Neutral Citation Number: [2012] IEHC 317

THE HIGH COURT

Commercial

[2011 No. 11880 P]

Between

Rory O'Meara

Plaintiff

And

The Commissioners of Public Works in Ireland, Ireland

and the Attorney General

Defendants

JUDGMENT of Mr. Justice Charleton delivered on the 25th day of July 2012

1. This motion concerns the Richmond Hospital in Dublin and two leases which were entered into for that property at a time when the State had a shortage of courtrooms. Since then the Criminal Courts of Justice building on Parkgate Street has been built. For ease of reference, I only need to refer to one of the leases, that one is dated the 18 November 1996, and was made between the plaintiff as the landlord and the first defendant, the Commissioners of Public Works in Ireland, as the tenants. Neither the State nor the Attorney General played any active role in the proceedings before this Court.

2. The dispute here is as to whether these proceedings should be stayed and the matter referred to arbitration. The claim of the plaintiff landlord is based upon a failure to repair under the lease and is additionally based upon the alleged commission of waste by the defendant. A sum of about €1.4 million is sought by the plaintiff landlord in damages. As the written submissions indicate, waste is a tort but waste can also be something which is incorporated into and is provided for under a lease in terms to be decided by arbitration.

The lease

3. The arbitration clause is set out at clause 9(a) of the lease. It provides as follows:-

> All disputes which arise between the parties in connection with this lease or the subject matter of this lease except where the same relates to forfeiture of this lease or relief from forfeiture or malice related thereto or where the means of resolving such dispute is expressly referred to in this lease shall be decided by an arbitrator agreed by the parties or in default of agreement appointed by the President for the time being of the Incorporated Law Society.

A second sub-clause provides that the provisions of sub-clause 9(a) should apply also to the appointment of any replacement arbitrator. The plaintiff landlord argues that the arbitration clause is inconsistent with the choice of law clause made under clause 7(47) of the lease which is in the following terms:-

> In relation to clause 9(a) and (b) hereinafter set out this lease shall be governed by and interpreted in accordance with the laws of Ireland, the tenant, hereby irrevocable agrees that the Courts of Ireland are to have jurisdiction in all or any disputes which arise in connection with this lease and that accordingly any suit, action or proceeding arising out of or in connection with this lease may be brought in such courts.

4. Briefly, the plaintiff landlord's first argument in opposing the defendant's motion to stay the proceedings and to have the dispute referred to arbitration is that in entering into the lease in 1996 the defendant could not be taken to have agreed to go to arbitration in respect of waste, which is said to be an issue arising outside the scope of the terms of the lease. Secondly, the plaintiff landlord pleads that, in any event, in agreeing to the terms of the lease, the plaintiff landlord was not agreeing to a change in the law whereby, as of the date of this judgment, the Arbitration Acts 1954 and 1980 have now been replaced by the Arbitration Act 2010; the major alteration in the legislation relevant here being that there is now no scope for an arbitrator operating under the Act of 2010 to refer a question of law for the interpretation of the High Court.

5. The most important question that could arise for interpretation, according to the plaintiff landlord, is the question of the proper construction and interpretation of section 65 of the Landlord and Tenant (Amendment) Act 1980, which I shall shortly refer to. On this motion, therefore, basically four questions arise for consideration.

The relevant questions

6. The first of these issues is what did the parties agree? I am satisfied that what the parties agreed to under this lease is that all of the relevant disputes which arose under or in relation to the lease should be referred to arbitration. There have been a number of cases before various courts in several jurisdictions as to the differences that may be drawn between the wording of various commercial arbitration clauses. These decisions demonstrate the arguments that can be made and which can succeed in excluding some wrongs from hearing by an arbitrator while including others. The result would be a dual hearing, as is argued for in this motion by the plaintiff landlord: a hearing in contract under the lease before the arbitrator; and a hearing in tort before the High Court. The courts in England and Wales, in particular, have set their attitude against such fine distinctions; it seems partially on the basis of policy and partially on the basis of tiring with a build up of case law relevant to fine distinctions as to what various clauses accomplish. In *Asghar & ors v The Legal Services Commission & anor* [2004] EWHC 1083 (Ch) the issue was similar to the present in that it concerned a system for dispute resolution arising out of an issue with the Law Society. In the course of that judgment, Lightman J at paragraph 21 expressed a view with which this court is in agreement:-

