NEUTRAL CITATION: [2015] IEHC 673

THE HIGH COURT

COMMERCIAL

[2014 No. 5017 P.]

BETWEEN

GO CODE LIMITED

PLAINTIFF

AND

CAPITA BUSINESS SERVICES LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 27th day of October, 2015

1. The defendant has brought an application before the court pursuant to s. 6 of the Arbitration Act 2010, and/or Article 8 of the UNCITRAL Model Law on International Commercial Arbitration staying these proceedings in circumstances where the matters complained of by the plaintiff fall to be determined by way of arbitration.

2. Section 6 of the Arbitration Act 2010, provides that the UNCITRAL Model Law has the force of law in the State and applies to both international commercial arbitrations and domestic arbitrations.

3. Article 8 of the Model Law states:-

> *"(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*
>
> *(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.*

4. The meaning of Article 8(1) of the Model Law was interpreted by Mac Eochaidh J. in P. Elliot & Co. Limited (In Receivership and In Liquidation) [2012] IEHC 361, where he said at para. 56:-

> *"I agree with the proposition that Article 8 of the Model Law does not create a discretion to refer or not to refer matters to arbitration but directs a court to grant or not to grant a stay, depending on the threshold issue of whether the parties to the proceedings are parties to an arbitration agreement. If they are, and the dispute is within the scope of the arbitration agreement and there is no finding that the agreement is null and void, inoperative or incapable of being performed, then the stay must be granted. Contrarily, if the parties are not bound by an arbitration agreement, then the stay, of course, must be refused."*

5. In that case, Mac Eochaidh J. adopted the judgment of Hinkson J. in the Canadian Court of Appeal in *Gulf Canada Resources Limited v. Arochen International Limited* [1992] BCJ 500, where he said:-

> *"The test formulated is that a stay of proceedings should be ordered where: (i) it is arguable that the subject dispute falls within the terms of the arbitration agreement; and (ii) where it is arguable that a party to the legal proceedings is a party to the arbitration agreement."*

6. I accept that the interpretation of Article 8 of the Model Law as set out in those cases is correct.

7. The plenary summons was issued on 9th June, 2014, and an appearance was entered on 15th August, 2014. The statement of claim was delivered on 18th December, 2014, and this motion to stay the proceedings and remit the matter to arbitration was brought on 23rd March, 2015.

8. The plaintiff relies on the decision of Hogan J. in *Mitchell v. Mulvey Developments Limited* [2012] 4 I.R. 671, where he refused to grant a stay on the proceedings on the basis that the defendant's solicitors sought delivery of a statement of claim after an order had been made providing for an extension of time for the entry of an appearance and the delivery of a defence. He said that having regard to the particular facts of that case, the context suggested an engagement with the court process. He distinguished the facts of that case from *Fury v. Lurgan-ville Construction Co. Limited* [2012] 4 I.R. 655, where the Supreme Court stayed the proceedings in similar circumstances.

9. The plaintiff argues that not only did the defendant seek a statement of claim in this case but that prior to the commencement of the proceedings, a detailed letter dated 17th April, 2014, setting out the nature of the claim was sent by the plaintiff's solicitor. The defendant, for its part, argues that apart from entering an appearance and calling for a statement of claim, it took no step in the proceedings nor did anything which might be considered a submission of its *"…first statement on the substance of the dispute…"* within the meaning of Article 8 of the Model Law.

10. There have been a number of cases where the courts have stayed proceedings on the basis of an arbitration clause notwithstanding the entry of an appearance and the delivery of a statement of claim. *In Framer Developments Limited v. L&K Keating & Ors* [2014] IEHC 295, Ryan J. granted a stay in relation to a construction dispute despite the fact that a statement of claim had

been delivered.

11. In the *Fury v. Lurgan-ville Construction Company Limited* case, the procedural history was as follows:-

(i) Plenary summons – 9th June, 2005.

(ii) Appearance entered – 20th June, 2005.

(iii) Statement of claim – 8th August, 2005.

(iv) Letter seeking additional three weeks to file defence – 11th July, 2006.

(v) Order on consent to allow additional three weeks for defence – 17th July, 2006.

(vi) First reliance on arbitration clause – 3rd November, 2006.

There was a fifteen month period between the delivery of the statement of claim and the invocation of the arbitration clause. In this motion before me, there is a three month period between the delivery of the statement of claim and the motion to stay the proceedings.

12. In *Fury,* Clarke J. stated that in order to create an estoppel which would render the arbitration clause inoperable, it is necessary to establish *"…something that amounts to an unequivocal promise or representation to the effect that strict contractual rights…will not be enforced"* and reliance by the plaintiff upon that representation. At para. [36], he said:-

> *"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."*

13. There were a number of distinguishing features between *Mitchell v. Mulvey Developments Limited* and *Fury v. Lurgan-ville Construction Company Limited* which seemed to have influenced Hogan J. He referred to the following as *"additional factors"* which were not present in the *Fury* case:-

(i) the correspondence requesting a statement of claim;

(ii) forbearance following delivery of the statement of claim; and

(iii) the fact that the delay was several months longer.

14. The plaintiff argues that the letters from the defendant's solicitors to the plaintiff's solicitors dated 28th August, 2014, 18th September, 2014, and 31st October, 2014, are evidence of a clear, unequivocal, promise or representation, to the effect that the arbitration clause would not be relied on. But these letters do no more than request delivery of a statement of claim and the final letter indicates an intention to issue a motion to dismiss for want of prosecution if this is not done. I find nothing in that correspondence which amounts to a promise or representation, to the effect, that the arbitration clause would not be relied on.

15. The plaintiff also claims that it has acted to its detriment in delivering a statement of claim as it involved it in additional costs. I do not accept this argument. In the first place, the defendant has informed the court that the statement of claim can be deemed to be the points of claim in the arbitration process between the parties. In any event, there is nothing in the other cases to which I referred which suggests that the delivery of a statement of claim is to be deemed an act to the detriment of the plaintiff.

Conclusion

16. I am satisfied that the facts of this case can be distinguished from those in the *Mitchell v. Mulvey Developments Limited* case. But even if that were not so, I am bound by the decision of the Supreme Court in *Fury v. Lurgan-ville Construction Company Limited & Ors.*

17. In these proceedings, the plaintiff relies on an agreement which is subject to an arbitration clause. There is no evidence to suggest that the agreement is either null or void or inoperative or incapable of being performed. Accordingly, the court is obliged to stay the proceedings pursuant to the provisions of Article 8(1) of the Model Law. I make an order in the terms of para. (1) of the notice of motion dated 24th February, 2015.