Neutral Citation Number: [2011] IEHC 249

THE HIGH COURT

2011 87 MCA

IN THE MATTER OF THE ARBITRATION ACTS 1954 – 2010

AND

IN THE MATTER OF AN INTENDED ARBITRATION

BETWEEN

WINTHROP ENGINEERING & CONTRACTING LIMITED

AND

CLEARY & DOYLE CONTRACTING LIMITED

BETWEEN

WINTHROP ENGINEERING AND CONTRACTING LIMITED

CLAIMANT

AND

CLEARY & DOYLE CONTRACTING LIMITED

RESPONDENT

Judgment of Miss Justice Laffoy delivered on 22nd day of June, 2011.

1. The application

1.1 On this application, which was initiated by an originating notice of motion dated 16th March, 2011, the respondent claims various reliefs but the substance of the relief is an order pursuant to Order 56, rule 3 of the Rules of the Superior Courts 1986, (the Rules), as amended, and Article 16(3) of the Model Law that Mr. John F.F.F. O'Brien (Mr. O'Brien) does not have jurisdiction to act as arbitrator or to determine the dispute existing between the parties herein in an arbitration. Alternatively, an order is sought, invoking the same jurisdiction, that there is no binding arbitration clause governing the dispute between the parties.

1.2 Since the application was initiated, a question has arisen as to whether the issue between the parties falls to be resolved in accordance with the Arbitration Act 2010 (the Act of 2010), which became operative on 8th June, 2010, or the legislation it replaced, the Arbitration Acts 1954 – 1998. A proposed amended notice of motion was put before the Court. I will return to that question later.

2. The factual background

2.1 The respondent was the main contractor in relation to a housing development at the rear of Ailesbury Road in the City of Dublin (the development works) under a building agreement dated 11th November, 2002 made between Aildev Ltd., as employer, of the one part and the respondent of the other part (the main contract). The main contract was in the standard form RIAI 2002 edition (Revision 1, Print 1) contract.

2.2 On 21st November, 2002 the architects named in the main contract, Crean Salley (the architects), instructed the respondent to enter into a sub-contract with the claimant for the supply and fitting of mechanical works at the development. On foot of that instruction a sub-contract dated 10th January, 2003 made between the respondent, as contractor, of the one part and the claimant, as sub-contractor, of the other part (the sub-contract) was entered into. The sub-contract was in the standard form Construction Industry Federation (CIF) sub-contract (for use with the RIAI Main Contract Form) 5th Ed., October 1989.

2.3 The sub-contract contained an arbitration clause (clause 26) which, insofar as is relevant for present purposes, was in the following terms:

> "In the event of any dispute or difference between the Contractor and the Sub-Contractor, whether arising during the execution or after the completion or abandonment of the Sub-Contract Works or after the determination of the employment of the Sub-Contractor under the Sub-Contract (whether by breach or in any other manner), in regard to any matter or thing of whatsoever nature arising out of this Sub-Contract or in connection therewith, then either party shall give to the other notice in writing of such dispute or difference and such dispute or difference shall be and is hereby referred to the arbitration of such person as the parties hereto may agree to appoint as Arbitrator or failing such agreement as may be appointed on the request of either party by the President for the time being of the Construction

Industry Federation and in either case the Award of such Arbitrator shall be final and binding on the parties.

PROVIDED …

AND provided further that in any such arbitration as is provided for in this Clause any decision of the Architect/Engineer which is final and binding on the Contractor under the Main Contract shall also be and be deemed to be final and binding between and upon the Contractor and Sub-Contractor.

Every or any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Acts 1954 … or any Act amending the same … ."

2.4 No other contract in writing was entered into by the respondent with the claimant in relation to the development works.

2.5 The claimant commenced the works required under the sub-contract in early 2003 and the works were completed in June 2004. During the works the claimant submitted payment applications to the respondent in the manner prescribed in the sub-contract, which were subject to certification by the architects. On 21st December, 2004 the architects certified a final account in the sum of €545,935.13 for the claimant and that sum was duly paid to the claimant on 21st January, 2005. The final retention moiety was paid to the claimant on 31st March, 2006, whereupon, the respondent contends, the sub-contract ended.

