Neutral Citation Number: [2011] IEHC 215

THE HIGH COURT

2011 33 MCA

IN THE MATTER OF SECTION 45 OF THE ARBITRATION ACT 1954 – 1958 AND IN THE MATTER OF SECTION 4(2) OF THE ARBITRATION ACT 2010 AND IN THE MATTER OF ORDER 56 OF THE RULES OF THE SUPERIOR COURTS

AND

IN THE MATTER OF AN INTENDED ARBITRATION

BETWEEN

ON-SITE WELDING SERVICES LIMITED

APPLICANT

AND

QUINN INSURANCE LIMITED (IN ADMINISTRATION)

RESPONDENT

Judgment of Miss Justice Laffoy delivered on 23rd day of May, 2011.

1. The application

1.1 On this application the applicant seeks an order pursuant to s. 45 of the Arbitration Act 1954 (the Act of 1954), having regard to s. 4(2) of the Arbitration Act 2010 (the Act of 2010), extending the time within which a dispute between the applicant and the respondent can be referred to an arbitrator.

1.2 The proceedings were initiated by originating notice of motion which issued on 8th February, 2011, after the date on which the Act of 2010 came into operation, that is to say, 8th June, 2010. An issue has been raised on behalf of the respondent that the Court has no jurisdiction to grant an extension of time under s. 45 of the Act of 1954, because, it is contended, that provision was repealed by the Act of 2010.

1.3 The evidence before the Court consists of:

(a) a grounding affidavit of John Scanlon, a director and shareholder of the applicant, sworn on 8th February, 2011;

(b) a replying affidavit sworn by Brian Storey, a Departmental Manager with the respondent, on 16th March, 2011;

(c) an affidavit of Declan O'Flaherty, a solicitor retained by the respondent, sworn on 29th March, 2011; and

(d) a supplemental affidavit sworn by Mr. Scanlon on 4th April, 2011.

There is a degree of conflict on the affidavit evidence, which obviously cannot be resolved on this application. Therefore, in setting out the factual background it is necessary to have regard to that conflict. It is also necessary for the Court to exercise a considerable degree of caution in outlining the facts because the dispute referred to in the originating notice of motion is subject to a personal injuries action in the High Court, which is listed for hearing on 21st July, 2011.

2. Factual background

2.1 The applicant is a company which in the past provided welding services. It has been averred by Mr. Scanlon that the applicant ceased carrying on business at the end of 2006 and instructed its accountants to take steps to have the company voluntarily struck off the register. However, that process was suspended when the applicant was notified of the claim the subject of the personal injuries proceedings. It is common case that the applicant has no assets. The most recent Abridged Financial Statements filed in the Companies Registration Office on behalf of the applicant, for the year ended 31st December, 2009, exhibited by Mr. O'Flaherty in his affidavit, confirmed that that is the case.

2.2 It is not disputed that in June 2006 the applicant had employer's liability cover with the respondent under a policy (the policy) which issued in January 2006. Two provisions of the policy are in issue, namely:

(a) clause 7 of the general policy conditions, which sets out the obligations of the applicant in relation to notifying the occurrence of an event which may give rise to liability under the policy; and

(b) clause 16 of the general policy conditions which deals with arbitration and provides:

> "Any dispute between the Insured and the Company on our liability in respect of a claim or the amount to be paid shall, in default of agreement, be referred within nine calendar months of the dispute arising, to an Arbitrator appointed jointly by the Insured and the Company in agreement, or failing agreement, appointed by the President for the time being of the Incorporated Law Society of Ireland or Northern Ireland and the decision of such Arbitrator shall be final and binding on both parties. If the dispute has not been referred to arbitration within the aforesaid nine-month period, then the claim shall be deemed to have been abandoned and not recoverable thereafter."

