Neutral Citation [2012] IEHC 561

THE HIGH COURT

[2009 No. 4373P]

BETWEEN/

MIKE AND MARGO MITCHELL

PLAINTIFFS

AND

MULVEY DEVELOPMENTS LTD. AND STEPHEN GARVEY (PRACTISING UNDER THE STYLE AND TITLE OF ADEPT CONSULTING ENGINEERS)

AND BY ORDER

THOMAS MULVEY, ROVERT MULVEY, DESIGN DEVELOPMENT SERVICES LTD. AND THE NATIONAL HOUSE BUILDING GUARANTEE COMPANY LTD.

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 20th December, 2012

1. Under what – if any – circumstances is a party to an arbitration clause estopped or otherwise precluded by his or her own conduct from invoking the terms of that clause? This is the principal issue which arises for determination on this application to stay proceedings pursuant to s. 6 of the Arbitration Act 2010 ("the 2010 Act"). The problem arises in the following way.

2. The plaintiffs are the owners of certain property situate at Ocean Links, Strandhill, Co. Sligo. If their contentions are correct, then the property which they purchased in 2005 was seriously defective. To this end they have sued both the developer (namely, Mulvey Developments Ltd.) and the original owners of the lands, Thomas Mulvey and Robert Mulvey, who were both also directors of the development company. The plaintiffs have also sued their architect, Stephen Garvey who is the second named defendant..

3. The sixth named defendant, the National House Building Guarantee Co. Ltd. ("Homebond") is sued pursuant to the guarantee which it gave under the "Home Bond Agreement" whereby it agreed to repair defectively constructed private dwellings in the event that one of its members defaulted on its obligation to effect such a repair.

4. It is not disputed but that the agreement contains an arbitration clause, although the plaintiffs deny the validity of that clause and maintain that it is inapplicable in the present case. They also contend – and, as we have noted, this is the essential issue for resolution on this motion – that Home Bond are estopped by its own conduct in relying on the terms of the arbitration clause contained at paragraph 6.1 of the agreement.

5. The clause itself provides in relevant part that:

> "Any dispute or difference which arises between the purchaser and/or Homebond and/or the Member in connection with or arising in relating to this agreement shall be referred to arbitration and the final decision of the arbitrator to be appointed (in the absence of agreement between the parties) on the application of a party to the dispute or difference to the Chairman of Homebond for the time after consultation with the Minister for the Environment and Local Government."

Whether the arbitration clause remains effective

6. Before considering the broader question of estoppel by conduct, it is necessary to examine the first point taken by the plaintiffs is that the clause has been rendered inoperative by reason of the change of name and title of the Minister from that of the Minister for Environment and Local Government to that of the Minister for the Environment, Community and Local Government. In my view, this point is entirely unsustainable for the following reasons.

7. Following the establishment of the State in 1922, the Oireachtas quickly acted to ensure that Government departments were placed on a proper statutory footing and did not dependent for their existence on some form of pre-existing Crown prerogative. Thus, s. 1(iv) of the Ministers and Secretaries Act 1924 ("the 1924 Act") created the Department of Local Government and Public Health. Section 2 of the 1924 Act provides that Ministers of State have legal personality and enjoy perpetual succession.

8. Next, s. 6(1)(a) of the Ministers and Secretaries (Amendment) Act 1939 ("the 1939 Act") empowers the Government to alter the name of any Department of State. Section 6(1)(b) empowers the Government to alter the title of any Minister of State. This is precisely what was done by Article 4(1)(b) of the Environment, Heritage and Local Government (Alteration of Name of Department and Title of Minister) Order 2011 (S.I. No. 193 of 2011) which altered the name of the Minister to that of the Minister for the Environment. Community and Local Government.

9. It is true that Article 4 is prefaced by the words "in any enactment or any instrument made under an enactment" and it is said that this change is effective only for statutes and statutory instruments and does not apply to private contractual agreements such as the one at issue here. This, however, is to miss the point so far as the contract is concerned. By virtue of s. 2 of the 1924 Act the Minister is a corporation sole and enjoys perpetual succession. All that has changed is simply a matter of nomenclature: the Minister - irrespective of his or her styling as Minister for Environment and Local Government (as formerly) or Minister for the Environment, Heritage and Local Government (as presently) – remains the same Minister. It follows that the same legal entity remains as a party to the contract and all that has happened is that the Minister has suffered a name change.

10. It follows, therefore, that the arbitration clause is fully effective as a matter of principle. It remains now to consider whether Homebond are estopped by its conduct from exercising their rights under that clause.

Whether Homebond are estopped from exercising their rights under the arbitration clause?
11. The gist of the plaintiffs' case is that Homebond should be adjudged to have forfeited their right to elect for arbitration by virtue of its delay in seeking to invoke the arbitration clause, which delay is said to have been inherently prejudicial. Here it is necessary to sketch out some of the essential background facts.

