Neutral Citation [2016] IEHC 636

THE HIGH COURT

[2016 No. 132 MCA]

IN THE MATTER OF THE ARBITRATION ACT 2010

AND IN THE MATTER OF ORDER 56 OF THE RULES OF THE SUPERIOR COURTS

BETWEEN

AVOBONE N.V. AND AVOBONE POLAND B.V.

APPLICANTS

AND

AURELIAN OIL AND GAS LIMITED, AURELIAN OIL AND GAS POLAND SP. Z.O.O., ENERGIA, ZACHOD HOLDINGS S.P. Z.O.O. AND AOG FINANCE LIMITED

RESPONDENTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 11th day of November, 2016

1. There are two motions before the court. The first in time is a motion brought by the applicants to enforce an arbitral award issued by the International Court of Arbitration of the International Chamber of Commerce in London in the jurisdiction of England and Wales on 21st May, 2015, together with a supplemental decision and an addendum on costs dated 5th October, 2015 (collectively referred to as "the award"). Further, or in the alternative, that relief is sought under Article 35 of the UNCITRAL Model Law., The applicant also seeks an order pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) enforcing the award in the State in the same manner as if the award was a judgment or order of the High Court. Judgment is sought in the sum of €20,863,818.44 with daily interest accruing from 6th April, 2016 until judgment in the amount of €2,523.75.

2. The second motion, brought later in time, is the respondents' motion to set aside an unconditional appearance entered on their behalf on the ground of mistake and in the alternative deeming it to be a conditional appearance entered for the purpose of contesting jurisdiction. The respondents also seek an order setting aside the order of Moriarty J. dated 12th April, 2016, giving the applicants leave to issue and serve notice of the within proceedings outside the jurisdiction. Alternatively, the respondents' seek an order staying the proceedings.

3. It was agreed between the parties that the respondents would proceed first and argue on the challenge to jurisdiction and that the court should later deal with the applicants' motion to enforce the arbitration award. The hearing proceeded on that basis.

Jurisdiction

4. An unconditional appearance was entered by the respondents to the proceedings on 10th June, 2016. The respondents' solicitor swore an affidavit in which he stated that he intended entering an appearance simply for the purpose of contesting jurisdiction but that "owing to an administrative error" he entered an unconditional appearance.

5. The respondent relies upon the decision of the Supreme Court in *Campbell International Trading House Limited v. Peter Van Aart* [1992] 2 I.R. 305. In that case, the court held that an appearance to contest jurisdiction could be entered by virtue of a communication of such to the appellant. The respondents rely on an email of 20th April, 2016, as an early indication of an intention to contest jurisdiction. While the email questions the applicants' entitlement to enforce the arbitration in this jurisdiction in circumstances where the respondent companies have no assets in Ireland, it does not suggest that a conditional appearance will be entered for the purpose of contesting jurisdiction.

6. In the alternative, the respondents rely on *Murray v. Times Newspaper Limited* [1995] 3 I.R. 244. In that case, Barron J. adopted the decision in *Campbell International Trading House Limited v. Peter Van Aart and O'Neill v. Ryan* [1993] I.L.R.M. 557, as authority for the proposition that the court can entertain an application to strike out a claim on the ground that no jurisdiction is given to the courts even where there is an unconditional appearance. But he stated, at 251:-

> "However, it is clear from those decisions that there must be something in the nature of mistake or similar justifying circumstances before the application can succeed."

7. The respondents also argue that in this case no significant steps have been taken such that the court could satisfy itself that the respondents are not entitled to challenge jurisdiction.

8. The applicants contend that, by entering an unconditional appearance, the respondents have submitted to the jurisdiction of the Irish courts and they rely on *Popely v. Popley* [2006] 4 I.R. 356 and *Devrajan v. District Judge Ballagh* [1993] 3 I.R. 377, as authority for the proposition that the respondents are required to provide a proper explanation for the original error and the continuation of engagement in the litigation process. The applicants argue that the respondents have not offered any sufficient explanation for the mistake which they claim and also that the facts show a significant engagement in the proceedings over a protracted period of time.