In my judgment, the expression "disputes concerning alleged breaches of the Contract" is very wide. No authority or text book has

been cited to me which has considered the meaning of any such expression or the word "concerning" in this context. I am accordingly neither assisted nor trammelled by any such guidance. The use of the expression makes plain that the jurisdiction of the arbitrator is not confined to the consideration of the parties' causes of action for breach of the contract. It is only necessary to establish jurisdiction that the dispute concerns what is alleged to be a breach of contract, but not that the dispute is exclusively concerned with what are alleged to be breaches of contract. If the determination of a claim in tort by the Claimants requires determination whether one or other party has committed a breach as part of the Contract, the arbitrator has jurisdiction to determine the claim in tort. The arbitrator has jurisdiction to determine whether a party has not merely acted in breach of the Contract but committed a tort. By use of the expression "disputes concerning alleged breaches of the Contract the parties have made plain their intention that there shall be one-stop adjudication for all disputes in which the issue of breach of contract arises and that the occasion shall not arise for the determination of the issue of breach of contract which the parties have agreed in the arbitration clause shall be determined by arbitration being determined in some other way. In a word the provision for arbitration is not to be by-passed without the consent of the parties by raising that issue and having it determined as an issue in court proceedings however framed.

7. A similar view was taken by the House of Lords in *Fiona Trust Corp v Privalov* [2007] 4 All ER 951. In the course of his speech, Lord Hoffman made some trenchant comments on the question of construction. He supported the proposition that it is the agreement of the parties that is to be enforced by the Court and that the commercial nature of such an agreement is to be vindicated. Therefore, situations are to be avoided whereby men and women of business would be surprised to learn that a general arbitration clause can be construed by a court to include some disputes but not others. At paragraphs 6 & 7 he said:-

In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.

If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

8. The Court notes that in *Kelly v Lennon* [2009] 3 IR 794 Mr Justice Clarke found, in contradistinction to those authorities, that some clauses can be such that part of the proceedings needs to be determined before a court as opposed to by an arbitrator. I do not see that case as being a departure from the general trend established; rather it seems to me that the litigation in question was one which turned on its very particular facts. That case involved the construction of the general conditions of sale of the Incorporated Law Society of Ireland which includes an arbitration clause as to the contract terms but where part of the dispute was as to the boundaries of the property allegedly sold under the agreement of sale in question. It was clear that disputes in relation to the interpretation of the contract were to be referred to arbitration, however the arbitration clause did not cover the subject matter of the contract, namely what was being sold.

9. Upon a brief analysis of the authorities, in this case, it seems to me that, as the wording of the arbitration clause indicates, the plaintiff landlord and the defendant tenant agreed to have all disputes which might arise between the parties in connection with the lease or the subject matter of the lease to be decided by an arbitrator. The clause in my view does not admit of fine distinctions such as the to failure to repair under a covenant and waste as a form of failure to repair. The clause could not therefore be clearer.

10. The second question is whether any alleged tortious action in relation to waste by the defendant tenant was included within the terms of the arbitration clause. That, in my view, is answered in the same way in the circumstances of this case. A dispute in tort can arise out the performance of a lease or it can arise completely independently. If the allegation made here was the unlikely one that the Commissioners of Public Works had demolished the premises or burnt them down, then a tort action would arise. Such a claim would go completely outside the scope of anything which anyone entering into the lease would have anticipated as potentially happening under the letting. Such a tortious act would be independent of the contract and, by extension, outside the scope of an arbitration clause contained therein.

11. The third issue is as to whether the change in the arbitration law of the State has any bearing on this motion. My view on that issue is that the matter is unambiguously governed by the Arbitration Act 2010. The general constitutional principle is that there is a presumption that a law will not apply retrospectively. I have some sympathy for the submission made on behalf of the plaintiff landlord of the premises that the law has changed so that reference to the Court on a defined point of law has now become impossible and that he should not be bound by that change. The clear terms, however, of sections 3 and 4 of the Arbitration Act 2010 make it inescapable that the change introduced in the law operates prospectively. The result is that any dispute under any existing lease or any dispute under an existing contract is not subject to the 2010 Act once, as of the date operative date of the legislation, an arbitration process has been started. Section 3(1) provides:-

This Act shall not apply to an arbitration under an arbitration agreement concerning an arbitration which has commenced before the operative date but shall apply to an arbitration commenced on or after the operative date.

