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High Court Examines Debt Recovery and Arbitration Agreements

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21st August 2019 | by

Does the commencement of summary proceedings to recover a debt constitute a repudiation of an existing arbitration agreement? Not necessarily, according to Ireland's designated Arbitration Judge, Mr Justice David Barniville.

Background

In 2007 Clancy Project Management Limited trading as Clancy Construction was appointed by Ocean Point Development Company Limited to construct a development in Co. Wexford. The contract entered into by Ocean Point and Clancy (the Contract) was in the standard RIAI form (2002 version) and contained an arbitration agreement (the Arbitration Agreement).

The Summary Proceedings in the High Court

On 17 October 2008 Clancy issued summary proceedings against Ocean Point to recover the sum of €768,379.45 which was certified as being due by an architect on 15 September 2008. While Ocean Point contended in correspondence in October 2008 that the matter was something which ought to be resolved by way of arbitration on foot of the Arbitration Agreement, that argument was not made in any of the affidavits exchanged during the course of the summary proceedings.

On 5 March 2009 a receiver was appointed over the assets of Ocean Point who initially contended that the works were defective, but did not impede Clancy's application for final judgment. On 10 December 2009 Clancy ultimately obtained an order for final judgment in the amount of €768,379.45. Ocean Point never paid the €768,379.45.

The Arbitral Proceedings

In early 2008 differences had arisen between Clancy and Ocean Point in respect of the quality of works completed by Clancy. They both agreed to refer the issues to conciliation in accordance with the Contract. The conciliation was unsuccessful and on 3 October 2008 the conciliator terminated the conciliation process. On 13 October 2008 Clancy took steps to commence arbitral proceedings on foot of the Arbitration Agreement in respect of the issues which had been the subject of conciliation. Clancy and Ocean Point agreed on the appointment of an arbitrator and on 20 January 2009 Clancy furnished a document to the arbitrator which set out the particulars of the dispute (as it alleged). The document did not contain reference to the outstanding payment of €768,379.45, which at that point was the subject of summary proceedings.

In circumstances where there was a disagreement in respect of the jurisdiction of the arbitrator and where a receiver was appointed over the assets of Ocean Point in March 2009, the arbitral proceedings were not advanced.

The Plenary Proceedings

On 5 September 2014 Ocean Point sued Clancy, claiming the quality of the works for which Clancy was responsible was "wholly inadequate" and alleging a loss in excess of €20,000,000.00.

Clancy argued that Ocean Point's claim ought to be dealt with by way of arbitration in accordance with the Arbitration Agreement. Clancy applied to the High Court for Order staying the plenary proceedings and referring the matter to arbitration pursuant to Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), which is incorporated into Irish law through the Arbitration Act 2010.

Opposing Clancy's application, Ocean Point argued that the commencement of debt recovery proceedings by Clancy in 2008 constituted a repudiation of the Arbitration Agreement and in turn, the commencement of plenary proceedings by it constituted an acceptance of the alleged repudiation. Ocean Point contended that the purported repudiation rendered the Arbitration Agreement inoperative.

The High Court Decision

Ocean Point Development Company Ltd. (in receivership) v Patterson Bannon Architects Ltd and others [2019] IEHC 311

Mr Justice Barnville stated that the court has no discretion to refer a matter to arbitration if the requirements of Article 8(1) of Model Law are satisfied.

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.

Judge Barnville expressed the view that whether or not the parties intended that any dispute arising ought to be covered by the Arbitration Agreement depended on the scope of the Arbitration Agreement. In this instance, Judge Barnville stated that the Arbitration Agreement explicitly referred to the withholding of an architect's certificate as a type of dispute which would fall within the scope of the Arbitration Agreement. In contrast, the Arbitration Agreement made no specific reference to a dispute in relation to the non-payment of a sum certified by an architect.

Judge Barnville noted that Clancy made clear that the summary proceedings concerned only the non-payment of a sum on foot of a specific architect's certificate and that the issues which it previously referred to arbitration were those issues which were the subject of a failed conciliation process. Judge Barnville determined that the commencement by Clancy of debt recovery proceedings did not demonstrate an intention to no longer be bound by the Arbitration Agreement. Referring to an English High Court decision, *BEA Hotels NV v Bellway LLC*, where the court concluded that a breach of an arbitration agreement by bringing other proceedings is only repudiatory if it is done in circumstances that "make very clear" that the party in question no longer intends to be bound to arbitrate. Judge Barnville confirmed that this decision accords with the position in Irish law.

Concluding that the commencement of debt recovery proceedings by Clancy did not constitute a repudiation of the Arbitration Agreement, Mr Justice Barnville stayed the plenary proceedings and referred the parties to arbitration in accordance with Article 8(1) of the Model Law.

Conclusion

It appears from this judgment that any attempt by a party to extricate themselves from an arbitration agreement in favour of litigation will be closely examined by Mr Justice Barnville, who is the judge designated to hear all arbitration related disputes coming before the High Court in Ireland. The judgment also serves as a reminder of the importance of giving due consideration to the scope of arbitration

agreements at pre-contract stage and the inherent risk of using boiler plate arbitration agreements not tailored to meet the specific needs of the contracting parties.

About the Author