9. The history of the respondents' involvement in the proceedings is as follows. The proceedings commenced by originating notice of motion on 13th April, 2016, with a return date of 9th May, 2016. The solicitor for the respondents entered an unconditional appearance on their behalf on 3rd June, 2016. In an affidavit of 7th September, 2016, sworn on behalf of the applicants, Mr. Pieter Van Dongen set out the steps taken by the respondents' solicitor on their behalf. His account has not been challenged by the respondents. He stated that the respondents' solicitor first made contact with the applicants' solicitor by email on 20th April, 2016, after courtesy copies of the proceedings had been forwarded to the respondents and to San Leon Energy plc. On 24th May, 2016, and 3rd June, 2016, the applicants' solicitors sent two letters to the respondents' solicitor on the question of entering an appearance on behalf of the respondents. Prior to that, an email had been received from the respondents' solicitor on 20th April, 2016, in which the solicitor called into question whether or not the applicants would be able to enforce a judgment in this jurisdiction as the respondents had no assets in the State. The emails said nothing about merely entering a conditional appearance.

10. The proceedings were listed in the Miscellaneous Common Law Applications List before the Deputy Master of the High Court on 13th June, 2016 and 11th July, 2016 and on those dates the respondents gave no indication that they had intended to file a conditional appearance or challenge jurisdiction. When the matter was listed on 13th June, 2016, the respondents agreed to a four

week period for filing replying affidavits. Until 22nd July, 2016, no reference was made in correspondence about the respondents entering a conditional appearance or otherwise seeking to reserve their right to challenge jurisdiction.

11. I am satisfied on the facts that a proper explanation which is required in respect of the alleged mistake or administrative error has not been furnished to the court and that the respondents, through their solicitor, have taken a number of steps up to 22nd July, 2016, inconsistent with an intention to enter a conditional appearance. In the circumstances, I am not prepared to make an order setting aside the unconditional appearance or deeming it to be a conditional appearance. No information has been furnished to the court as to the nature of the "administrative error" which gave rise to the failure to enter a conditional appearance.

12. Jurisdiction must be found to exist before enforcement can be considered by the court. Having decided that the court should not set aside the unconditional appearance which has been entered, it seems to me that I should, nevertheless, go on to consider whether or not the court should set aside the service of the proceedings and should decline jurisdiction on the basis that the respondents have no assets within the jurisdiction. This is a separate ground of relief sought in the respondents' notice of motion and it was also argued by the respondents on the basis they were entitled to invite the court to decline jurisdiction even if they are deemed to have entered an unconditional appearance.

13. The court has been referred to the judgment of Kelly J., as he then was, in *Broström Tankers A.B. v. Factorias Vulcano S.A.* [2004] 2 I.R. 191 and *Yukos Capital S.A.R.L. v. O.A.O. Tomskneft V.N.K.* [2014] IEHC 115.

14. In the *Broström Tankers* case, Kelly J. stated at para. 6 of his judgment:-

> "One may wonder why a Swedish company is seeking to enforce an award governed by Norwegian law against a Spanish company in Ireland. The reason arises from the plaintiff's belief that there is an intercompany debt owed to the defendant by an Irish company called Rucile International Ltd. which may, if the application to enforce the award is successful, be subject to garnishee."

15. In *Yukos Capital*, Kelly J. stated at para. 112:-

> "I am, however, satisfied that the presence of assets within the jurisdiction is not a pre-requisite for the granting of leave to serve out of the jurisdiction on an application to enforce a Convention Award."

