Neutral Citation Number: [2011] IEHC 185

THE HIGH COURT

2011 35 MCA

IN THE MATTER OF AN ARBITRATION HEARD AND DETERMINED BY FRANCIS J. MURPHY ON 29th OCTOBER, 2010

AND

IN THE MATTER OF THE ARBITRATION ACT 2010

BETWEEN

CÓRAS IOMPAIR ÉIREANN

APPLICANT

AND

SPENCER DOCK DEVELOPMENT COMPANY LIMITED

AND

PEARL BAY LIMITED

RESPONDENTS

Judgment of Miss Justice Laffoy delivered on the 11th day of March, 2011.

1. The application

1.1 The primary relief sought by the applicant on this application is formulated in the following terms:

> "An Order directing the Respondents and/or each of them to comply with the award made by Francis J. Murphy on 29th October, 2010 by paying to the Applicant the sums due to it in the amount of 17.5% of the gross rents received by the Respondents or both of them in respect of the car-parking facility serving the Conference Centre at Spencer Dock in the City of Dublin."

The remainder of the reliefs sought by the applicant are ancillary to the primary relief: an order directing an account of gross rents received; an order for sequestration of the property of the respondents; and an order attaching the current directors of the respondents for disobedience to the award.

1.2 The application was grounded on the affidavit of Frank Masterson, the Assistant Group Property Manager of the applicant, which was sworn on 8th February, 2011. That affidavit referred to a factual matter, to which I will refer later, which is of no relevance to the limited jurisdiction the Court has on this application.

1.3 While the applicant has invoked the Arbitration Act 2010 (the Act of 2010) in the title of the proceedings, the applicant did not invoke any specific provision thereof. I assume that what the applicant is seeking is the leave of the Court to enforce or enter judgment in respect of the award pursuant to s. 23(1) of the Act of 2010.

1.4 No replying affidavit was filed on behalf of the respondents. However, the respondents resisted this application and it was suggested by their counsel, on the assumption that the application has disclosed a new dispute, that the Court should make an order under Article 8(1) of the Model Law as set out in Schedule 1 to the Act of 2010 referring the new dispute to arbitration.

2. The award

2.1 The award dated 29th October, 2010 of Francis J. Murphy (the arbitrator) was made in an arbitration in which the applicant was claimant and the respondents were respondents. It was expressed to be made pursuant to:

> (a) Clause 34 of the Master Development Agreement (MDA) of 6th October, 1998 referred to in its title, to which the applicant and the first respondent, among others, were parties; and
>
> (b) Clause 5.14 of a Licence and Agreement for Lease (LAL) of 5th April, 2007 also referred to in its title, to which the applicant and both respondents were parties.

The only document exhibited on this application in relation to the arbitration is the award.

2.2 In the award it is stated that a dispute had arisen between the applicant and the respondents as to the interpretation of the definition of "Conference Centre", and the meaning and import of certain clauses relevant to the "Conference Centre", in the MDA. The arbitration clause in the MDA, Clause 34, is quoted. It is then stated that Clause 5.14 of the LAL provided that both respondents might seek arbitration on the issue of whether "Additional Rent" is payable.

2.3 In the award it is emphasised that the kernel of the dispute concerned the interpretation, not of the "National Conference Centre", but of the "Conference Centre" as defined in the MDA and as referred to in Clause 5 thereof. The significance of Clause 5, which is quoted in full, is that it provided, *inter alia*, for the grant of a Ground Lease (as defined) reserving a Ground Rent (as defined) in respect of the Conference Centre Site to the first respondent. However, it was expressly provided in Cause 5.5 as follows:

> "For the avoidance of doubt where structures constructed on the Conference Centre Site include any elements

> other than the Conference Centre [the applicant] shall have an entitlement to a Ground Rent in respect of such other elements other than the Conference Centre."

2.4 In fact, as appears from the award, by agreement with the first respondent, the Ground Lease of the Conference Centre was granted by the applicant to the Commissioners of Public Works in Ireland and that lease (the OPW Lease) was being held in escrow pending the outcome of the arbitration.

2.5 In any event, Clause 11.2 of the MDA linked the Ground Rent to be paid to the applicant to the "Agreed Percentage", as defined therein, of rents received by the lessee. "Agreed Percentage" was defined as meaning "17.5 per centum subject to the provisions of Clause 12". It is recorded in the award that it was accepted by the parties that the Agreed Percentage of 17.5% that otherwise applies in accordance with the provisions of the MDA does not apply to the Conference Centre. The crucial question for consideration on the arbitration is identified in the award as whether certain underground car parking spaces designated by the relevant planning permission for use by the Conference Centre come within the definition of "Conference Centre".

2.6 It is recorded in the award that the applicant agreed with the first respondent to grant to the second respondent, a wholly owned subsidiary of the first respondent, the LAL, which relates to the car parking spaces in issue on the arbitration. In the draft lease annexed to the LAL, the "Additional Rent" which was to be thereby reserved, was defined and the definition is quoted in full in the award. It is based on a percentage of 17.5% of certain receipts but, as is pointed out by the arbitrator in a foot note, it does not replicate the definition of "Agreed Percentage" in the MDA because it excludes certain sums which are introduced in the definition by the words "other than …". The contention of the applicant before the arbitrator, as recorded in the award, was that the car park spaces the subject of the LAL do not comprise part of the "Conference Centre", as defined in the MDA, so that "Additional Rent", as defined in the LAL, is payable by the respondents to the applicant in respect of the car park spaces designated for use of attendees of the Conference Centre.