12. Homebond was first notified of these complaints as early as 2005.In November 2005 Homebond wrote to the plaintiffs indicating that it was accepted that "there is a defect in the dwelling which fall within the terms of Homebond's cover." The letter then gave details of the defects which related to moisture penetration on the balcony which, in turn, had led to moisture ingress to ceilings and walls of the ground floor. Homebond then contacted the builder, Mulvey Developments. Various assurances were given by the developer that the building would be repaired, but to no avail.

13. On 28 March 2007 the plaintiffs' solicitors wrote to Homebond complaining that living conditions for the plaintiffs and their young family "have become intolerable", as there was "constant water ingress into the dwellinghouse." The plaintiffs' solicitors went on to the threaten litigation. Homebond then appointed a contractor who reported in June 2007 on remedial works that were necessary to be carried out. Efforts were made by Homebond to have a contractor effect certain repairs in the autumn and early winter of 2007/2008, but the appointed contractor was ultimately discharged by the plaintiffs before any significant works could be carried out.

14. By 2009 the plaintiffs had retained a new firm of solicitors and throughout 2009 that firm corresponded with Homebond, while constantly threatening litigation. A formal letter before action was sent on 25th January 2010. Proceedings were served on 24 March 2010, but Homebond only entered an appearance on 27th April 2011, *i.e.*, over a year later. In the meantime Homebond had sought and obtained access to the plaintiff's property in June 2010 for the purposes of carrying out a detailed inspection. The plaintiff's solicitor then wrote to Homebond on 13 August 2010 seeking to ascertain Homebond's position regarding the claim after the inspection. There was, however, no response to this request.

15. The plaintiffs then found themselves obliged to issue a motion for judgment in default of appearance as all but the second defendant had failed to enter an appearance. Judgment was given by Ryan J. on 11th April 2011 against the developer and Mr. Thomas Mulvey in default of appearance. The curial part of that order recites that Homebond were represented by counsel and, furthermore, that a statement of claim was filed in court in lieu of delivery. The order then recited that Homebond were obliged to file an appearance within one week and to a file a defence within four weeks.

16. Homebond finally entered an appearance on 27th April 2011. No explanation has been offered for the delay in filing such an appearance, but, in truth, it is difficult to understand why there should have *any* delay in taking this routine step, much less a delay of over one year and one necessitating an application by the plaintiffs to Court for motion for judgment. Homebond's solicitors then wrote in June 2011 seeking delivery of a statement of claim. A copy was furnished by letter dated 17th August 2011 and a copy of the defence was requested. It has to be said that this exchange is puzzling, since it is perfectly clear from the order of Ryan J. that Homebond was already in possession of the statement of claim at the date of the making by him of his order. It is equally curious that neither solicitor appears to have alluded to this issue.

17. Here again further delay enters the scene. The plaintiffs' solicitors wrote on 9th September 2011 requesting a defence, but on 30th September 2011 Homebond's solicitors replied requesting the plaintiffs not to issue a motion for judgment in default of defence. On 28th November 2011 the plaintiffs' solicitors wrote again referring to previous correspondence and stated:

> "We have now afforded your client ample opportunity to provide your office with instructions and have exercised forbearance in respect of issuing a motion in default of defence."

18. The letter-writer called upon Homebond to deliver a defence within seven days or else face another application for judgment in default of defence. By letter dated the 23rd December 2011 the solicitors for Homebond wrote to the plaintiff's solicitors invoking the arbitration clause for the first time. This letter prompted the plaintiffs' solicitors to protest in strong terms in their reply of 5th January 2012 at the belated nature of Homebond's endeavour to invoke the arbitration clause.

19. One cannot but sympathise with their frustration and with that of their clients. Whatever the precise rights and wrongs of the matter, it seems evident that a private dwelling has been constructed in a defective fashion. This does not appear to be seriously disputed by Homebond. While – perhaps – some of the delay may possibly be attributed to the plaintiffs and they may – perhaps – be faulted in discharging the contractor appointed by Homebond, the underlying reality is that Homebond have been aware since at least November 2005 that the plaintiffs' house was defectively constructed. Moreover, Homebond took over one year to enter an appearance and delayed for a further eight months before it purported to invoke the arbitration clause for the first time. If Homebond intended to invoke the arbitration clause, it is rather difficult to understand why they waited so long before electing to do so. I fear that I cannot avoid observing that this is all the more unsatisfactory given that Homebond have given no explanation for this delay.

