

THE HIGH COURT

[2015 No. 188 MCA]

IN THE MATTER OF THE ARBITRATION ACT 2010

IN THE MATTER OF SECTION 9 OF THE ARBITRATION ACT 2010

IN THE MATTER OF ARTICLE 16(3) OF THE UNCITRAL MODEL LAW

BETWEEN

MAYO COUNTY COUNCIL

APPLICANT

AND

JOE REILLY PLANT HIRE LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Brian McGovern delivered on the 31st day of July, 2015

1. The applicant seeks a declaration pursuant to O. 56, r. 1(3)(f) of the Rules of the Superior Courts, 1986 and Article 16(3) of the UNCITRAL Model Law, that Dr. Brian Bond, an arbitrator, has no jurisdiction pursuant to a contract dated 23rd July, 2004, between the applicant and the respondent, to enter upon an adjudication of a claim made by the respondent against the applicant in respect of the costs of works carried out by the respondent on behalf of the applicant.

2. On 11th May, 2015, the arbitrator concluded that he had jurisdiction to arbitrate a dispute between the parties arising out of the remediation of a landfill site between 2004 and 2009. The contract was dated November 2003 and revised in February 2004. The works in question were executed between 2004 and 2009. After the respondent concluded work on the site in 2009, the parties were unable to agree on the final sum due. On 16th February, 2011, the engineer under the contract issued a final determination directing that the balance of €127,408.21 be paid to the respondent. Payment issued to the respondent on 24th February, 2011, and on 2nd March, 2011, the respondent cashed the payment without qualification.

3. On 26th August, 2013, two and a half years later, the respondent issued a notice of dispute on the applicant and on 26th February, 2014, served a notice of referral to arbitration. The arbitration clause is to be found in Clause 66 of the agreement. Clause 66(1) reads as follows:-

"Except as otherwise provided for in these Conditions if a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works including any dispute as to any decision opinion instruction direction certification or evaluation of the Engineer (whether during the process of the works or after their completion and whether before or after the determination abandonment or breach of the contract) it shall be determined in accordance with the following provisions..."

4. The clause is wide in its terms and encompasses disputes whether arising during the process of the works or after their completion and after the determination of the contract.

5. The applicant argues that because the respondent accepted payment in March 2011 without qualification that there was accord and satisfaction. In *Heyman v. Darwins Limited* [1942] A.C. 356, Macmillan J. stated at pp. 373 and 374:-

"...an arbitration clause in a contract...is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other ... but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution ... what is commonly called repudiation or total breach of a contract . . . does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party.

The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."

This authority has been cited with approval in *Parkarran Limited v. M. & P. Construction Limited* [1996] 1 I.R. 83 and *Doyle v. Irish National Insurance Co. Limited* [1998] 1 I.R. 89.

6. Notwithstanding this line of authority, the applicant argues that if there is accord and satisfaction it brings into being a further agreement which supersedes the earlier contract in its entirety.

7. In this case, there is an issue to be determined as to whether there was accord and satisfaction. There was no agreement signed by the parties acknowledging that monies were paid or accepted in full and final discharge of any sums due. What happened was that the respondent cashed a payment made by the applicant without qualification and on that basis the applicant contends there was accord and satisfaction. It is clear that this was not the view of the respondent as it sought further sums on foot of the contract and the parties entered into the conciliation process as provided for in the terms of the agreement but unfortunately this did not resolve

the dispute. Then the respondent referred the matter to arbitration.

8. Following a referral to arbitration by the respondent, the parties were advised by letter of 26th February, 2015, that Dr. Brian Bond had been appointed arbitrator. The applicant advised the respondent that it contested the arbitrator's jurisdiction to proceed with an adjudication and a preliminary issue took place before the arbitrator on his jurisdiction to determine the dispute raised by the respondent. Written submissions were presented to the arbitrator and on 11th May, 2015, he gave his ruling on the preliminary issue. He decided that he had jurisdiction to arbitrate the dispute between the parties.

9. In this application, the applicant challenges that ruling pursuant to Article 16(3) of the Model Law which states:-

"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."

The court specified in Article 6 is the High Court.

10. There is a valid arbitration clause in the contract and this is not disputed by the parties. Neither does the applicant contend that the dispute is outside the scope of the arbitration clause. Rather, it argues that the clause is no longer operative. The two issues which arose at the hearing of the motion were:-

(a) whether accord and satisfaction gives rise to the basis of a challenge to the jurisdiction of the arbitrator under Article 16(3) of the Model Law or whether this is a matter of defence within the jurisdiction of the arbitrator;

(b) whether the applicant is entitled to raise new grounds of challenge to the arbitrator's jurisdiction in an application under Article 16(3) which were not raised before the arbitrator in the preliminary hearing.

11. Article 16(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. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. This gives effect to the competence-competence doctrine. In *John G. Byrnes Limited v. Grange Construction and Roofing Co. Limited* [2013] 1 I.R. 707, Laffoy J. held that in an application brought under Article 16(3), the court may consider such evidence as it sees fit and is not bound by the submissions made to the arbitrator. I accept that as being the correct approach.

12. Having considered the submissions of the parties and affidavits and exhibits, I am satisfied that the arbitrator was entitled to embark upon a preliminary hearing as to whether or not he had jurisdiction to arbitrate the dispute. Whether the respondent is estopped from receiving any further payments on foot of the applicant's assertion that there is accord and satisfaction is a matter for the arbitrator to determine. In the arbitration clause, he is given power to hear a dispute of any kind between the employer and the contractor in connection with or arising out of the contract whether during the process of the works or after their completion and whether before or after the determination, abandonment or breach of contract. I accept the submission made on behalf the respondent that if an issue of accord and satisfaction arises, it is as a defence to the claim made by the respondent in the arbitration and does not go to the issue of the arbitrator's jurisdiction.

13. In circumstances where the existence of an arbitration clause is not in dispute, the courts will be very slow to interfere with the arbitrator's ruling on his own jurisdiction having regard to the competence-competence principle.

14. A challenge under Article 16(3) is a challenge to the arbitrator's jurisdiction. It is not an appeal against his construction of the agreement. Rather, it is a challenge to his entitlement to embark on such an exercise. What this court has to decide is whether he had jurisdiction to hear the preliminary issue, or whether the arbitration clause giving him that power was spent. If he has jurisdiction then it is a matter for him as to how he construes the agreement. In this case, there is no challenge to the arbitration clause. The court therefore has to decide whether or not the arbitrator was correct in law in holding that he had jurisdiction to commence the hearing and rule on his own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement.

15. In my view, he did have jurisdiction and was therefore competent to rule on the preliminary issues before him. It is for the arbitrator and not this Court to determine the issues before him. Accordingly, I refuse the relief sought in the notice of motion.