16. This is supported by *Russell on Arbitration* (24th ed., Sweet & Maxwell 2015) at para. [8-032]. Kelly J. adopted the "solid practical benefit test" enunciated by Mustill LJ. in *Insurance Corporation of Ireland v. Strombus International Insurance Co.* [1985] 2 Lloyd's Rep. 138 at 144 where he said that the court should be careful not to bring a foreigner here as a defendant where no positive relief is claimed against him unless it can be shown that a solid practical benefit would ensue. In that case, Mustill LJ. also held that even an indirect or prospective benefit can amount to a solid practical benefit.

17. In the motions before the court, the applicants have adduced cogent evidence (through the affidavit of Mr. Pieter van Dongen) that the amount of €27,700,000 is owed by San Leon Energy plc to the first named respondent and that the sum is repayable on demand. San Leon Energy plc is the direct parent company of the first named respondent which, in turn, is the immediate parent of the second and fourth named respondents respectively. San Leon Energy plc holds an indirect shareholding in the third named respondent through its shareholding in Pozan Energy B.V. San Leon Energy plc is an Irish company. Mr. van Dongen says that these intercompany receivables or loans will involve repayments being made by an Irish company and consequently these receivables constitute assets of the first named respondent within Ireland which are capable of enforcement by way of garnishee proceedings or otherwise in due course. He avers that the enforcement of the award would constitute a solid practical benefit to the applicants. If that evidence is correct, then the applicants can apply in this jurisdiction to garnishee that sum. There has been no meaningful engagement by the respondents on this issue and this evidence has not been challenged on affidavit. I am satisfied that the applicants have established that a solid practical benefit would ensue to them if they were to enforce the arbitral award in this jurisdiction as it could then apply to garnishee this debt from the Irish parent company.

18. Accordingly, there is no basis on which the court should set aside the order of the High Court permitting service outside the jurisdiction nor is there any basis for concluding that the court should decline to hear the application to enforce the arbitral award in this jurisdiction.

The Enforcement Proceedings

19. An arbitral award can only be challenged on very limited grounds as set out in Article 36 of the Model Law. The respondents have not made out any ground of challenge coming within the scope of that Article. It is true that, up until the commencement of the hearing, the respondents maintained that they were relying on Article 36(iv) on the basis that the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties or the law of the country where the arbitration took place. This point was raised in written submissions but not on affidavit. During the hearing, the court was informed that, while the arbitration clause required that the arbitrators be of a different nationality to the parties, that this was, in fact, waived at the instance of the respondents themselves. Counsel for the respondents conceded that this was so and that they were not pursuing that point and accepted that it should not have been made.

20. I cannot ignore the fact that, in proceedings commenced in the High Court of England and Wales to set aside the award under s. 68 of the UK Arbitration Act 1996, the application was dismissed as an abuse of process. In the proceedings before this court, having conceded that the requirement that the arbitrators be of a different nationality was waived by the respondents themselves, there remained no other ground on which the entitlement of the applicants to enforce the award was challenged. The only thing that can be said in favour of the respondents was that when they were faced with these undisputed facts they did not seek to waste the court's time by arguing the point further. But I think these matters call into question the *bona fides* of the respondents' challenge to the award and to the jurisdiction of the court.

21. So far as the second, third and fourth named respondents are concerned, I have been informed that they were held to be jointly and severally liable under the arbitral award and the motion to set aside the unconditional appearance and the challenge to the award was made on behalf of all the respondents. They are represented by the same legal team and there seems to be no reason why they should be treated in a way which would distinguish them from the first named respondent. I, therefore, discern no prejudice in dealing with the recognition and enforcement issue as against all the respondents and the same holds true for the challenge to the jurisdiction of the court.

Conclusion

22. For the reasons I have set out above, I am satisfied that there is no basis on which the unconditional appearance should be set

aside or deemed to be a conditional appearance and I am satisfied that the court has jurisdiction to deal with the enforcement application. I am also satisfied that no valid challenge has been raised to the enforcement of the award and the applicants are therefore entitled to an order in the terms of the notice of motion enforcing the arbitral award.