2.3 In June 2006 the applicant was engaged by T. Bourke & Co. Ltd. as a sub-contractor to provide welding services at a site in Drogheda which was owned by Becton Dickinson Medical Systems. Mr. Thomas Bateson was employed by the applicant at that time as "a casual employee" and he was working on the site on 6th June, 2006 as a pipe fitter. On 27th September, 2007 the applicant was notified by solicitors acting on behalf of Mr. Bateson that he had suffered personal injuries as a result of an accident which occurred on the site on 6th June, 2006 and that responsibility for the accident lay with the applicant and/or the main contractor and/or the site owner. Mr. Scanlon has averred that that letter was the first intimation to the applicant of the claim by Mr. Bateson. The personal injuries proceedings in the High Court were initiated by a Personal Injuries Summons (Record No. 2008/9030P), which issued on 3rd October, 2008 in which Mr. Bateson is plaintiff and T. Bourke & Co. Ltd. and Becton Dickinson & Co. Ltd. are co-defendants with the applicant. The applicant has instructed solicitors to enter an appearance and to deliver a defence in the personal injuries proceedings, which has been done.

2.4 There is a factual dispute as to when Mr. Scanlon first became aware that Mr. Bateson was involved in an accident. In the grounding affidavit he averred that he was aware that Mr. Bateson went home from work sick on 6th June, 2006, but he was unaware as to any accident suffered by him. The applicant's sub-contract at the Drogheda site was completed on 9th June, 2006 and Mr. Bateson did not continue in the employment of the applicant thereafter. The position of the respondent is that it first became aware of the claim of Mr. Bateson when the solicitors instructed by FBD Insurance Plc acting on behalf of T. Bourke & Co. Ltd. in the personal injuries proceedings notified it of the existence of the proceedings. At that stage the respondent investigated the matter and a statement was taken from Mr. Scanlon on 23rd February, 2009. In the statement, Mr. Scanlon acknowledged that he became aware of the "incident" involving Mr. Bateson on the day following the incident, 7th June, 2006. However, in his supplemental affidavit he has reiterated that the first and only letter of a claim by Mr. Bateson which he received was the letter of 27th September, 2007.

2.5 On receipt of the letter of 27th September, 2007 Mr. Scanlon advised First Ireland Risk Management, an insurance broker, which he contends was the respondent's agent, of the threatened litigation and the underlying incident on 15th October, 2007. The position of the respondent is that First Ireland Risk Management is not its agent. Further, Mr. Storey in his affidavit has exhibited a copy of a letter of 15th October, 2007 from First Ireland Risk Management to Mr. Scanlon sending him a claim form and asking him to return it along with any correspondence received in relation to the matter and also requesting that Mr. Scanlon write a reasonable explanation as to the delay in reporting the matter. The reason for the last requirement was set out: the respondent requires immediate notification of any incident, regardless of whether the insured is of opinion that it will lead to a claim or not. In his supplemental affidavit Mr. Scanlon has averred that he does not recall receiving that letter or ever being asked to complete a claim form.

2.6 In any event, as I have stated, the position of the respondent is that it was not in fact notified of the claim by Mr. Bateson until it received the letter from the solicitors for FBD Insurance Plc dated 13th February, 2009. Apparently, on receipt of that letter, the respondent investigated the claim. By letter dated 13th March, 2009 the respondent informed the applicant that its investigations into the claim were complete and that it would not be indemnifying the applicant due to a breach of the terms and conditions of the policy. A portion of clause 7 of the general policy conditions was then quoted, which provides:

> "In the event of any occurrence which may give rise to liability under this policy, and regardless of the likelihood or probability of a claim being brought under this policy:
>
> a. The Insured shall:
>
> i Notify the company immediately on becoming aware of any incident or as soon as practically possible (or in accordance with any agreement made with the company) and as soon as possible thereafter provide any documentation which the company may require with regards to the occurrence."

At that point in time, 13th March, 2009, liability on the part of the respondent was disputed, thus triggering the commencement of the nine calendar months period for initiating arbitration proceedings provided for in clause 16 quoted above.