2.6 The dispute which has arisen between the parties relates to a claim made by the claimant to the respondent on 23rd October, 2008 seeking the following sums:

(a) the sum of €68,856 in respect of "direct works"; and

(b) the sum of €81,865.89 in respect of "extension of contract".

The position adopted on behalf of the respondent in response to that claim was that it was understood between the parties that all matters had been concluded between the parties in March 2006. The respondent, nevertheless, sought copies of any contract or agreement upon which the claimant was relying in respect of the claim. The reply on behalf of the claimant, by letter dated 20th May, 2009, in essence was that the matter was covered by the sub-contract. Further information was furnished by letter dated 12th June, 2009, including information to which the respondent attaches significance, namely, that the claimant received written instructions from the respondent to replace damaged electrical panels in four houses and that all other items were "verbally instructed". In the letter of 12th June, 2009 the claimant imposed a deadline of 17th July, 2009 "for full resolution", after which the claimant would be requesting the appointment of a conciliator or arbitrator, depending on the wishes of the respondent.

2.7 Apparently, from the respondent's perspective, what happened next was that it received a letter from the CIF dated 19th March, 2010 appointing Mr. O'Brien as arbitrator pursuant to the sub-contract at the request of the claimant. The respondent's position is that the claimant unilaterally procured the appointment of Mr. O'Brien as arbitrator.

2.8 The respondent then adopted the position that there was no arbitration agreement in relation to the matters in dispute between the parties and contended that Mr. O'Brien had been incorrectly appointed as arbitrator in relation to the dispute. A stream of correspondent ensued. Eventually, by letter dated 17th June, 2010 Mr. O'Brien sought a detailed submission from the respondent "explaining precisely why it does not accept arbitration is the correct forum to resolve this matter" and a detailed response from the claimant. That was duly done. The claimant's response was dated 8th August, 2010. There is one particular paragraph in the response to which the respondent attaches significance, which is in the following terms:

"[The claimant] submitted their final proposed 'domestic claim' to [the respondent] in October 2004. This was separate to the claim for the nominated works which was agreed and recommended by the mechanical consultant … on the 30th August, 2004 … . Variation 27 dealing with the claim for extension of time along with some other variations were deemed by [the mechanical consultant] not to be within his remit. These items along with any further variations considered to be a 'domestic type variation' was referred to [the respondent] domestic account currently requested. [The respondent] were fully aware of this. This submission in October 2004 to [the respondent] included all remaining items which required agreement and this included our claim for extension of time costs. We were told by the mechanical consultant that all domestic variations and extension of time claims <u>were to be dealt with by the main contractor under a separate agreement</u>. This approach was considered reasonable at the time as [the mechanical consultant] would not have had the authority or knowledge to agree the remaining domestic variations or extension of time claim." (Emphasis added).

The significance attached by the respondent to the words to which emphasis has been added in that quotation is that it is contended that it is a recognition by the claimant that the "domestic" claim, which is synonymous with "direct works" claim, and the extension of time claim were advanced by the claimant not under the sub-contract but under a separate agreement.

2.9 On 20th August, 2010 Mr. O'Brien issued a determination specifically addressing the matter of whether arbitration "is the correct forum to resolve the dispute between the parties". It was a reasoned determination on what he referred to as an "interlocutory matter". He made the following determination:

"(i) I determine that Arbitration is the correct forum to resolve the dispute between the parties under the Arbitration Clause in the Sub- Contract and I am satisfied that the parties agreed to the provisions of Clause 26 at the time of the Contract.

(ii) I also determine that my appointment by the CIF to act as Arbitrator in this matter is valid."

3. The jurisdiction invoked by the respondent: procedural issues

3.1 Article 16(3) of the Model Law is to be found in the text of the UNCITRAL Model Law on International Commercial Arbitration set out in Schedule I to the Act of 2010. Article 16 deals with the competence of an arbitral tribunal to rule on its own jurisdiction. Sub-Article (1) provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. Sub-Article (2) covers the pleas which may be raised, namely, that the arbitral tribunal does not have jurisdiction and that the arbitral tribunal is exceeding the scope of its authority. Sub-Article (3) provides:

"The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an

> award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

3.2 Order 56, rule 3(1), as now in force, sets out the procedure for initiating various applications to Court concerning arbitrations, including, an application "to decide on a plea that the arbitral tribunal does not have jurisdiction pursuant to Article 16(3) of the Model Law (provided that the application is made within the period prescribed in that Article)".

