Neutral Citation [2014] IEHC 695

**THE HIGH COURT**

**[2013 No. 333 MCA]**

**BETWEEN**

**DELUXE ART & THEME LIMITED**

**APPLICANT**

**AND**

**SHEFFS LIMITED**

**(IN RECEIVERSHIP AND LIQUIDATION)**

**RESPONDENT**

**JUDGMENT of Mr. Justice Gilligan delivered on the 16th day of July, 2014**

1. The applicant seeks an order pursuant to O. 56, r. 3(1)(i) of the Rules of the Superior Courts and pursuant to Article 34 of Schedule 1 of the Arbitration Act 2010 setting aside an arbitration award ("the Award"). The Award is dated 22nd July, 2013, and is in favour of the applicant as against the respondent in the sum of €60,427.58, inclusive of V.A.T., plus interest on such sum at the rate of 8% per annum from 24th August, 2009, until payment is made.

2. The applicant and the respondent to this notice of motion entered into a contract in April, 2009. The applicant agreed to provide and install Fit-Out works identified in the Contract Drawings for a consideration in the sum of €1.2m. A dispute arose between the parties in relation to this contract. The dispute was sent to arbitration under the terms of the contract. Mr. Jude O'Loughlin was appointed by the President of the Royal Institute of Architects of Ireland as arbitrator and delivered his award on 22nd July, 2013. The applicant had sought a declaration that it was entitled to exercise a lien over unfixed materials or goods on the respondent's premises to the value of €75,536.72 which it said it benefited from under the terms of Clause 34(b) of the contract which provides that:

> "In addition to all other remedies the Contractor upon the said determination may take possession of and shall have a lien upon all unfixed materials and goods intended for the Works which may have become the property of the Employer under this Contract until payment of all money due to the Contractor from the Employer."

In the alternative the applicant sought an award in the sum of €60, 427.58 inclusive of VAT in respect of the contract works which was due and owing.

3. At paras. 4.13-4.14 the award the arbitrator stated:

> "4.13. On this basis I would be of the view that the [Applicant] is effectively estopped from invoking Clause 34(b) by his own actions in handing over possession of the site and the disputed loose fixtures and fittings and accepting that the outstanding monies would be paid by the Respondent out of the projected cash-flow.
>
> 4.14. Accordingly I will not therefore grant the Declaration sought. I will grant an award of the said €60, 427.58 inclusive of VAT plus interest at the rate of 8% per annum from 24th August, 2009, until payment is made."

4. The respondent company is in receivership and in liquidation and, therefore, the monetary award made by the arbitrator is, in real terms, of little or no value to the applicant. The lien over goods however, would be of value. The applicant submits that the award made by the arbitrator and, in particular, his finding that the applicant was estopped from invoking Clause 34(b) of the contract which allowed it to exercise a lien, is incorrect and ought to be set aside by the court. The applicant submits that this alleged estoppel was at no stage raised by the respondent either in its Statement of Defence or during the course of the hearing which took place on 25th April, 2013. No evidence was adduced in support of this contention and no opportunity was given to the applicant to make submissions in regard to it. The applicant submits that the decision was therefore unsupported by oral testimony or submissions of the parties and the award was therefore improperly procured. The respondent submits that this is not the case and that, in effect, the arbitrator, though he used the word "estopped," was not actually referring to the distinct doctrine of estoppel as it is known to contract law but rather was using the term in the sense which is usually attributed to it in common parlance i.e. "precluded from" or "not entitled to" carry out some action or other.

5. This arbitration commenced after the operative date of the Arbitration Act 2010, namely, 8th June, 2010, and therefore it is the provisions of this legislation rather than the Arbitration Act 1954 which shall apply.

**Submissions**

6. Pursuant to s. 6 of the Arbitration Act 2010 the UNCITRAL Model Law governing arbitrations has force of law within the State. The applicant makes this application under Art 34 of the Model Law which sets out the grounds which a court may have regard to in setting aside an arbitral award. Art 34(2) of the Model Law provides:

> "(2) An arbitral award may be set aside by the court specified in article 6 only if:
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> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(B) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State."

The applicant relies, in particular, on Article 34(2)(a)(ii), Article 34(2)(a)(iii) and Article 34(2)(b)(ii) of the Model Law.

7. The applicant claims that it has been, in effect, denied an element of procedural fairness in the conduct of the arbitration by the arbitrator's failure to give it the opportunity to adequately present its case in relation to the issue of estoppel. Counsel on behalf of the applicant submits that this is also in breach of Article 18 of the Model Law which provides that "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