2.7 What happened after that was that there was correspondence between the applicant's solicitors and the respondent. The full stream of correspondence does not appear to have been exhibited in the grounding affidavit. I assume that the explanation for the gaps is that letters emanating from the applicant were headed "Without Prejudice", although I note that some correspondence from the respondent headed "Without Prejudice" has been put before the Court. However, no issue was raised in relation to that. On the basis of the correspondence exhibited, it would seem that the first letter from the applicant to the respondent was dated 7th July, 2009. In the respondent's response of 8th July, 2009 the respondent stated that, due to a breach of the policy conditions, it was not indemnifying the applicant and referred to the letter of 13th March, 2009. In subsequent correspondence with the applicant's solicitor in 2009, the respondent adopted an approach consistent with the approach in the letter of 8th July, 2009. A similar approach was adopted in correspondence from the respondent to the applicant's solicitor in early 2010. The last letter exhibited in that stream was a letter of 19th March, 2010 from the respondent to the applicant's solicitor stating once again that they were not indemnifying the applicant.

2.8 By letter dated 12th August, 2010 the applicant's solicitor informed the respondent that the applicant intended issuing proceedings against the respondent but proposed to invoke the arbitration clause in the policy first and sought an extension of time to refer the dispute to arbitration. The explanation advanced by the applicant for not meeting the nine month limitation period in clause 16 was that Mr. Scanlon did not have the terms and conditions of the policy in his possession until the same were obtained by the applicant's solicitor from the respondent on 29th June, 2010. That is also disputed by the respondent. Mr. Storey has averred that the policy was forwarded both to First Ireland Risk Management and the applicant with letters dated 14th January, 2005, copies of which are exhibited. Mr. Scanlon in his second affidavit has averred that he did not get the "unsigned version", which, apparently accompanied a letter of 14th January, 2005 to him, and that the "signed version" dated 18th January, 2006 was ultimately provided to a solicitor on 29th June, 2010. It will be for the arbitrator to resolve that conflict, if the matter goes to arbitration.

2.9 While no correspondence subsequent to the letter of 12th August, 2010 has been exhibited, the request for an extension of time was obviously refused and, as I have stated at the outset, this application was initiated on 8th February, 2011.

3. Jurisdiction issue

3.1 Sub-section (1) of s. 4 of the Act of 2010 provides that, subject to subs. (2), the Arbitration Acts 1954 to 1998 are repealed. Sub-section (2) provides:

> "Subject to section 3, the repeal of the Acts referred to in subsection (1) shall not prejudice or affect any proceedings, whether or not pending at the time of the repeal, in respect of any right, privilege, obligation or liability and any proceedings taken under those 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."

In subs. (3) of s. 4, for the purposes of s. 4, "proceedings" is defined as including "arbitral proceedings and civil or criminal proceedings".

3.2 Sub-section (1) of s. 3 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."

As I have stated, the operative date, which was three months after the passing of the Act of 2010, was 8th June, 2010.

3.3 On a plain reading of s. 4, the repeal of the Act of 1954 is not effective in a situation which comes within subs. (2). On the application of subs. (2) to the situation which arises in this case, the question which has to be addressed is whether this application is in respect of a right of the applicant which was acquired before 8th June, 2010. It patently is, because the right which the applicant seeks to enforce is its right to request the Court to extend the time for referring to arbitration the dispute which has arisen as a result of the decision of the respondent not to indemnify the applicant. That decision was made on 13th March, 2009 and the right of the applicant to apply to Court for an extension of time was acquired at the expiration of the period of nine months provided for in clause 16. It is absolutely clear on the wording of subs. (2) that the repeal of the Act of 1954 does not prejudice or affect an application in civil proceedings under that Act in respect of a right which has been acquired before its repeal even though the application is "not pending" at the time of the repeal. There is even a drafting "belt and braces" aspect to subs. (2) in that regard, in that it expressly provides that the application may be "instituted" as if the Act of 1954 had not been repealed.

3.4 Accordingly, the Court has jurisdiction to hear this application. However, if the applicant is granted an extension of time and an arbitration is commenced in the future, that arbitration will be governed by the Act of 2010 in accordance with s. 3(1) thereof.

4. Section 45/authorities

4.1 Section 45 of the Act of 1954 provides as follows:

> "Where –
>
> (a) the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and
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> (b) a dispute arises to which the agreement applies,
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> the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, but without prejudice to section 42 of this Act, extend the time for such period as it thinks proper."