3.3 Section 3(1) of the Act of 2010 provides as follows:

> "This Act shall not apply to an arbitration under an arbitration agreement concerning an arbitration which has commenced before the operative date but shall apply to an arbitration commenced on or after the operative date."

The process initiated by the appointment of Mr. O'Brien by the CIF is either an arbitration or it is not, depending on whether the parties have given him jurisdiction to conduct the process or not. If it is an arbitration, it commenced before the operative date, that is to say, 8th June, 2010 and the Act of 2010 and, as a result, the provisions of the Model Law have no application to it. The consequence is that, if it is an arbitration, it is governed by the Arbitration Acts 1954 – 1998. The repeal of those Acts by the Act of 2010, in broad terms, is without prejudice to and does not affect existing accrued rights. Therefore, the core procedural question is what, if any, power is conferred on the Court to determine the type of issue which arises on this application, namely, whether an arbitration agreement exists and Mr. O'Brien has jurisdiction to arbitrate the dispute between the parties in this case. I can find nothing in those Acts analogous to the provisions of Article 16 of the Model Law. In the proposed amended notice of motion, while the Act of 1954 is invoked, there is no reference to any specific section or provision thereof. However, the Court's inherent jurisdiction is also invoked in the proposed amended notice of motion.

3.4 There is long established authority in the United Kingdom that the Court has an inherent power to make a declaration that the arbitrator has no jurisdiction to hear or determine a claim, but the exercise of the power is discretionary. A similar inherent jurisdiction has been recognised in this jurisdiction. As is pointed out in Dowling-Hussey and Dunne on *Arbitration Law* (Thomson Round Hall 2008) at para. 9 – 24, outside the Arbitration Acts 1954 – 1998, the High Court has jurisdiction to grant declaratory and injunctive relief in respect of the arbitration process, but applications for declaratory and injunctive relief are properly brought by way of the plenary summons procedure. In relation to the jurisdiction to make a declaratory order, the authors point out (at para. 9 – 26) that there are several grounds upon which an arbitrator would lack jurisdiction to decide the dispute between the parties, for example, there may not be an arbitration agreement between the parties, or the arbitration agreement might not have been incorporated into the main contract between the parties. They cite a decision of the High Court (Gilligan J.) in *Anglo-Irish Banking Corporation v. Tolka Structural Engineering* [2005] IEHC 239 as a recent example of a case in which a party successfully applied for a declaration that the arbitrator lacked jurisdiction to decide a dispute.

3.5 In this case, the respondent's position is that Mr. O'Brien has no jurisdiction to arbitrate the dispute between the parties and, in the proposed amended notice of motion, the Court's inherent jurisdiction for an order to that effect, which, in essence, would be a declaratory order, is invoked. While I am satisfied that the Court has inherent jurisdiction to make the type of order sought in an appropriate case, I consider that it is doubtful that procedure by way of originating notice of motion under Order 56 is the appropriate procedure to invoke that jurisdiction. In short, the application should have been brought by way of plenary summons. On 9th June, 2011 the parties were apprised of the Court's concern that the appropriate procedure had not been adopted in seeking what is, in substance, declaratory relief. Since then the Court has been informed that the parties are in agreement that the Court should determine the issue which arises, not withstanding the manner in which the application has come before the Court. It is on the basis of that agreement that I will now deal with the substantive application.

4. The substantive application: the factual issues

4.1 The respondent contends that Mr. O'Brien does not have jurisdiction to determine the dispute referred to him on a number of grounds.

