Neutral Citation Number: [2008] IEHC 197

THE HIGH COURT

2007 No. 5801 P

BETWEEN

McCORMACK FUELS LIMITED

PLAINTIFF

AND
MAXOL LIMITED

DEFENDANT

Judgment delivered by Ms. Justice Dunne on the 20th day of June, 2008

1. The application herein is for an order pursuant to s. 5(1) of the Arbitration Act 1980, to stay the proceedings in the above title. The application is grounded on an affidavit of Gavin Simons, solicitor on behalf of the defendant herein. In his affidavit sworn on the 24th September, 2007, Mr. Simons referred to an Authorised Distributor Agreement dated the 18th August, 2004, between the defendant and the plaintiff. That agreement contains an arbitration clause. In the course of his affidavit, Mr. Simons explained that the parties have been involved in discussions of and concerning petrol rebates and the rates to be struck in respect thereof.

2. Given that the application to stay the proceedings pending arbitration has been resisted by the plaintiff, it is somewhat ironic to note that the position of the parties herein to arbitration has changed somewhat over a period of time. In April 2007, it appears that both parties to the proceedings were agreeable to arbitration in respect of their dispute. By June 2007, the plaintiff herein in a letter dated the 5th June, 2007, referred to a threat of legal action from the defendant herein and as such indicated "in the light of this I have decided not to seek any reference to arbitration and not to consent to your company putting any of the disputes between us before an arbitrator". Ultimately a plenary summons was issued herein and served on the 14th August, 2007.

3. A replying affidavit was sworn herein by John McCormack on the 23rd November, 2007. In that affidavit he referred to the petrol distribution and supply agreement entered into by the plaintiff and the defendant. He set out details in relation to what he described as one of the principal clauses and alleged that the defendant was in breach of that clause which provided for a review of the commissions payable by the defendant to the plaintiff. He alleged that that condition was a fundamental term of the agreement and even if not fundamental, that it was an essential term in the agreement. He contended that there was a breach of that term and that this amounted to a "fundamental rupture" of the agreement which had the effect of rescinding the agreement.

4. A similar contention was considered in the decision in the case of *Doyle v. Irish National Insurance Company Plc* [1998] 1 I.R. 89. In that case it was held by Kelly J. that the arbitration clause survived the voidance of the contract and that the defendant was entitled to have the dispute referred to arbitration. In the course of his judgment Kelly J. followed the leading case of *Heyman v. Darwins Limited* [1942] A.C. 356. In the course of the judgment at p. 92, Kelly J. quoted from that decision where it was stated by Macmillan L.J. at pp.373 and 374 as follows:-

> "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.
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> 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."

5. Having referred to that passage Kelly J. went on to say:-

> "Whilst that decision speaks of repudiation or total breach of contract the principle decided by it is equally applicable in circumstances where one party seeks to void or rescind a contract on the ground of misrepresentation or non-disclosure. That is so whether the misrepresentation or non-disclosure is fraudulent, negligent or innocent. Provided that the words of the clause are sufficiently wide, these are matters which can be referred to arbitration."

6. It seems to me to be clear that had matters rested with the first affidavit of Mr. McCormack there could be no issue but that these proceedings should be stayed pursuant to s. 5 of the Arbitration Act 1980.

7. A further affidavit was sworn herein by Mr. McCormack on the 21st December, 2007. In that affidavit, Mr. McCormack sets out more detail by way of background as to the relationship between the plaintiff and the defendant. It is clear from that affidavit that the parties have dealt with one another for a considerable number of years. It would also appear that during the period of their dealing prior to entering into the agreement, the subject matter of these proceedings, on the 18th August 2004 that there had been issues between the plaintiff and the defendant as to the margins or profit levels being attained by the plaintiff. Critical to the level of margin was the extent of rebates on the products supplied by the defendant to the plaintiff. It was clearly a part of the arrangement between the plaintiff and the defendant that rebates would be reviewed by the defendant over the course of the contract.

