

THE HIGH COURT

COMMERCIAL

[2016 No. 4410 P.]

BETWEEN

BAM BUILDING LIMITED

PLAINTIFF

AND

UCD PROPERTY DEVELOPMENT COMPANY LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 20th day of October, 2016

1. These proceedings have been initiated in the context of a dispute between the parties concerning the construction of the UCD Sutherland School of Law pursuant to contract dated the 17th February, 2012.
2. The contract provides for the conciliation and arbitration of disputes arising under that contract. Mr. David O'Leary, the appointed conciliator under the contract, made a recommendation on 30th November, 2015, that the defendant pay to the plaintiff the sum of €1,141,838.93. In accordance with the terms of the contract, the defendant issued a notice of dissatisfaction which entitled either party to refer the dispute to arbitration under sub-clause 13.2 of the agreement. Sub-clause 13.1.11 of the contract provides that, where the conciliator has recommended the payment of money and notice of dissatisfaction is given, certain requirements come into play. In the first place, the party who has served the notice of dissatisfaction is obliged to make the payment recommended by the conciliator provided the party being paid agrees to comply with the arbitration rules in the agreement referring the dispute to arbitration and giving the paying party a bond as provided for in the contract. That sub-clause also provides that, when the dispute is finally resolved, if it is found that the party receiving payment on the conciliator's recommendation was not entitled to some or all of the monies paid, then that party shall repay the amount that was paid and found not to be due together with interest. The agreement provides for the conciliation process to be confidential; however, since the amount of the conciliator's recommendation has been stated in affidavits sworn on behalf of each side, I have not redacted the figure from this judgment.
3. The following matters are not in dispute:-
 - (i) there is an arbitration clause in the contract;
 - (ii) the arbitration agreement is not null or void, inoperable or incapable of being performed; and,
 - (iii) the dispute giving rise to the conciliator's recommendation has been referred to arbitration.
4. Having served notice of dissatisfaction against the conciliator's recommendation, the disputed sum has now been referred to arbitration; however, the defendant has not paid, on account, the amount recommended to be paid by the conciliator as required by sub-clause 13.1.11 of the contract. Accordingly, the plaintiff has commenced these proceedings seeking various declarations including a declaration that the defendant is in breach of sub-clause 13.1.11, subsection (1) of the contract and, furthermore, it seeks specific performance of that subsection as against the defendant.
5. The defendant in the proceedings has brought a motion before the court for an order staying these proceedings pursuant to Article 8(1) of the Model Law as adopted by s. 6 of the Arbitration Act 2010 on the grounds that the dispute between the parties is the subject of an arbitration agreement. That is the matter before the court and which I have to decide at this stage.
6. The courts in this jurisdiction have long been supportive of the arbitral process and there is a line of recent authority which clearly establishes that Article 8 of the Model Law does not create a discretion to refer or not to refer matters to arbitration. If there is an arbitration clause and the dispute is within the scope of the arbitration agreement and there is no finding that the agreement is null and void, inoperative or incapable of being performed, then a stay must be granted. See *P. Elliott and Company Limited (In Receivership and In Liquidation) v. F.C.C. Elliot Construction Limited* [2012] IEHC 361; and, *Go Code Limited v. Capita Business Services Limited* [2015] IEHC 673.

7. This application falls outside the normal range of applications brought pursuant to Article 8 of the Model Law. Both parties agree that there is a valid arbitration clause. The disputed recommendation of the conciliator has been referred to arbitration and the parties have agreed an arbitrator although no arbitration has yet commenced. At this hearing, the parties were in agreement that the arbitration process could proceed on the issue of the conciliator's recommendation but the defendant maintains that, insofar as there is a dispute as to whether or not it is liable to pay, on account, the sum recommended by the conciliator pending the arbitration, this is also a matter that should be determined by the arbitrator.

8. The defendant contends that the recommendation made by the conciliator was not made within the strict timeframe provided for in clause 13. Accordingly, the defendant argues that the recommendation made by the conciliator was void. The plaintiff does not accept this. The defendant claims that, insofar as there is a dispute on the issue, it is one which should be determined by the arbitrator.

9. In order to determine whether this issue is a dispute within the scope of the arbitration clause, it is necessary to examine in some detail clause 13 of the agreement which provides for the resolution of disputes as follows:-

"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...

13.1.2 Within 10 working days of the referral of a dispute to conciliation, the parties shall jointly appoint a conciliator who is competent to adjudicate upon the dispute and independent of the parties...