4.2 First, it is contended that the works in respect of which the claimant seeks payment were outside the nominated works covered by the sub-contract and, accordingly, the sub-contract, and the arbitration clause in it, do not apply to them. As regards practice in the building industry in relation to "domestic" or "direct" works carried out by a nominated sub-contractor, Joe McNabb, in the grounding affidavit sworn on behalf of the respondent on 15th March, 2011, has averred as follows:

> "I say and believe that in the context of a building project the expression 'domestic work' refers to works carried out by a subcontractor for a main contractor under a private agreement between the parties and the same is not subject to any involvement of any other party, including the main contractors, Employer, or the Employer's agents, as would be the case in a nominated sub-contract situation. I say and believe that the majority of main contractor/subcontractor relationships on most building projects will be 'domestic' in nature and, in those circumstances, the parties are obviously free to arrange their own contractual relationship as they see fit. In some instances this will involve the execution of written agreements containing a binding Arbitration clause or, as in the present case, not executing a formal agreement at all."

Mr. McNabb relied on the passage from the submission of the respondent to Mr. O'Brien dated 8th August, 2010 quoted at 2.8 above as being wholly consistent with the respondent's position that the claim being made by the claimant is made under a separate agreement and not under the sub-contract. It is contended by the respondent that the claimant is attempting to "piggy-back" on the arbitration clause in the sub-contract in relation to the dispute in issue here and that it is not entitled to do so. That primary ground – that there is no arbitration agreement in existence – clearly raises an issue on which the Court may adjudicate under its inherent jurisdiction.

4.3 However, it seems to me that other arguments advanced in support of the respondent's contention that Mr. O'Brien does not have jurisdiction to arbitrate are not really matters which go to jurisdiction, but rather are matters which would be determined by Mr. O'Brien, if he had jurisdiction, or which would be relied on as defences to any action brought by the claimant against the respondent. One such argument is that the element of the claimant's claim in relation to delay and disruption has already been determined by an expert appointed under the main contract in a manner which is final and binding upon the claimant by virtue of the second proviso in clause 26 of the sub-contract quoted earlier. Even if it were possible to express a view on that argument, I think it would be inappropriate to do so. Another such argument is that, under clause 6 of the sub-contract in relation to variations, varied instructions and variations which the claimant was obliged to comply with and carry out were required to be given in writing or confirmed in

writing, whereas there were no written instructions by the respondent to the claimant in relation to the items in respect of which the claimant seeks payment, apart from the one written instruction to which I have alluded earlier. Again, if Mr. O'Brien has jurisdiction, in my view, the relevance or otherwise of clause 6, and, if it is relevant, whether it has been complied with, would be a matter for Mr. O'Brien to determine in his capacity as arbitrator.

4.4 The final objection made by the respondent is that sometime after 7th August, 2009, the CIF at the request of an agent acting on behalf of the claimant, appointed a person other than Mr. O'Brien to act as arbitrator, and, without the respondent being notified of the appointment, the claimant withdrew the matter from the arbitration procedure, according to the CIF, "due to incorrect identification of the parties in the first instance". The respondent's argument is that, on the claimant's withdrawal from the process, the arbitration process was spent. While that argument would probably go to jurisdiction if interpreted as an argument that the arbitration has not been validly commenced, on the evidence, in my view, there is no factual basis to support the argument as so interpreted.

4.5 A short affidavit sworn by James Brophy, a director of the claimant, has been filed in response to the respondent's application. Mr. Brophy identifies the two elements in the claim of the claimant, namely, payment for works carried out at the specific request of the respondent (the "domestic works" or the "direct works") and compensation for losses due to delay. The primary position of the claimant is that the domestic works were carried out to the development works pursuant to the directions of the respondent's employees under the sub-contract, and were required for or in support of the successful completion of the contracted works.

4.6 The alternative position of the claimant is that, if the claimant is wrong in contending that the direct works were carried out pursuant to the sub-contract, and were in fact the subject of a new contract which was agreed between the parties, the arbitration clause should, nonetheless, be regarded as applying thereto because, as Mr. Brophy averred, –

> "… the use of arbitration agreements is so widespread in the construction industry that I believed at all times that we agreed that any disputes between the parties would be referred to arbitration."

Mr. Brophy further averred that both the claimant and the respondent are parties which have extensive, if not exclusive, previous general experience of trading under contracts which contain arbitration clauses.

