking monies owed to it by the respondent. The respondents did not seek to put a stay on those proceedings and compel the applicant to comply with the arbitration agreement at that time. In giving judgment on the applicant's application for summary judgment [2014] IEHC 188, Barrett J. referred to the arbitration clause and stated, at para. 3;

> "However, notwithstanding this clause, it appears that all of the issues arising between the parties to these proceedings are being litigated, or are being threatened to be litigated, in court, and no objection appears to have been raised by either side to this fact. Given that this is so, the court infers that the parties should be considered, despite the arbitration clause in the building agreement, to have agreed subsequently, whether expressly or impliedly, that the matters raised in the instant proceedings should go to litigation."

18. The scope of this arbitration agreement does not allow for the division of disputes that do or do not come within it, as was provided for by the arbitration agreement in *Ocean Point*. This arbitration agreement is wide enough to encompass the issues in the current dispute the respondents have raised against the applicant and the issues the applicant raised against the respondents in the 2013 proceedings.

19. I am satisfied that the institution of the proceedings in 2013 constituted a repudiation of the arbitration agreement and was accepted as such by the respondents.

20. I have also had regard to the conduct of the applicant when the within proceedings were commenced which, when assessed objectively, fortifies my findings in relation to their earlier repudiation and also satisfies me that they should be estopped from now seeking to rely on the arbitration agreement. The applicant engaged both with the pleadings and with the arrangement of an engineer's inspection. They delayed from when they were first informed of the proceedings on 8 January 2020 (which was some time after the Plenary Summons had been issued) until 9 June 2021, before asserting for the first time what they now claim was the respondents' obligation to refer their dispute to arbitration.

21. In *Ocean Point*, Barniville J. recognised the potential relevance of delay in stating, at para. 30;

> "In addition to specific circumstances set out in Article 8(1) in which the mandatory obligation to refer to arbitration does not arise, the Irish Courts have also recognised that it is possible that the party seeking the reference to arbitration under Article 8 maybe estopped from seeking such reference. The circumstances in which such an estoppel would arise are rare as is clear from the decision of the Supreme Court in *Furey v. Lurgan-ville Construction Company Limited & Ors.* [2012] 4 I.R. 655 and the decision of the High Court in *Go Code Ltd v Capita Business Services Ltd.* [2015] IEHC 673 and *Townmore*."

22. In another decision handed down by Barniville J. around the same time, *XPL Engineering Ltd v. K&J Townmore Construction Ltd* [2019] IEHC 665, he observed, at para. 61, that unreasonable delay in bringing an application even where the applicant complies with the time limit in Article 8 being "not later than when submitting his first statement on the substance of the dispute", may permit a court to refuse a stay, despite the mandatory terms of Article 8(1) "if that delay had caused prejudice to the other party or amounted in effect to an abuse of the process of the court".

23. The applicant's delay of approximately nineteen months is only a little less than the delay of 21 months condemned by Hogan J. in *Mitchell v. Mulvey Development Ltd* [2012] IEHC 561, [2012] 4 I.R. 671, where he stated, at para. 19:-

> "If the sixth defendant intended to invoke the arbitration clause, it is rather difficult to understand why it waited so long before electing to do so. I fear that I cannot avoid observing that this is all the more unsatisfactory given that the sixth defendant has given no explanation for this delay."

24. Hogan J. also had regard to the plaintiff's conduct in altering their position to their detriment by agreeing not to bring a motion for judgment in default of defence. In the within case, the respondents looked for a defence in May 2021. Some weeks later the applicant indicated their intention to refer matters to arbitration.

25. There is a further point here that suggests a potential detriment for the respondents which fortifies the refusal of the application. The passage of time from when the respondent issued the Plenary Summons in April 2019 to when the applicant raised arbitration for the first time in June 2021, may enable the applicant to make a limitation point in the arbitration. The applicant has reserved its right to raise such a point in the arbitration, confirmed by their deponent's supplemental affidavit sworn on 9 November 2021, at para. 14, "I believe and am advised that the second defendant is entitled to rely on a limitation defence if one is available to it and if Mr. Kenny believes that the second defendant should be estopped from relying on such a defence, then this is a matter which can be raised and dealt with in any arbitration".

26. For the reasons set out above, I am refusing this application.

<u>Indicative view on costs</u>

27. In accordance with s. 169 of the Legal Service Regulatory Act 2015, my indicative view on costs is that, as the applicant has failed in its application, costs should be granted to the respondents with a stay on the execution of those costs pending the final resolution of the proceedings. I will put the matter in for mention before me at 10.30 a.m. on 12 May for the parties to make submissions in relation to final orders to be made including costs. If

either party wishes to lodge written submissions, they should be furnished at least 48 hours in advance of the matter coming back before me.

Counsel for the Applicant: Patricia Hill BL

Counsel for the Respondent: Alan Keating BL