...

13.1.6 The conciliator shall not be an arbitrator and the Arbitration Act 2010 and the law relating to arbitration shall not apply to the conciliation.

...

13.1.8 If the dispute is not resolved by agreement within 42 days after the conciliator was appointed, or a longer period proposed by the conciliator and agreed by the parties, the conciliator shall give both parties a written recommendation. The conciliator shall base the recommendation on the parties' rights and obligations under the Contract.

13.1.9 If either party is dissatisfied with the conciliator's recommendation, it may, within 42 days after receiving the conciliator's recommendation, so notify the other party. The notice shall state that it is given under sub-clause 13.1 of the Contract, and shall state the matters in dispute and the reasons for dissatisfaction. If the conciliator has failed to give a recommendation within 42 days after appointment, either party may give a notice of dissatisfaction. If notice of dissatisfaction has been given in accordance with this clause, either party may refer the dispute to arbitration under sub-clause 13.2.

...

13.1.11 If the conciliator has recommended the payment of money and a notice of dissatisfaction is given, the following shall apply:

(1) The party concerned shall make the payment recommended by the conciliator, provided that the other party first

(a) gave a notice, complying with the arbitration rules referred to in sub-clause 13.2 referring the same dispute to arbitration and

(b) gave the paying party a bond executed by a surety approved by the paying party, acting reasonably, in the form included in the Works Requirements, or if there is none, a form approved by the paying party, acting reasonably, for the amount of the payment.

(2) If, when the dispute is finally resolved, it is found that the party received payment on the conciliator's recommendation was not entitled to some or all of the amount paid, then that party shall repay the amount it was paid and found not to be entitled to, together with interest.

...

13.2 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.

13.3 Jurisdiction

Subject to the above provisions of this clause, the parties submit to the jurisdiction of the Irish courts to settle any dispute that may arise out of or in connection with the Contract or the Works."

10. On 24th June, 2016, Mr. Julian Bostridge, on behalf of the defendant, swore an affidavit in which he set out the background to the issues before the court. In para. 5 of the affidavit he states:-

"The plaintiff referred a dispute to conciliation under sub-clause 13.1 of the contract on 7 August, 2013. The dispute related to a claim by the plaintiff that it was entitled to certain additional monies arising out of the alleged illegal/unenforceable specification of certain products and services in the contract. The plaintiff claimed that the specifications for work and material contained in the contract were contrary to European law."

11. He goes on to state that the parties agreed to appoint Mr. David O'Leary as the conciliator under the terms of the agreement. With the agreement of the parties, the conciliator gave a preliminary recommendation on 3rd June, 2015, in which he provided answers to five questions posed by the defendant. The defendant disagreed with the conciliator's answers and notified the plaintiff and the conciliator of its dissatisfaction with the preliminary recommendation. On 10th July, 2015, the defendant called on the conciliator to propose an extended period of time for the agreement of the parties to conclude the conciliation.

12. Ultimately, the parties agreed to extend the date by which the conciliator was to give his recommendation to 27th November, 2015, and this was confirmed in an exchange of emails between Mr. Barry Doyle for the defendant, Mr. Brian Davis for the plaintiff, and the conciliator. None of these facts are in dispute.

13. On 30th November, 2015 the conciliator delivered his final recommendation (making his recommendation on quantum), that the defendant pay to the plaintiff the sum of €1,141,833.93.

14. It is not in dispute that the conciliator was in a position to make his recommendation on 27th November, 2015, being the deadline under the terms of the dispute clause. The conciliator swore an affidavit in which he states that the defendant nominated Mr. Barry Doyle as the person with whom he was to communicate on its behalf in the conciliation and that Mr. Doyle, in turn, told him to communicate with Mr. Trevor Smith in relation to quantum. Mr. Smith also worked for the same project management company as Mr. Doyle. The conciliator also states that the only matter to be dealt with in the conciliation was the issue of quantum. He was comfortable that Mr. Trevor Smith had authority to represent the defendant. Mr. Trevor Smith emailed the conciliator at 15:19 on Friday, 27th November, 2015, and said that it would be Monday, 30th November, 2015, before he could respond completely to a query

raised by the conciliator. This has not been disputed. Although it was personally inconvenient for the conciliator, he agreed to give his recommendation on 30th November in those circumstances.