5. The law

5.1 Counsel for the claimant referred the Court to a decision of the Queen's Bench Division of the English High Court in *A & B v. C & D* [1982] 1 Lloyds Law Reports 166. The facts in that case were very complex. However, the aspect of the decision of Mustill J. to which the Court was referred arose from the fact that C had entered into an agreement with X (the predecessor of the plaintiffs, A and B) in 1972 in connection with the construction of a liquefied natural gas plant in Qatar. That agreement related to the provision by C of planning and supervisory services in relation to the construction of the plant. A year later, in 1973, C entered into a further agreement with X to furnish advice and services with regard to the provision of personnel, the training of personnel and the operation and maintenance of the plant. After the plant entered into service, there was a breakdown in 1976. At that stage C offered the services of their tank inspector. There was an issue between the plaintiffs and C as to the basis on which the work in 1976 was performed by C. The plaintiffs contended that there was a new and separate agreement under which C was obliged to supply advice and services which lay outside the scope of its obligations under the existing contracts. C, on the other hand, maintained that the work was carried out pursuant to the second agreement. For the purposes of his judgment, Mustill J. found it convenient to assume that there was a separate agreement and to refer to it as the third agreement. In any event, the tank failed again in 1977 and the plant was destroyed. The issue between the plaintiffs and C, which is of relevance for present purposes, and his decision on it, is set out by Mustill J. in the following passage of his judgment (at p. 172):

> "The question is therefore whether the plaintiffs' claim is within the scope of the identical clauses in the first and second contracts. The plaintiffs argue that it is not since it is founded on the third agreement. In my submission this argument is unsound for three reasons: –
>
> > (i) I am far from convinced that there ever was a third agreement. The parts of the second agreement relating to voluntary services were wide enough to cover the advice and inspection which C in fact supplied. There is no sign in the documents of any distinct contract to cover these particular services nor, so far as I can see, any practical reason why the parties should have troubled to make one. The reference to art. 13 of the second agreement is perfectly well explicable as an act of caution, and does not unequivocally recognise that the work lay outside the scope of the existing agreements.
> >
> > (ii) Even if there was a third agreement, I consider that a claim relating to a breach of it would, in the particular circumstances of this case, be connected with both the previous agreements. The services related to the investigation and repair of work done under the first agreement, and were governed by exactly the same terms regarding liability as applied to both agreements.
> >
> > (iii) The plaintiffs' claim in respect of the second agreement is founded variously on the first, second and third agreements. Precisely the same facts will be relevant to the claims under each agreement, and the liabilities arising from those facts will be precisely the same whichever agreement is applied.
>
> Accordingly, I consider that the plaintiffs' claim does lie within the agreements to arbitrate … ."

That decision, in my view, turned on the proper construction of the agreements which X and C had entered into.

5.2 An alternative strand of jurisprudence relied on behalf of the claimant relates to the question whether an arbitration agreement has been incorporated into the contract which the parties acknowledge existed. In particular, the decisions of the High Court in *Lynch Roofing Systems v. Bennett & Son Ltd.* [1999] 2 I.R. 450 and in *McCrory Scaffolding Ltd. v. McInerney Construction Ltd.* [2004] 3 I.R. 592 were relied on.

5.3 In the earlier case, while there was no written contract between the plaintiff and the defendant in respect of roofing works sub-contracted by the defendant main contractor to the plaintiff sub-contractor, the defendant claimed that at the time of negotiation of the contract, the price and the fact that the standard conditions of contract RIAI (April 1998 Edition), which contained an arbitration clause, would apply to the sub-contract were agreed between the parties. A letter was sent to the plaintiff confirming the contract

as agreed and specifying that it was subject to a written receipt of acceptance of terms, which incorporated the standard conditions of contract RIAI, and stipulating that failure to respond would be reviewed as acceptance of the conditions. No response was received from the plaintiff, who contended that, during the negotiations, the existence of the arbitration clause was not brought to its attention. Morris P., in granting a stay pursuant to s. 5 of the Arbitration Act 1980 to the defendant, stated (at p. 453):

> "…two issues therefore appear to me to arise in this case. Firstly, did the parties habitually trade under contracts which incorporated arbitration clauses so that a court would be forced to conclude that the parties expected and knew that this clause would govern their contract. …
>
> In the present case I am satisfied that each party was sufficiently familiar with the trade so as to lead a court to conclude that, as Denning L.J. put it in *British Crane Hire v. Ipswich Plant Hire* [1975] 1 Q.B. 303, the defendants would be understood and presumed to say 'of course that is quite understood'. I would find it hard to believe that a large roofing contractor would undertake this contract without the benefit of a building contract."