8. Counsel submits that though the words "otherwise unable to present his case" used in Article 34(2)(a)(ii) are not clearly defined they introduce the notion of fair procedures and natural justice which are associated with the requirement that an arbitrator not misconduct himself during the proceedings. The finding of "estoppel" is the central element of the Award and the applicant should have been given the opportunity to make submissions in this regard. Counsel submits that the arbitrator was in breach of the *audi alteram partem* principle in this regard. The case law in relation to misconduct of an arbitrator under the previous legislative regime, the Arbitration Acts 1954-1980, was submitted by counsel for the applicant to be relevant to this issue. Counsel relied on the decision of the Supreme Court in *Galway City Council v. Samuel Kingston Construction Ltd and Anor* [2010] IESC 18 where it was held by O'Donnell J. that a court should set aside an award where the offending matter is so substantial or so fundamental that it would be clearly unjust to allow the award to stand. Examples of such misconduct included refusing to hear evidence on a material aspect of the dispute, adopting procedures which place one party at a clear advantage, acting with a clear level of favouritism towards one of the parties or deciding a case on a point which was not put to the parties. The conduct of the arbitrator in this instance, in relation to his finding of an estoppel, was clearly unjust within the meaning of that case. The High Court of England and Wales has also reached a similar conclusion in *Cameroon Airlines v. Transnet Limited* [2004] EWHC 1829 (Comm) in which a *dictum* of Bingham J. in *Zermalt Holdings SA v. Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 was cited. Bingham J. stated at p. 15 of that decision that:

> "If an arbitrator is impressed by a point that has never been raised by either side, then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. If he is to an extent relying on his own personal experience in a specific way then that again is something that he should mention so that it can be explored. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him."

9. In addition, it is submitted that by addressing an issue which was not raised by the parties to the arbitration the arbitrator strayed beyond the scope of the terms of the arbitration and therefore breached Article 34(2)(a)(iii).

10. Counsel for the applicant also suggested that the alleged procedural unfairness is in conflict with the public policy of the State and therefore this was further grounds for setting aside the award. However, it was accepted at the hearing of this motion that the limitation period under s. 12 of the Arbitration Act 2010 (56 days from the making of the award) for the bringing of such a claim had, in fact, expired.

11. Counsel for the respondent submits that no question of procedural unfairness arises since the award made by the arbitrator is based on an interpretation of the contract and this issue was fully debated at the hearing. Though the word "estopped" was used in the Award the decision made by the arbitrator was not actually based on the doctrine of estoppel but on an interpretation of the contract alone. Counsel on behalf of the respondent also submits that the arbitrator had sufficient jurisdiction to decide the question before him in regard to the contractual lien. The respondent accepts, however, that the issue of estoppel was neither pleaded nor raised at the arbitral hearing.

12. Counsel for the respondent submits that the autonomy of the parties is central to the arbitration regime in Ireland and that the High Court has, in the words of Laffoy J. at para. 31 of her decision in *Snoddy v Mavroudis* [2013] IEHC 285, only a "very limited jurisdiction" to set aside an arbitral award. This may only be done for a reason specified in Article 34 of the Model Law.

13. Counsel for the respondent submits that the Award must be construed as a whole, with the word "estopped" being interpreted in its proper context. The word appears only once in the Award as part of the expression "effectively estopped." This is not a technical legal usage of the term but amounts to a synonym of words like "prevented." None of the essential ingredients of an estoppel such as a representation, a voluntary promise or detrimental reliance are mentioned or discussed in the Award. The Award is, in fact, concerned with the proper interpretation of Clause 34(b) of the contract which was an issue fully ventilated at the arbitration hearing. Therefore no question of unfairness of procedures arises on the facts of this case. The applicant is, in effect, requesting that the court examine the substance of the arbitrator's award rather than any question of procedural fairness, something which is not permitted by the legislative scheme governing arbitration.

14. Counsel also submits that the arbitration agreement, contained in Clause 38 of the contract, is clear in its terms and that the arbitrator had jurisdiction to assess the correct interpretation of Clause 34(b) of the contract. There is also a "strong presumption… that a tribunal acts within its mandate" as held by Laffoy J. in *Snoddy v Mavroudis* [2013] IEHC 285 at para. 32. The application made in this instance is, it is submitted by counsel for the respondent, a misconceived attempt by the applicant to request that the court examine the merits of the Award made by the arbitrator, which is impermissible.

15. In response to these submissions counsel for the applicant submitted that there is sufficient evidence from the text of the Award that the arbitrator had concluded that a specific form of estoppel, estoppel by conduct, had arisen from the behaviour of the applicant and that this was inappropriate since no opportunity to address this claim had been given to the parties. Counsel for the respondent submitted in response that the elements of an estoppel by conduct were not discussed or mentioned anywhere in the Award and therefore it was not possible to see this factor as having any influence on the decision actually made by the arbitrator.

**Conclusion**

16. The question which the Court must determine on this application is whether or not the word "estoppel" as used by the arbitrator in the Award made on 22nd July, 2013, was used in its legal sense or was used in a more general fashion.

17. The jurisdiction of the court to set aside an order made by an arbitral tribunal, as submitted by counsel and as stated by Laffoy J. in *Snoddy v Mavroudis* [2013] IEHC 285, is very limited. The grounds for such an order are clearly set out in Article 34 of the Model Law.

18. It is also clear that the doctrine of estoppel is a complex and technical element of the law of contract and the law of equity which has given rise to considerable judicial comment. It is not necessary for the court to enter into a discussion as to whether or not estoppel actually arose on the facts of this case, as it is not for this Court to examine the merits of the Award. Nor is it the role of this Court to examine in detail the complex jurisprudence relating to the doctrine of estoppel in its various forms.