8. In the course of his affidavit, Mr. McCormack states that in the course of his discussions with representatives of the defendant prior to entering into this contract that his complaints as to the level of profits he was achieving were met by a comment "Do you boys not talk at all down there?" The clear implication of this is an allegation by Mr. McCormack that the defendant suggested that he and his competitors should meet for the purpose of agreeing a price for the products they sold. Such a course of action would, of course, be in breach of competition law.

9. Mr. McCormack continues in that affidavit, to set out in more detail his complaints in relation to the issue of rebate review. He outlined a number of meetings that occurred subsequent to entering into the agreement at issue in these proceedings and he refers to losses which he states his company has suffered as a result of the failure of the defendant to honour the terms of the agreement.

10. He also dealt at length with an allegation that, as previously stated, the review of the commissions on the terms agreed between the parties is a fundamental term of the agreement. He asserted that the defendant never intended to engage with the plaintiff in a

meaningful way in any such review and on the contrary suggested that the plaintiff engage in the practice of price fixing so as to manipulate the market. Finally he set out details of what he describes as particulars of incitement to engage in price fixing. He contended that the defendant falsely induced the plaintiff into believing that the products delivered to the plaintiff were competitively priced, would be subject to review at annual intervals, that the defendant never intended to engage in a review and encouraged the plaintiff to engage in price fixing to achieve what was provided for in the contract by way of rebate review. Thus, it is alleged that the defendant has perpetrated a fraud.

11. Two affidavits were sworn by way of reply. The first of those was an affidavit of Thomas Noonan sworn herein, on the 10th January, 2008. He commented that the matters referred to in Mr. McCormack's affidavit are not relevant to the application to consider a stay of proceedings. He refuted the allegation that he, Mr. Noonan encouraged Mr. McCormack to engage in price fixing with his competitors. Mr. Noonan, given the allegations now made by Mr. McCormack to the suggestions in relation to price fixing and the level of dissatisfaction on the part of Mr. McCormack in relation to his company's profitability, expressed surprise that Mr. McCormack through his company entered into the agreement which is the subject matter of these proceedings.

12. The second affidavit sworn in response to the affidavit of Mr. McCormack is that of Patrick Meehan sworn herein, on the 10th January, 2008. He too refuted an allegation of Mr. McCormack that he, Mr. Meehan, suggested that Mr. McCormack should meet with his competitors to sort out his difficulties, the inference being that a price fixing arrangement be made.

13. Mr. O'Moore S.C. on behalf of the plaintiff herein, has referred to the provisions of s. 39(2) of the Arbitration Act 1954, which provides as follows:-

> "Where:
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> (a) an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and
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> (b) a dispute which so arises involves a question whether any party has been guilty of fraud,
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> the Court shall, so far as may be necessary to enable the question to be determined by the Court, have power to order that the agreement shall erase [sic] to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement."

14. The provisions of s. 39(2) were considered in the case *of Greyridge Developments Limited v. McGuigan*, High Court, unrep., 28th June, 2006. In that case, Gilligan J. was satisfied that the parties had entered into a valid and binding agreement which provided for arbitration. He was further satisfied that a dispute had arisen in that case between the parties which involved the question as to whether or not the defendant had been guilty of fraud. Accordingly, the question he had to consider is whether or not in the exercise of his discretion on the particular facts of the case the court should direct that the agreement should cease to have effect, insofar as it provided for arbitration and that the authority of the Arbitrator should be revoked. In that regard he considered the case of *Cunningham Reid and Another v. Buchannon-Jardine* [1988] 2 All E.R. 438. In that case, Woolf L.J. stated at pp. 445-446 as follows:-