12. Section 4 provides that the repeal of the Arbitration Acts of 1954 and 1980:-

> … shall not prejudice or effect any proceedings, whether or not pending at the time of the repeal, in respect of any right, privilege, obligation or liability or any proceedings taken under these Acts in respect of any such right, privilege, obligation or liability acquired, accrued or incurred under the Acts may be instituted, continued or enforced, as if the Acts concerned had not been repealed.

According to section 1(2) the operative date of the Act of 2010 was three months after the passing of the Act on 8 March 2010. It is therefore clear from the wording of sections 3 and 4 that in excluding proceedings which as of the operative date of the Act of 2010 had already been referred to arbitration, such proceedings continued under the Arbitration Acts 1954 and 1980. Litigation as to the rights and liabilities of parties arising from any arbitration decided under the governance of that earlier legislation is also unaffected by the passing of the Act of 2010. The Act of 2010 does not interfere with arbitrations commenced prior to 8 June 2010 or with awards

made under the Acts of 1954 or 1980. However, in respect of contracts and leases of whatever date, which are subject to arbitration clauses, but where there was not yet a dispute between the parties referred to arbitration, the change in the law effected by the Act of 2010 is binding.

13. A court has little choice where a valid arbitration clause occurs in a lease or contract. Turning to the model law appended to the Act of 2010, which is based on a worldwide agreement, there are limited circumstances in which a court, when faced with a substantive claim based on an agreement containing an arbitration clause and where there is a request to refer the matter to arbitration, may refuse that request and proceed to hear the merits of the claim. In particular Article 8(1) 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.

14. None of those conditions apply here. Under Article 34, which deals with an application for setting aside recourse under an arbitration agreement, it is provided that an arbitral award may be set aside by the court specified in Article 6 only if the party making the application furnishes proof of some incapacity; or that they were not given notice of either the appointment of the arbitration, the arbitral proceedings or were otherwise unable to present their case; or that the award deals with a dispute not contemplated as falling within the terms of the submissions to arbitration; or where the composition of the arbitral tribunal was not in accordance with law. It can also happen, under the model law, that the subject matter of a dispute is not capable of resolution by arbitration under the law of the State, in this case Ireland, as for instance where there is a law passed forbidding the courts of a country being deprived of jurisdiction in respect of certain subject matter, be it human reproduction or some other sensitive issue, or where such an award would be in conflict with public policy of the State. There is no question of any of those situations arising in this instance.

15. The last, and fourth, question is therefore in relation to the legal interpretation of section 65 of the Landlord and Tenant (Amendment) Act 1980. I am grateful for the submissions made in relation to this because it eases the concern that I had prior to the commencement of the hearing. Section 65 of the Landlord and Tenant (Amendment) Act 1980 was in fact a restatement and reformulation of its earlier manifestations in section 55 of the Landlord and Tenant Act 1931 which should be familiar to all practitioners in this area. Basically it provides that where there is a lease which contains a covenant to keep a tenement in repair, the damages which are recoverable for any breach of same shall not exceed the value by which the reversion is diminished owing to the breach and, where there is a want of repair due wholly or substantially to wilful damage or wilful waste, damages are not to be recoverable in any court for such breach if it is shown that repair was physically impossible or was excessive in proportion to the value of the tenement or, having regard to the character and situation of the tenement, it could not be so repaired and when so repaired be profitably used.

16. I do not see any question of such moment that might arise out of questions of the interpretation of that section which would require me to refuse to refer the dispute to arbitration. While the High Court would be the natural forum in which, for instance, a point of law of exceptional public importance to the people of Ireland might be decided, I am not at all sure that a serious legal dispute could arise on this section in these proceedings. The section has the advantage of being very clearly drafted and of having stood the test of time. An arbitrator is entitled, in any event, to decide such points of law as arise for hearing in the arbitration. I am not even sure, therefore, that even a complex point of law is a basis upon which an application to stay a proceeding can be refused but I am not deciding that here.

17. Nevertheless, in this instance I do not think that the point that a legal issue of high complexity and importance arises is strong enough to interfere with the jurisdiction as to disputes decided by agreement between the parties. That jurisdiction is that disputes should be decided by an arbitrator.

Result
18. Therefore, I am making an order staying these proceedings and referring the disputes among the plaintiff landlord and defendant tenant to arbitration.