19. However, according to *Murdoch's Dictionary of Irish Law*, Henry Murdoch, 4th Ed., (Dublin, 2004) at p. 410 estoppel is defined as:

> "A rule of evidence which precludes a person from asserting or denying a fact, which he has by words or conduct led others to believe in. If a person by a representation induces another to change his position on the faith of the representation, he cannot afterwards deny the truth of this representation. Estoppel must be pleaded to be taken advantage of; it provides a shield not a sword and consequently it cannot create a cause of action."

This is, in effect, a *précis* of the well established jurisprudence from which the primary elements of the doctrine of estoppel, namely, representation by word or conduct and detrimental reliance, have emerged such as *Amalgamated Property Co. v. Texas Bank* [1982] 1 Q.B. 84, *Taylor Fashions Ltd v. Liverpool Victoria Trustee Co. Ltd.* [1982] Q.B. 133 and, in Ireland, *Ryan v Connolly* [2001] 2 I.L.R.M. 174. It is not necessary for this Court to examine the different manifestations of the doctrine of estoppel, whether by conduct, by representation or by record (*res judiciata*).

20. A similar legal definition of the term estoppel can be found in *Jowitt's Dictionary of English Law*, Greenberg, 3rd Ed., (London, 2010) at p. 838:

> "The precluding of a party, in certain circumstances, from proving in litigation particular facts or matters which, if proved, would assist him to succeed as plaintiff…or defendant in an action"

The author then continues to examine some of the more specific forms of the doctrine of estoppel such as estoppel by conduct, by record or by representation.

21. However, it is clear that the word "estoppel" may also be used in non-legal contexts and may have other, similar but not technically the same, meanings attributed to it. The *Oxford English Dictionary*, Simpson and Weiner, 2nd Ed., (Oxford, 1989) for example states at p. 412 that the noun estoppel can mean

> "1. An obstruction (to a watercourse) whether natural or artificial….
>
> 2. *Law*. An impediment or bar to a right of action arising from a man's own act, or where he is forbidden by law to speak against his own deed…
>
> b. stoppage, prohibition. *Obs*."

The term "*Obs*" after the last recorded meaning for estoppel is an abbreviation for "Obsolete." However, The Oxford English Dictionary also states that the word in its verb form, "estop," can also mean "to stop with or as with a dam or plug", to stop, bar or preclude in a legal action or "b. *gen*. To stop, prevent. *rare*." This last recorded general meaning, similarly to the position with the noun "estoppel" is described as "rare." However, though the usage of the word "estoppel" in the general sense of "prevent" may be rare, it is not unheard of.

22. It is also clear that the elements of the doctrine of estoppel are not discussed or even mentioned at any other stage of the Award. There is no, even implicit, examination of the factors which would allow the arbitrator to have reached a conclusion that an estoppel had occurred. Other legal submissions were made to the arbitrator on other matters of contract law. It would be unusual for an arbitrator to have used the word estopped in the strict legal sense without examining the complex jurisprudence which surrounds the application of this doctrine in its many different contexts. It is clear that in this instance the arbitrator engaged in a comprehensive interpretation of Clause 34(b) of the contract in the context and scheme of the contract as a whole and reached the conclusion that the applicant could not exercise the contractual lien provided therein, as it did not meet, or no longer met, the conditions required by the provision for the exercise of that power.

23. It is of some significance that the applicant sought not only a declaration that it was entitled to exercise a lien over the unfixed materials or goods to the value of €75,536.72 which it maintained it benefited from under the terms of Clause 34(b) of the contract, but in the alternative sought an award in the sum of €60,427.58 inclusive of VAT in respect of the contract works which was due and owing.

24. This Court also has to have regard to the views as expressed by O'Donnell J. in *Galway City Council* that a court should set aside an award where the offending matter is so substantial or so fundamental that it would be clearly unjust to allow the award to stand. The examples as given by O'Donnell J. were misconduct, including refusing to hear evidence on a material aspect of the dispute, adopting procedures which place one party at a clear advantage, acting with a clear level of favoritism towards one of the parties or deciding a case on a point which was not put to the parties.

25. In my view on the basis that Clause 34(b) of the contract was argued in full before the arbitrator, the fact that he used the term "estopped" and that this is the offending matter is not so substantial or so fundamental that it would be clearly unjust to allow the

award to stand. I do accept that it was unfortunate that the arbitrator chose to use a word with distinct legal connotation having regard to the reliefs as sought but it is clear that Clause 34(b) of the contract was argued in full by both sides, and the use of the term "effectively estopped" in my view does not bring about a sufficient injustice to accede to the relief as sought herein on the applicant's behalf.

26. Furthermore, I do not consider that by the use of the term "effectively estopped", the applicant can bring itself within the provisions of Article 34(2)(a) or (b) of the Model Law.

27. Accordingly, the application to set aside the award is dismissed.