> "In my view this is a case where there is a serious charge of fraud made, but in which there is no good reason why the normal course should not be adopted of allowing the matter to proceed to arbitration in accord with the parties agreement … There is no difficulty in this day and age in appointing an arbitrator who is well capable of properly determining and trying an issue of fraud of this sort, indeed many members of both sides of the profession now have very considerable experience as recorders of trying just such issues. … In addition it is to be noted that, apart from the fact that there is this allegation of fraud made by the party opposing the stay, there is no feature about this case which means that it is particularly suited to trial by a court rather than an arbitrator. In my view there can be circumstances which would make a case unsuited to be the subject of a stay where the stay is being opposed by the party charging fraud, but this is not one of those cases. There is in particular no special public interest aspect arising from this charge of fraud which means that it is undesirable from the public point of view that the matter should be dealt with by arbitration rather than in open court. I regard this case as one where, while there is an allegation of fraud at this stage that is something which clearly falls within the arbitration agreement and therefore the proper exercise of discretion looking at all the circumstances of this case was one which required the judge to uphold the decision of Master Lubbock and to grant a stay and I would therefore allow this appeal and restore the Master's order".

15. The statement of the law set out above had previously been approved by O'Hanlon J. in his judgment in *Administratia Asigurarilor de Stat, Wynterthur Swiss Insurance Company and Others v. The Insurance Corporation of Ireland Plc (Under Administration)* [1990] 2 I.R. 246. he held, inter alia, that the High Court has a discretion under S. 39 of the Arbitration Act 1954 to retain proceedings before a court and to refuse a request by one party for a stay to enable matters in dispute to be resolved at arbitration where the claims are of great magnitude and complexity involving difficult questions of law and allegations of fraud.

16. In the *McGuigan Construction* case, Gilligan J. was satisfied that the plaintiff's allegations against the defendant in respect of forgery and fraud were made *bona fide*; however, in that case he did not stay the arbitration, which was ongoing, because he was satisfied that:-

> "I do not consider that this case is one of great complexity or that the matter involves the resolution of any serious or difficult questions of law, although I accept that any allegation of fraud raises a serious issue. The claim in my view is a standard dispute between a developer and a building contractor as retained and pertains solely to sums of money claimed in respect of works allegedly carried out and a counterclaim by the developer against the building contractor for having failed to complete the necessary works as agreed in the contracts."

17. In the course of his submissions, Mr. O'Moore S.C. submitted that this was a case where the court had a discretion under and by virtue of s. 39(2). He submitted that there is an allegation that the plaintiff was defrauded and that the plaintiff was encouraged to engage in conduct which amounted to a fraud on the public by way of price fixing. Relying on the judgment of O'Hanlon J. in the case referred to above, he submitted that this was a case of particular complexity, that the thrust of the case being made by Mr. McCormack in his second affidavit was that the defendant sought to distort the market. Further he noted that having regard to the nature of the dispute between the parties that the issue of discovery was something that would arise. Finally, he argued that having regard to the allegations in respect of the distortion of the market that there was a special public interest aspect arising from this allegation.

18. It would be helpful to look at the specific allegations made by Mr. McCormack in his affidavit and to consider whether those allegations are such that this Court should exercise its discretion under s. 39(2) of the Act not to stay these proceedings pending arbitration. The first aspect of the plaintiff's case in this regard refers to the allegation of fraud. In his second affidavit he described his previous involvement with the defendant herein and the negotiations that took place from late 2003 to mid-2004 in respect of the agreement. The agreement was concluded on the 18th August, 2004. An important aspect of the agreement was the question of review of rebates. In the agreement itself, it was provided for that the commission's payable would be subject to review on a "month to month" basis. Mr. McCormack contended that there was an agreement between the parties that the review would be on a twelve month basis commencing in April 2005 and backdated to the 1st April 2004 and thereafter backdated to the 1st April each year. He said that the defendant never intended to engage in a meaningful way with the plaintiff in a review of the commission.