15. The defendant is challenging the recommendation of the conciliator both on the basis of quantum and also on the basis that it was made out of time and, therefore, void. The plaintiff contends that, while the dispute on the issue of quantum comes within the scope of an arbitration under sub-clause 13.2, the issue as to whether or not the recommendation was out of time and, therefore, void is not a "dispute" which the parties had agreed could be sent to arbitration.

16. What makes this case unusual is the fact that both parties agree that the dispute resolution clause of the agreement provides for arbitration in the event of notice of dissatisfaction being served following the conciliator's recommendation. In this case, a bond was offered by the plaintiff and the matter has been referred to arbitration. The plaintiff does not seek, through these proceedings, to oust the jurisdiction of the arbitrator but, rather, seeks to have the defendant comply with the terms of the dispute resolution clause which includes the payment of the recommended sum on account.

17. The plaintiff invites the court to deal with the issue of whether or not there was delay of a nature which would render the conciliator's recommendation void. This would involve deciding whether or not Mr. Trevor Smith had actual or ostensible authority to look for an extension of time from the conciliator. The plaintiff argues that the determination of such an issue is outside the scope of arbitration as provided for in the agreement. It is worth noting that Mr. Julian Bostridge, in an affidavit sworn on behalf of the defendant on 24th June, 2016, describes the dispute as one "...related to a claim by the plaintiff that it was entitled to certain additional monies..." and the conciliator swore an affidavit in which he states that the only matter to be dealt with in the conciliation was the matter of quantum. The plaintiff agrees with that position. But the defendant in this application maintains that, now that a notice of dissatisfaction has issued and the matter has been referred to arbitration, any issue concerning the validity of the conciliator's recommendation is also a matter for the arbitrator and that is the issue which I have to decide.

18. The notice of dissatisfaction issued by the defendant is dated 22nd December, 2015, and there is no doubt that it raises two issues; namely, quantum and the validity of the recommendation within the meaning of clause 13 on the basis that it was not given within the time provided for in sub-clause 13.1.

19. In *Premium Nafta Products Limited and Ors. v. Fili Shipping Company Limited and Ors.* [2007] UKHL 40, Lord Hoffman said:-

"5. ...Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

6. In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law...

7. ...[I]ts construction must be influenced by whether [the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts...If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

...

13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: 'if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.'

I adopt those words of Lord Hoffman and hold that the starting point of any interpretation of an arbitration clause should be on the basis of an assumption that, unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction, all disputes between the parties should be referred to arbitration where an arbitration clause exists.

Does the dispute come within the scope of Clause 13?

20. Clause 13 bears the heading "Disputes" and within the clause there is provision for a process of conciliation with the possibility of arbitration if notice of dissatisfaction is given in respect of the conciliator's recommendation. The arbitration clause provides that:-

"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..."

21. Disputes referred to in sub-clause 13.1 include disputes arising under the contract and are not merely confined to disputes involving the payment of money. Sub-clause 13.1.11 provides what is to happen if the conciliator "...has recommended the payment of money and a notice of dissatisfaction is given..."

22. If a party is dissatisfied with the conciliator's recommendation it is obliged to notify the other party and "the notice shall state that it is given under sub-clause 13.1 of the contract and shall state the matters in dispute and the reasons for dissatisfaction".

23. It is clear that the notice of dissatisfaction met the criteria specified in sub-clause 13.1.9, having stated the matters in dispute and the reasons for dissatisfaction. Quite apart from the presumption that clause 13 should be interpreted on the basis that the parties intended all disputes arising out of the conciliation to be capable of referral to arbitration, the text of clause 13 also points in

that direction.

24. 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.

25. The plaintiff contends that the defendant cannot argue that the conciliator's recommendation is void on the grounds that it was delivered late, since the only reason it was delivered "*late*" was to facilitate the defendant's request for further time to make a submission. This may involve a determination of whether or not Mr. Trevor Smith had actual or ostensible authority from the defendant to ask for an extension of time. But the courts can only determine such issues if they are not within the scope of the arbitration agreement. Accordingly, this is a matter for the arbitrator to decide. The terms of clause 13 are sufficient to bring the issue of the validity of the recommendation within the scope of the arbitration agreement quite apart from the general presumption that exists in favour of such an interpretation.

Decision

26. I hold that this issue is one for determination by the arbitrator in addition to the level of quantum in the recommendation.

27. The defendant is entitled to an order in the terms of para. 1 of the notice of motion of 27th June, 2016, staying these proceedings pursuant to Article 8(1) of the Model Law.