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THE HIGH COURT

2004 No. 1628 SS

IN THE MATTER OF SECTION 35 (1) OF THE ARBITRATION ACTS, 1954-1980 AND ORDER 62 OF THE RULES OF THE SUPERIOR COURTS, 1986, AS AMENDED

BETWEEN

KEVIN BYRNE

CLAIMANT

AND

EDWARD BYRNE

RESPONDENT

Judgment delivered by Macken J. on the 3rd day of March 2005

1. This is a case stated pursuant to section 35 (1) of the Arbitration Act, 1954 and Order 62 of the Rules of the Superior Courts 1986, as amended.

2. The following are the relevant facts:

(1) An agreement dated 9th October, 1995 ("the agreement") was entered into between the claimant and the respondent.

(2) Both parties were shareholders in a private limited company called Byrne's (Temple Bar) Limited ("the Company"), in which the claimant held 49% of the shares and the respondent 51%.

(3) The agreement recited that the parties were desirous of entering into it for the purpose of agreeing between them their respective input into the establishment of the proposed business, both in terms of labour and capital, and "for the purpose of regulating the manner of the disposal by them and each of them of their respective shareholdings" in the Company.

(4) Clause 7 of the agreement provides as follows:

a. "The parties agree that in the event of any dispute arising between them in the carrying out of their respective duties as Directors of the Company or in the exercise of their rights as Shareholders in the Company, their initial recourse shall be to the services of an Arbitrator or Mediator (and in default of agreement on which, then an Arbitrator) and in default of agreement between them on the nomination of an Arbitrator or Mediator, then such nomination shall be made by the President for the time being of the Incorporated Law Society of Ireland.

b. The costs of a Mediator shall be borne by the Company. The costs of an Arbitrator shall be borne by the Company or by either or both of the parties as deemed appropriate by the said Arbitrator."

3. The Arbitrator was appointed by letter of appointment on 19th April, 2004, on the nomination of the President of The Law Society, pursuant to Clause 7 a. of the Agree-ment, and according to the case stated, the arbitration forms were completed by each of the parties on 30th April and 23rd August 2004 respectively.

4. The Arbitrator held a preliminary meeting shortly after his appointment a which stage an issue arose as to whether any award made by him was binding on the parties.

5. According to the case stated, the Arbitrator invited the parties to agree that the arbitration process, as well as any award made pursuant to it, would be binding on the parties. The parties were not in accord as to the meaning of Clause 7 of the agreement, and in particular as to the binding nature of the process itself or of any award made by the Arbitrator. In the circumstances, the Arbitrator has stated a case for the opinion of the Court on the correct interpretation of the clause in issue.

6. The question posed to the High Court by the Arbitrator is in the following terms:

"In light of Clause 7 of the agreement dated 9th October, 1995 and in light of the Arbitration Acts, 1954 - 1988 and particularly s. 27 of the Arbitration Act, 1954 is an award made by me pursuant to the above reference binding upon the parties?"

7. According to the affidavit filed on behalf of the claimant and sworn on 4th November, 2004, the claimant says that his understanding of Clause 7 a. of the agreement is that this clause is a binding arbitration and mediation clause, and he avers "I have always understood that the intention of this provision of the shareholders' agreement was to force the parties to refer any dispute to mediation or arbitration, thereby avoiding expensive and time-consuming High Court proceedings".

8. He also says in his affidavit that, on the basis that there was a binding arbitration clause in existence, he did not institute High Court proceedings pursuant to the provisions of the Companies Act, 1963 which he says he could have done were it not for the existence of Clause 7. He avers that he acted at all times in full reliance on the shareholders' agreement and says that the respondent's solicitors indicated on the 2nd June, 2004 that they, on behalf of the respondent, accepted the respondent was obliged to participate in the arbitration process.

9. He states in his affidavit that the practical consequence of not being bound by Clause 7 a. is that the respondent might choose not to abide by any award made by the arbitrator, and therefore it might be necessary to institute proceedings after the award, to establish that the award was conclusive. He says that this is illogical and would defeat the entire purpose of having included an arbitration clause in the agreement in the first place.

10. The respondent did not swear any affidavit. His counsel confines his argument to an objective interpretation of the clause, and to legal argument to which I will return in due course.

Legal Submissions

11. Mr O'Donnell, SC, for the claimant, submits that the agreement was brought about so as to enable both parties regulate the public

house business owned by their company, in so far as that might affect both of them and in particular that the agreement would be for the express purpose of regulating the manner of the disposal by them and each of them of their respective shareholding in the company.

12. He argues that the agreement is clearly one which falls within the ambit of the Arbitration Act, 1954 and that the only issue is whether or not an award made pursuant to the agreement is binding on the parties. He says the phrase "initial recourse shall be to the services of an arbitrator or a mediator" in clause 7 means that an initial choice is to be made by the parties as to whether or not the dispute shall be referred either to one or the other, and nothing more. He suggests that this is a correct interpretation, and says the agreement was drawn up by a solicitor who knew what the parties wanted.