19. I have considered carefully the judgment of Gilligan J. in the case of *Greyridge Developments Limited v. McGuigan* referred to above and the authorities referred to therein. Undoubtedly, the plaintiff has raised an issue to the effect that the plaintiff company was induced to enter into this particular agreement on the basis of an inducement which the plaintiff as to review of rebates which it is alleged that the defendant had no intention of complying with. This allegation is central to the plaintiff's claim but it does not seem to me to be of such complexity that, to paraphrase the words of Woolf L.J. in the case of *Cunningham Reid and Another v. Buchann-Jardine* referred to above, there should be any difficulty in appointing an arbitrator who is well capable of properly determining and trying an issue of fraudulent misrepresentation of this sort. It seems to me to be something that comes within the range of disputes that the parties themselves had agreed should be dealt with by arbitration.

20. The allegation made on behalf of the plaintiff by Mr. McCormack in his affidavit relating to the incitement to engage in price fixing is more serious. In the course of his affidavit, Mr. McCormack has given details of a number of occasions, some prior to the period of the current agreement during which it is alleged that representatives of the defendant encouraged the plaintiff to engage with his competitors in price fixing. The occasions set out by Mr. McCormack predate the entry into the agreement, save for one occasion on the 8th April, 2005, after the plaintiff had entered into the current agreement. These allegations are contested by the defendant herein. The allegations in relation to price fixing are of relevance for two reasons. First, it is contended on behalf of Mr. McCormack that the suggestions made to him about price fixing demonstrate that the defendant never intended to engage with him in respect of a review of rebates and thus, did not intend to comply with the terms of the agreement. The second point relied on in regard to the price fixing allegation is that this generates a special public interest aspect to the case thus being an appropriate consideration for having the matter dealt with in open court as opposed to being dealt with by way of arbitration. The height of this allegation is that the defendant suggested to the plaintiff prior to entering into the agreement and during the course of previous agreements between the parties, that in order to generate profits he should engage with his competitors in price fixing. The Plaintiff did not take up such suggestions. There is no evidence before the court that the defendant was engaged in price fixing and there is no evidence to suggest that any of the plaintiff's competitors were engaged in price fixing. I do not disagree with the contention that price fixing would amount to a fraud on the public, would be in breach of competition law and could, in an appropriate case, give a dispute a special public interest aspect. However, looking closely at the facts set out in the affidavit of Mr. McCormack in relation to this issue there are a number of points to make. He alleges that he was incited to engage in price fixing on three separate occasions, once in 1999, on a trip to New York, once in May 2002, on a trip to Spain and once on the 30th March, 2003 in Dublin. It is noteworthy that those three occasions took place prior to the plaintiff entering into the current agreement. Notwithstanding the allegation that the plaintiff was encouraged to engage in price fixing, he clearly did not to do so and he chose to enter into the agreement on the 18th August, 2004. It is difficult to see how any such encouragement to engage in price fixing prior to entering into the current agreement could be of relevance to the intentions of the defendant in respect of the operation of the current agreement.

21. The final occasion referred to by Mr. McCormack in his second Affidavit allegedly took place on the 8th April, 2005, at a meeting in Sligo when there was a discussion as to the plaintiff's financial difficulties and the applicable pricing structure. The incidents of alleged incitement to engage in illegal price fixing are relied on by the plaintiff to contend that the defendant had no commitment to adhere to a review of rebates as provided for in the agreement. As I have observed, it is difficult to see how matters that occurred prior to the currency of the present agreement can have a bearing on whether or not the defendant intended to comply with the terms of the agreement. What is alleged to have occurred subsequently at the meeting in 2005 could have a bearing on the issue as to whether or not the defendant intended to comply with the terms of the agreement. That is a matter which is well within the capacity of an arbitrator to determine.

22. I am not satisfied that the issues in this case are of such magnitude or complexity that they cannot properly be dealt with by arbitration. The allegation of incitement to engage in price fixing made in this case by Mr. McCormack does not seem to me to be such as to create a special public interest arising from the allegation such that it is inappropriate from the public point of view that the matter should be dealt with by way of arbitration rather than in open court. Indeed, I have to say that the issue of incitement to engage in price fixing as raised by Mr. McCormack seems to me to be peripheral to the real dispute at issue between the parties.

23. For the reasons set out above I am granting the order sought by the defendant herein.