The decision of the Supreme Court in *Furey v. Lurgan-ville Construction Co*.
20. It is, however, necessary at this juncture to examine the decision of the Supreme Court in *Furey v. Lurgan-ville Construction Co. Ltd.* [2012] IESC 38. In that case the parties had entered into a building contract in 2002 whereby the first defendant agreed to construct a dwelling. The plaintiff purchasers commenced proceedings in June 2005. The defendants immediately entered appearances. A motion for judgment in default of defence came before this Court in June 2006 and Lurgan-ville's solicitors sought the consent of the plaintiffs' solicitors for an extension of time and on that basis a consent order was duly made. Some ten days before a second motion for judgment came on for hearing Lurgan-ville's solicitors asserted for the first time the right to invoke the arbitration clause which was contained in the building contract.

21. In his judgment, Clarke J. stressed that no step had been taken in the proceedings within the meaning of s.5 of the Arbitration Act 1980 since the defendants had neither engaged with the merits of the case or taking action "in invoking the jurisdiction of the court which leads to costs." So far as the estoppel point was concerned Clarke J. observed that in this context there would need to be "a clear unequivocal promise or representation to the effect that the arbitration clause would not be relied upon" and that the plaintiff had acted upon that promise.

22. Was that the case in *Furey*? Clarke J. did not think so:

> "It is true that the assertion of an entitlement to arbitrate came late in the day. It is also true that there was some additional correspondence after the motion for judgment was dealt with by consent. However, it does not seem to me that anything in the conduct of Lurgan-ville can be characterised as amounting to a clear and unequivocal representation or promise that Lurgan-ville did not intend relying on the arbitration clause. The arbitration clause did not come up at all. I am not, therefore, satisfied that there is anything on the facts of this case which could be said to amount to a sufficient

representation or promise that the arbitration clause was not to be relied on by Lurgan-ville."

Whether the decision in *Furey* also governs the present case
23. Counsel for Homebond, Mr. Beatty, forcefully and eloquently argued that the decision in *Furey* completely governed the present case. In both cases consent to an extension of time for the delivery of a defence was sought and in both cases orders to this effect were made. In both cases the arbitration clause was invoked very belatedly: in *Furey* the period was 17 months after the service of the proceedings, whereas in the present case the period was four months longer again.

24. There are, however, some differences as well. As we have seen, Homebond's solicitors sought delivery of a statement of claim in June 2011 after an order had been providing for an extension of time for the entry of an appearance and the delivery of a defence. Passing over the question as to whether Homebond already had a copy of the statement of claim (as, judging by the recitals in the order of Ryan J., it would seem to have had), an unqualified letter of that kind would seem to amount to an implied representation at that juncture and in those circumstances that that defendant was intending to contest the proceedings. The context here clearly suggests an engagement with the court.

25. I do not overlook here the fact that Mr. Beatty stressed that Homebond was entitled to know the case against them before electing to decide whether to invoke the arbitration clause. But it would have been perfectly possible for such a request to be made while reserving simultaneously the right to invoke the arbitration clause. Had Homebond reserved unto itself that right in correspondence, it would at least have put the plaintiffs on their guard and alerted them to this very possibility.

26. In any event, this correspondence did set in train a sequence of events in August and September whereby the plaintiffs altered their position to their detriment. Following the delivery of the statement of claim in August 2011, the plaintiffs' solicitors sought to compel the Homebond to deliver its defence. In their letter of 30 September 2011 Homebond's solicitors expressly asked the plaintiffs' solicitors to take no steps "for now in relation to bringing a motion for judgment in default of defence", adding that they could confirm that their client "does not intend to delay in these matters." The plaintiffs' solicitors clearly acted on the strength of this representation, as no motion was issued and the letter referring the matter to arbitration only issued almost three months later once a further motion was threatened. Can it be realistically supposed that the plaintiffs' solicitors would have given such forbearance had it ever been suggested prior to that point that Homebond might invoke the arbitration clause, thus aborting the entire legal process?

27. In these circumstances, I find myself coerced to the conclusion that by its conduct after April 2011 Homebond represented that it was going to engage in the proceedings and to defend the case on its merits. In these circumstances, I must hold that it has forfeited its right to invoke the arbitration clause. I appreciate that a similar claim did not prevail in *Furey*, a case with facts not dissimilar to the present one. Yet it seems implicit in the judgment of Clarke J. in *Furey* that the matter was finely balanced by reference to the particular facts of that case. Here it is the *additional* factors which were not present in *Furey* which I find tip the scales in the opposite direction: the correspondence requesting a statement of claim; further requests for forbearance following delivery of the statement of claim and the fact that the delay was several months longer. All of these factors certainly led the plaintiffs to believe – by the late Autumn 2011, if not earlier – that Homebond intended to contest the matter on its merits and the plaintiffs acted upon that assumption.

Conclusions
28. It follows, therefore, that for all of these reasons, I find that Homebond is precluded by its conduct from invoking the arbitration clause. I will accordingly refuse to make the order sought pursuant to s. 6 of the 2010 Act staying the proceedings.