13. He contends that once the parties have accepted, as here, that there is to be arbitration, it is for the respondent to establish that the arbitration is other than binding. It is insufficient for the respondent to say that its non binding force is implied by reason of the fact that the agreement uses the words "initial recourse." He argues that that cannot be correct, since when an arbitration agreement is silent on its binding or non binding nature, the Arbitration Act, 1954 itself makes it binding, citing S. 27 of that Act which reads as follows:

> *"Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively"*

14. He says therefore that it is for the respondent to prove that the provisions of that Act have been expressly disapplied by the parties.

15. He further submits that the common law has adopted a "one stop shop" approach, that is to say, the modern approach of the law is to interpret arbitration agreements on the basis that the parties wish to resolve any disagreements in one forum and avoid a plethora of proceedings. According to Mr. O'Donnell this "one stop shop" approach has also been accepted by the Supreme Court in the case of *Via Net Works (Ireland) Limited*, [2002] 2 I.R. 47.

16. Mr. Dowling B.L. for the respondent takes an entirely different view. First of all, he says that the correct test to be applied is that of ascertaining the intention of the parties, that the ordinary meaning should be given to the words of the agreement, and that if the claimant wished to adopt a different meaning, not expressed in the agreement, there should be evidence of that different meaning, which evidence has not been presented to the court. He says, in particular that the insertion of the words "initial recourse" in the clause has the clear and unambiguous meaning, from the use of the very words them-selves, that the parties did not contemplate that any such initial recourse to arbitration or to mediation would be final and binding, contending that the word "initial" cannot be interpreted as meaning "final".

17. He argues that it would have been appropriate for the claimant, who makes the case for a binding agreement, to have presented the evidence of the solicitor who drew up the agreement on behalf of the parties, and who could have given evidence as to the parties' declared intentions at the time. Instead, he argues, there is no such evidence, and what the claimant is seeking to do is to go behind or ignore the ordinary meaning of the words used. He submits that it is logical to interpret "initial recourse to either an arbitrator or a mediator" as being what it is says, namely the initial level on which the parties will operate, and if that initial approach does not resolve matters between the parties, that initial approach would not prevent the parties from having access to the courts. In those circumstances he argues that the clause could not be interpreted as ascribing to an award in an arbitration which forms part of that initial level of recourse, a binding nature. Indeed, he says that by including in the one phrase the terms "mediation" and "arbitration", it is more logical to interpret the clause as not being binding.

18. In particular, he submits, that it is not a question of deciding what the parties might have agreed had they used different words, or had they been advised in a different manner, or had they had the benefit of considering what the reasonable onlooker might think. Rather, he says, it is a question of ascertaining what it was these particular parties agreed, and what these particular parties wrote with the assistance of their solicitor.

Conclusions

19. The Court, faced with these conflicting arguments, must decide the approach to take to resolve the conflicting interpretations suggested.

20. The starting point for this, it seems to me, must be the disclosed intention of the parties, and in that regard the affidavit of the claimant makes it clear that as far as he was concerned, the clause was binding and was intended to avoid matters having to proceed by recourse to The High Court. At first glance, this might be thought to be very reasonable How-ever, since the clause covers both arbitration and mediation, an argument that the clause must be considered binding cannot, in my view succeed, because of course a mere mediation is not binding. To apply a binding interpretation to the clause in so far as it covers both mediation and also arbitration, does not solve the problem. There is nothing in the clause to suggest that if mediation were to be the choice of the parties that mediation would also be binding on them and on balance, taking account also of what I say below in relation to the costs clause in the agreement, I do not consider this likely.

21. While the approach proposed by the respondent appears also, at first glance, to be a very attractive approach, that is to say, that neither mediation nor arbitration would be binding, I am not satisfied it is the appropriate one either. It would have been possible for the respondent to have sworn an affidavit indicating precisely what his intentions were when the solicitor drew up the agreement. And it would have been also possible for him, equally with the claimant, to put the evidence of the solicitor who was asked to draft the clause to the Court. But in the absence of such evidence, I have to examine the clause to see if what the respondent contends for is clearly the intention of the parties. I do not think so. If, as the respondent says, access to the Courts was always to be available, or more correctly, was not precluded by the choice which might be made at first level, then such an approach would render the "initial recourse" level to be without a great dealt of sense, unless the respondent can point to material differences or advantages in choosing one of the options of mediation or arbitration over the other, to support his contention, and he has not done so. It was always possible, even on the respondent's view, that rather than mediation, arbitration might well be chosen by the parties, or might be imposed in default of agreement between them.

22. Clearly the clause is ambiguous. Having combined the words "mediation" which is not generally binding and "arbitration", which is usually binding, in the one clause, with a further qualification that, in the absence of agreement as to one or the other it must be arbitration, there is a dilemma as to whether an award under such arbitration is binding. The words "initial recourse" in the agreement, are not capable in my view of being clearly and unambiguously applied only to a first level of choice between either mediation or arbitration, in the manner which one or other party has suggested, one party averring that the clause was binding whether mediation

or arbitration is chosen and the other party arguing that regardless of whether or not one or other was chosen, neither was binding.