Section 42 of the Act of 1954 provides that the statutes of limitation shall apply to an arbitration under an arbitration agreement as they apply to actions in the Court. Section 3(1) of the Act of 1954 provides that, for the purposes of that Act, "an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other party or parties a written notice requiring him or them to appoint or concur in appointing an arbitrator …".

4.2 The Court was referred to two authorities on the application of s. 45.

4.3 Chronologically, the earliest authority was the decision of Hamilton J., as he then was, in *Walsh v. Shield Insurance* [1976-7] ILRM 218. At the core of that application was an employers' liability insurance policy, as here, and a personal injuries claim by a third party against the applicant. The respondent insurer repudiated liability on 13th October, 1970, whereupon a twelve month limitation period in which a dispute could be referred to arbitration commenced. The applicant insured, by letter dated 17th January, 1973, requested the respondent insurer to concur in the appointment of a named person as an arbitrator. The respondent insurer, by letter dated 23rd January, 1973, in response, pointed out that the period of twelve months had expired and that the applicant insured would have to apply to Court for permission to commence arbitration proceedings. The application under s. 45 was not, in fact, initiated until 2nd July, 1976. Hamilton J. held that there had been inexcusable delay on the part of the applicant insured in both commencing the arbitration proceedings and bringing an application under s. 45. However, he was satisfied that the respondent insurer had not been prejudiced by such delay stating:

> "The respondent has repudiated liability on foot of the policy on the grounds set forth in their letter dated 13th October, 1970 and if these grounds are valid, the delay has not in any way affected them or prevented them from being in a position to make the case before the arbitrator."

It is not clear from the judgment what grounds were set forth in the letter of 13th October, 1970. Further, Hamilton J. stated that he was satisfied that undue hardship would be caused to the applicant insured if an extension of time was not granted. However, he ordered that the applicant insured was to be responsible for the costs of the motion and was not to be awarded the costs of the arbitration if he was successful therein.

4.4 The other authority relied on is the decision of this Court in *O'Sullivan v. Eagle Star Insurance Co. Ltd*. [2006] IEHC 249. The policy in issue on that application was a "Homestar 25 Plus Policy". The claim in respect of which the claimants sought indemnity was a personal injuries action arising out of an accident which occurred on 12th July, 2002 brought by a third party plaintiff engaged in works in the premises covered by the policy. The respondent insurer declined to provide an indemnity by letter of 28th March, 2003 on the ground of failure to disclose a material fact – that the premises were not in good repair because there was no stairway fitted at the time – whereupon a twelve month period within which the matter could be referred to arbitration commenced. That case was complicated by the particular circumstances that the claimants also had cover with what was described as "business liability insurers", Quinn Direct. For present purposes suffice it to say that the claimants did not invoke the arbitration clause against the respondent insurer until 22nd December, 2005, whereupon the position adopted by the respondent insurer was that the claim was deemed to have been abandoned. The application under s. 45 was initiated on 15th June, 2006. The Court granted an extension of

time within which to commence the arbitration, subject to the imposition of conditions similar to the conditions imposed in *Walsh v. Shield Insurance*.

5. Conclusion

5.1 The only criterion stipulated in s. 45 for the exercise of the Court's jurisdiction to extend time is whether, in the circumstances of the case, undue hardship would be caused if an extension was not granted, although the Court has to condition any extension granted in a manner which meets the requirements of the justice of the case. What the Court has to form an opinion on is whether undue hardship would be caused to the applicant party to the arbitration agreement, in this case, the applicant, not to the claimant who is maintaining an action against the applicant, in this case the plaintiff in the personal injuries proceedings. Accordingly, I reject the argument advanced on behalf of the applicant that the Court should have regard to the fact that the plaintiff in the personal injuries proceedings may incur hardship, if the respondent does not indemnify the applicant, which has no assets.