Later, (at p. 454) Morris P. observed that, in his view, it would be extremely unlikely that experienced contractors contemplated a roofing sub-contract would be performed otherwise than being governed by an appropriate building contract.

5.4 The passage from the judgment of Morris P. quoted above was quoted and approved of by Peart J. in *McCrory Scaffolding Ltd. v. McInerney Construction Ltd*. On the facts of that case, Peart J. stayed proceedings on the ground that an arbitration agreement formed part of the scaffolding contract between the parties, notwithstanding the fact that a written agreement was never entered into. In so doing, he attached significance to the fact that the parties were commercial entities and experienced in the trade and that each had previous general experience of trading under contracts that included arbitration clauses.

6. Application of the law to the facts

6.1 It seems to me that, irrespective of the strand of jurisprudence one applies to the facts of this case, one must conclude that it was intended that the dispute which has been referred to Mr. O'Brien would be the subject of the arbitration clause in the sub-contract. That dispute is eminently suitable for resolution through the arbitral process.

6.2 The arbitration clause is drafted in very broad terms. It is made clear that a dispute or a difference between the parties may be referred to arbitration during the execution of the works or after determination of the employment of the claimant howsoever arising. Moreover, it is made clear that any dispute or difference in regard to any matter or thing of whatsoever nature "arising out of" or "in connection [with]" the sub-contract may be submitted to arbitration. The works in respect of which the current dispute arises were executed by the claimant while the claimant was on site for the purposes of executing the nominated works specified in the sub-contract. Those works, to the extent that they did not directly arise out of the nominated works, on any common sense view of the matter must be seen as being connected with the nominated works and the claimant's contractual obligations under the sub-contract. Therefore, as a matter of construction of the arbitration clause, in my view, the dispute in relation to those works must be regarded as arising out of or in connection with the sub-contract. Any other interpretation flies in the face of good commercial sense.

6.3 Alternatively, by analogy to the decisions referred to at 5.2 above, it must be presumed that it was the intention of the parties that any works requested by the respondent which the claimant agreed to do while on the site for the purposes of fulfilling its obligations under the sub-contract would be subject to the provisions of the sub-contract. The argument that the claimant was a nominated sub-contractor and that the respondent submitted payment applications received from the claimant in respect of the nominated works, which were specifically the subject of the sub-contract, to the architects and, when certified, the respondent received payment from the employer under the main contract, does not, in my view, preclude the conclusion that the intention of the parties was that the arbitration clause in the sub-contract would apply to the works agreed to be executed by the claimant at the request of the respondent to the development works which were outside that payment process. The important factor, in my view, is that the contractual relationship which existed under the sub-contract was between the claimant and the respondent and the contractual relationship in relation to the works not specified in the sub-contract was between the claimant and the respondent. In those circumstances it is reasonable to presume that it was intended by the parties that the arbitration clause would apply to all works executed by the claimant at the site at the request of the respondent.

6.4 Accordingly, I find that the dispute which was referred to Mr. O'Brien is a dispute which is subject to the arbitration clause in the sub-contract.

7. Order

7.1 The notice of motion will be amended to include an application for a declaration, under the Court's inherent jurisdiction, that no binding arbitration clause exists governing the dispute between the parties. The order will record that the parties agreed to the Court determining whether such a declaration should be made in the proceedings as constituted.

7.2 On the basis of the finding recorded earlier that the dispute between the parties is governed by clause 26 of the sub-contract and that an arbitrator appointed in accordance with that clause has jurisdiction to determine the dispute, there will be an order dismissing the application.

7.3 For the avoidance of doubt, no view is expressed in this judgment as to whether Mr. O'Brien was properly appointed in accordance with clause 26.