2.7 The arbitrator's conclusion on the dispute before him is set out as follows at the end of the award:

> "I have no doubt that the car park and/or the 240 car park spaces allocated for the use of attendees of the Conference Centre are elements other than the Conference Centre as defined in the MDA, and I am not persuaded to the contrary by the Respondents. I hold for the claimant and accordingly the claimant is entitled to Additional Rent."

The arbitrator went on to state that he awaited the submissions of the parties as to the exact wording of the declaration(s), if any, which he should make in the light of that finding, and any other orders that were required to be made for its implementation. The issue of costs was left over to a further hearing.

2.8 Counsel for the respondents informed the Court, albeit supra protest from counsel for the applicant, because it was not on affidavit, that, as a matter of fact, the arbitrator has not been asked to make any declarations or orders.

3. New dispute?

3.1 I have quoted the primary relief sought by the applicant on this application verbatim to demonstrate that what the Court is being asked to give effect to is not what the arbitrator found in setting out his conclusion. The arbitrator found that the applicant is "entitled to Additional Rent". What the applicant seeks on this application is that the Court compel the respondents to pay to it sums "in the amount of 17.5% of the gross rents received by the respondents … in respect of the car parking facility". The position of the respondents on this application is that the arbitrator did not address whether the percentage to which the applicant is entitled is a percentage of "the gross rents". Therefore, it was submitted that there is a new dispute which has not been determined and which has to be determined by arbitration, namely, how the amount due to the applicant, which the arbitrator held the applicant is entitled to in principle, should be calculated. In that context, counsel for the respondents asked the Court to refer that dispute to arbitration under Article 8(1) of the Model Law.

3.2 In the grounding affidavit, Mr. Masterson embarked on an exposition of the provisions of the MDA and the LAL, which verged on advocacy. In relation to the provisions of the MDA, he referred to the definitions of "Ground Rent" and "Ground Lease" and to Clause 11.2, which, as I have noted, broadly speaking, relates the Ground Rent to the "Agreed Percentage" as defined. He exhibited an interim award dated 15th June, 2004 made by Hugh O'Neill, as arbitrator, in an arbitration in which the first respondent was claimant and the applicant was respondent. It is clear from reading the recitals in conjunction with the operative part of that award that one of the issues there was whether in implementing Clause 11.2 of the MDA in the draft Ground Lease –

> "in calculating the rent payable under the Ground Lease certain deductions should be made from the rents received in respect of matters set forth in the Eight Schedule to the draft Ground Lease submitted by [the first respondent] … ('the Deduction from Rent Provision')".

His finding on that point was that "the Ground Lease should not contain the Deduction from Rent Provision". Presumably, that award is now reflected in the OPW Lease.

3.3 Mr. Masterson went on to aver that those "principles" were reflected in the LAL. He referred to the definition of "Additional Rent" and quoted only the first line of the fourteen line definition, notably omitting the segment which stipulated that the sums captured by the definition excluded certain sums introduced by the phrase "other than". Mr. Masterson then referred to the award of the arbitrator and quoted the following passage (at p. 44):

> "It was always … open to the parties … to specifically exclude from the additional rent (i.e. the 17.5%) all or some of the car parking income that would be generated …."

Finally, Mr. Masterson correctly averred that the "arbitrator himself concluded that CIE" was entitled to Additional Rent and made the point that the second respondent was a party to the arbitration.

4. Conclusion on applicant's application

4.1 The arbitrator definitely found that the applicant is entitled to the Additional Rent. He did not expressly find that the applicant is entitled to "17.5% of the gross rents", and such a finding is not implicit in the award. In my view, Mr. Masterson's reasoning is less than convincing. The passage he quoted from the award is taken out of context. What the arbitrator was addressing there was the definition of Conference Centre in the context of Clause 5.4 and 5.5 of the MDA. He was not addressing the calculation of Additional Rent, which is a term used in the LAL, not in the MDA. As I have pointed out earlier, the arbitrator pointed to the difference between "Additional Rent", as defined in the LAL, and "Agreed Percentage", as defined in the MDA (*cf.*, footnote 3 at p. 18).

4.2 Accordingly, I am not satisfied that the effect of the award is that the applicant is entitled to sums "in the amount of 17.5% of the gross rents received by the respondents … in respect of the car parking facility servicing the Conference Centre". Therefore, the applicant is not entitled to the primary order sought on this application. It follows that the applicant is not entitled to the ancillary reliefs claimed.

5. Article 8(1) of the Model Law
5.1 Article 8(1) of the Model Law provides:

> "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."

That provision is the analogue of s. 5 of the Arbitration Act 1980, which replaced s. 12 of the Arbitration Act 1954, which was the provision which gave the Court jurisdiction to stay proceedings where a party proved the existence of an arbitration agreement.

5.2 Aside from the fact that the respondents have not brought an application seeking an order referring the contended for new dispute to arbitration, in my view, Article 8(1) has no application to the circumstances which has arisen here, where the arbitration has taken place, the proceedings which are before the Court are proceedings to enforce the arbitration award and the parties are not *ad idem* as to the effect of the award. Accordingly, I am of the view that the Court has no jurisdiction to make an order under Article 8(1). However, in my view, the logical and sensible course for the parties to adopt would be to avail of the arbitrator's invitation to make further submissions to him.

6. Extraneous matter
6.1 In the grounding affidavit, Mr. Masterson adverted to the fact that he has learned from a representative of the first respondent since the award was made that, as he put it, "a further arrangement has purportedly been entered into between [the second respondent] and another entity, Park Rite Limited". The relevant Licence Agreement was exhibited. The implications of that arrangement are totally extraneous to any issue with which the Court could conceivably be concerned on an application under the Act of 2010 to enforce the award. I express no view whatsoever on it.

7. Order
7.1 There will be an order dismissing the applicant's application.