5.2 I am of opinion that, in the circumstances of the case, undue hardship would be caused to the applicant if the extension of time was not granted. If the plaintiff in the personal injuries proceedings is successful against the applicant and is awarded damages, on the evidence before the Court it is clear that the company will not have assets to meet the award against it. In those circumstances, the plaintiff may have recourse to the mechanisms available under the Companies Acts code to render the officers of the company liable. The officers of the applicant company have complied with their obligations in relation to filing annual returns and the applicant company continues in existence, although it no longer trades. In the circumstances, it would inflict undue hardship on the applicant and its officers if it and they were to be deprived of an opportunity of challenging the respondent's repudiation of liability in an arbitral process. Whether the respondent was entitled to repudiate in reliance on clause 7 is not a matter for the Court. Therefore, I express no view on a submission made on behalf of the respondent that, given the likelihood that the underlying claim of the applicant will be unsuccessful in the light of the clear breach of condition 7, no undue hardship would ensue to the applicant if the application for an extension of time were refused. Moreover, I express no view on whether First Ireland Risk Management is or is not an agent of the respondent. It will be for the arbitrator to determine whether the applicant was in breach of clause 7 and, if it was, the consequences of such breach.

5.3 The jurisdiction conferred by s. 45 is discretionary. Therefore, it is appropriate to consider whether there is a basis other than the absence of undue hardship for refusing the application, in particular, whether the respondent will be prejudiced by delay or otherwise. On the facts of this application, I find that the respondent will not be prejudiced by the grant of an extension of time as sought by the applicant, particularly, in the light of the contention of the respondent that the likelihood is that the applicant will be unsuccessful at arbitration, which is averred to in Mr. Storey's affidavit. I think one is entitled to draw the inference from that averment that the respondent's advisers are not conscious of any prejudice caused to the respondent by the delay on the part of the applicant in initiating the arbitration, which will be concerned only with whether the respondent was entitled to repudiate on the ground of non-compliance with clause 7.

5.4 The issue which remains is what, if any, terms the Court should impose on the granting of an extension of time to meet the justice of the case. It was submitted on behalf of the respondent that the extension of time should only be granted on the basis that the applicant will not be entitled to any costs of the arbitration. Further, it was submitted that if an extension of time is granted, the Court should, pursuant to the provisions of s. 19 of the Act of 2010, require the applicant to give security for the respondent's costs in respect of the arbitration before the arbitration takes place. In relation to the latter submission, the jurisdiction to order a party to provide security for the costs of an arbitration is vested in the arbitral tribunal by virtue of s. 19 of the Act of 2010. Accordingly, in my view, it would not be appropriate to make the order extending time conditional upon the applicant providing for security for costs. The matter of security for costs may be pursued before the arbitrator, if the respondent considers it appropriate to do so.

5.5 In relation to the earlier submission, that the extension of time should be conditional on the applicant not being entitled to the costs of arbitration, even if successful, it is undoubtedly the case that the two authorities referred to above support that proposition. However, on reflection, I cannot see the logic of imposing such a condition. Arbitration is a process which, if it is invoked, as here, to afford a party to a contract redress for an alleged breach of contract, will obviate the necessity to institute legal proceedings to achieve that outcome. The position of the applicant is that it is entitled to be indemnified by virtue of the provisions of the policy. The position of the respondent is that it is not because of failure to comply with clause 7. If the applicant is correct, if the Court were to refuse to grant an extension, presumably, it would institute proceedings as was threatened in the letter of 12th August, 2010. While I am conscious that I am departing from the approach adopted in the authorities, I have come to the conclusion that, in the circumstances of this case, the Court should not, as a condition of granting an extension of time, pre-empt the arbitrator from determining where liability for the costs of the arbitration should lie. Accordingly, no such condition will be imposed.

5.6 However, as a condition of the grant of an extension of time, the applicant must be liable for the respondent's costs of this application, because it was the failure on the part of the applicant to comply with the time limit in clause 16 which necessitated this application.

6. Order

6.1 There will be an order extending the time for commencing the arbitration for one week from today, that is to say, 23rd May, 2011. The order will provide that the applicant is liable for the respondent's costs of the application, such costs to be taxed in default of agreement.