23. In these circumstances I consider it appropriate to adopt as guidance, the approach taken in the case on the issue in the United Kingdom, in *Ashville Construction v. Elmer Contractors* [1989] QB 488. which approach was explained in the following manner:

> *"In seeking to construe a clause in a contract, there is no scope for adopting either a liberal or a narrow approach, whatever that may mean. The exercise that has to be undertaken is to determine what the words used mean. It can happen that in doing so one is driven to the conclusion that the clause is ambiguous, that it has two possible meanings. In those circumstances, the court has to prefer one above the other in accordance with settled principles. If one meaning is more in accord with what the court considers to be underlying purpose and intent of the contract, or part of it, than the other, then the court will choose the former rather than the latter."*

24. Somewhat similar approaches are clear from several cases in this jurisdiction, and I need refer only the comments of McCarthy J in the Supreme Court decision of *Keating v New Ireland Assurance* (1990) 2 I.R. 383 and those of Griffin, J. in delivering the unanimous decision of the Supreme Court in *Rohan Construction Ltd and Insurance Corporation of Ireland* (1988) ILRM 373.

25. Counsel on behalf of the claimant is correct in submitting that if an arbitration agreement is entered into, even if the parties themselves do not state that an award made pursuant to it is binding, it is nevertheless made binding under the provisions of the Arbitration Act, 1954. That being so, and counsel for the respondent does not contest this, then it is appropriate to interpret the agreement, the binding consequences of arbitration, unless I find that the respondent's contention as to the correct interpretation of the clause should be preferred. An interpretation which is contrary to what is contended for by the claimant, would I agree have to be express, or at least so clear that it excludes the statutory effects applicable to an arbitration, whether that arbitration is imposed or is the choice of the parties. It could not, in my view, simply be implied by the existence of the words "initial recourse".

26. There is a factor which, on balance, persuades me that it is right to consider the "initial recourse" as being an initial choice between mediation and arbitration. If it were otherwise, as the respondent contends, there would really be no material difference between mediation and arbitration. It seems to me this would hardly be the most logical approach for businessmen to take, for the following reasons. Providing for a choice between mediation and arbitration must mean that that choice was intended by the parties to lead to different results, for otherwise there would be no point to the existence of the choice. As to mediation, the essence of this is precisely the voluntary nature of the process and the non-enforceability of the mediator's findings. The respondent contends however for precisely the same effect also for the clause in question, if arbitration is the initial choice of the parties, thereby leaving no distinction between one and the other. Since it must be presumed that the parties, when choosing two possibilities, considered that one choice would be different, or would lead to different results, I cannot accept an interpretation which would have as its consequences that each of the choices was to have identical consequences.

27. It is interesting to note the position concerning costs in the agreement. It provides that costs are to be dealt with differently, depending on whether there is a mediation or an arbitration. In the case of mediation, costs are always borne by the Company, not by either party. On the other hand, in the event of arbitration, it is the Arbitrator who will decide the costs, and they might be the charge of either or both parties or the Arbitrator could fix the company with the costs. Even on costs, therefore, there was to be a material difference between a non binding procedure, such as mediation, and a normally binding procedure, such as arbitration, where in the latter, the costs might well be those of the "losing" party. If anything, it seems to me that such a costs clause in the agreement supports the contention that there was to be a significantly different result or outcome or consequence resulting from mediation on the one hand and arbitration on the other.

28. I am driven to the conclusion that the appropriate interpretation of the clause is that propounded on behalf of the claimant, namely, that the "initial recourse" facility is limited to the first choice which is made by the parties between mediation – with all that entails, and arbitration – with all that entails.

29. Such an interpretation also results in an approach more closely linked to the evidence before the court as to the parties' intentions. There does not appear to be any doubt but that the intention behind the clause in the agreement is to resolve issues arising between the parties without the necessity to proceed to court, if that could be achieved, although it is true that evidence of that intention is averred to only by the applicant. But it was not denied by counsel for the respondent that this was the intention, who contends only that before going to court, two possible first choices exist, neither of which is binding. However, if as here, arbitration is agreed or imposed, such an arbitration – whose award is statutorily binding – is the only means by which court proceedings can in fact be avoided. On the other hand, if both mediation and arbitration are available as a first level of activity, and neither were binding, this would not meet the intention of avoiding court proceedings.

30. I do not have to consider, for the purposes of this judgment, whether a principle of "one stop shop" evident in the case law in the United Kingdom, has been incorporated into the general law of this country. It is not necessary for me to do so for the purpose of resolving the issue in this case, and I make no findings on that proposition put forward on behalf of the claimant. I am satisfied that it is possible to interpret the clause in question without recourse to such a principle, which in any event does not appear to add anything more to an indication by the parties to resolve any disputes between them by means of a binding arbitration clause, if chosen or imposed, since, if binding, it has the same effect as a so called "one stop shop" approach.

31. For the above reasons, I find that the correct interpretation of Clause -7 of the agreement made between the parties is that, once the parties have chosen arbitration over mediation, or once an arbitration has been imposed on them, in default of agreement as to one or the other, any award made pursuant to such an arbitration is binding on both parties.

32. Having regard to the foregoing, the answer to the question posed by the Arbitrator in the case stated is "Yes."