Neutral Citation No. [2011] NIQB 74 | *Ref:* **WEA8259**

Judgment: approved by the Court for handing down | *Delivered:* **27/07/2011**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHEN IRELAND

QUEENS BENCH DIVISION (COMMERCIAL)

THE LONDONDERRY PORT AND HARBOUR COMMISSIONERS
Plaintiff

-v-

W S ATKINS CONSULTANTS LIMITED

and

CHARLES BRAND LIMITED
Defendants

_____

WEATHERUP J

[1] This is an application by the first defendant for a stay of proceedings pursuant to section 9 of the Arbitration Act 1996 and that the dispute which is the subject matter of this action be determined by arbitration. Mr Lockhart QC appeared for the first defendant and Mr Humphreys for the plaintiff.

[2] The action is brought by the plaintiff as owner and occupier of Londonderry Port and Harbour. The first defendant provides design and consultancy services to the construction industry. The second defendant is a construction contractor. The Statement of Claim pleads that the plaintiff engaged the first defendant on 17 February 2000 to provide design and consultancy services, prepare tender documentation and manage the tender process for the construction of a proposed new quay extension at the port.

[3] The construction works were commenced by the second defendant in March 2000 and concluded in 2001. In June 2006 the plaintiff became aware of excessive settlement in the area of the new quay extension. This settlement is alleged to have been caused by the breach of contract and negligence of the defendants. Consequently the plaintiff claims against the defendants for loss and damage sustained as a result of the settlement and the amount claimed is of the order of £1M.

[4] The Writ of Summons was issued on 29 February 2008. The first defendant entered its appearance on 10 April 2008. A Statement of Claim was served on 27 September 2010. On 16 March 2011, an Order was made on the application of the second defendant for a stay of the proceedings against the second defendant and the dispute between the plaintiff and the second defendant is to be determined by arbitration. The first defendant made this application on 12 April 2011.

[5] Upon this application by the first defendant two issues arise. First of all, did the contract between the first defendant and the plaintiff incorporate an arbitration agreement? Secondly, if the answer on the first issue is yes, did the first defendant take a step in these proceedings so as to prevent a stay of the proceedings?

[6] In relation to the first issue as to whether there was an incorporated arbitration agreement, the Statement of Claim refers to the agreement between the first defendant and the plaintiff as having been made on 17 February 2000. However the first defendant's affidavit refers to agreement by letter of 5 July 1999 from the first defendant to the plaintiff. That letter stated that following a 14 May Board decision "and your request to proceed with design etc. it was left that we should in due course clarify the fee arrangements which I reported in my 19 March letter and our Project Status Report of the same date." The letter then specified the scheme that was to proceed, the fee arrangements and the scope of the works and continued –

> "Our work over the years has rested on the 1981 ACE Agreement used in our original appointment. That document was revised in 1995 and we now propose for this and other work our services should be generally in accordance with the ACE Conditions of Engagement 1995 Agreement A(1)."

[7] A copy of the relevant ACE 1995 Conditions was enclosed with the letter. Clause 9 of the Conditions refers to 'Disputes and Differences' and provisions are set out under the headings 'Mediation' and 'Adjudication' and at paragraph 9.6 'Arbitration'. The arbitration clause provides -

> "If a dispute should arise between the Consulting Engineer and the Client …. the dispute shall be referred to the arbitration of a person to be agreed between the parties to act as arbitrator or failing agreement within one month of a notice by either party to the other requesting agreement to an arbitrator , to an arbitrator appointed by the President of the Chartered Institute of Arbitrators."

[8] The plaintiff contends that the letter of 5 July 1999 was purely a proposal put forward by the first defendant and that there is no evidence of any agreement to the 1995 ACE Conditions by the plaintiffs or that the plaintiff accepted the first defendant's proposal either orally or in writing. Accordingly the plaintiff contends that the 1995 ACE Conditions were not incorporated into the terms of engagement of the first defendant and there is no arbitration agreement in place between the parties. The first defendant counters that the reality is that the services were in fact rendered by the first defendant on the basis set out in the letter and at no stage did the plaintiff submit a counter proposal or in any way demur from the terms of the letter.

[9] Section 5 (1) of the 1996 Act provides that the provisions of the Act apply only where the arbitration agreement is in writing and any other agreement between the parties as to any matters is effective for the purposes of the Act only if it is in writing.

Sub-section (2) provides that there is an agreement in writing (a) if the agreement is made in writing (whether or not signed by the parties), or (b) if the agreement is made by exchange of communications in writing, or (c) if the agreement is evidenced in writing.

Sub-section (3) provides that where parties agree otherwise than in writing by reference to terms which are in writing they make an agreement in writing.

[10] Section 5 of the 1996 Act distinguishes between on the one hand the 'arbitration agreement' and on the other hand 'any other agreement'. However both have to be in writing. In the instant case the first defendant relies on the arbitration agreement in clause 9 of the ACE Conditions. Further the first defendant relies on an engagement agreement between the first defendant and the plaintiff based on the terms of the letter of 5 July 1999 and the ACE Conditions. The plaintiff says that the engagement agreement was on 17 February 2000, although the nature of that agreement has not been established and no agreement in writing has been produced.

[11] The plaintiff referred to RJT Consulting Engineers [2002] 1 WLR 2344 as to the meaning of 'evidence in writing' from which it was established that

the evidence in writing must relate to the whole of the agreement, that it is not sufficient for the purposes of the legislation that there was evidence in writing capable of supporting the existence of the agreement or its substance and that evidence in writing of the terms of the agreement is required. If the first defendant is correct in its reliance on the letter of 5 July 1999 and the 1995 ACE Conditions and the clause 9 arbitration agreement I am satisfied that the terms of the engagement agreement and of the arbitration agreement are in writing for the purposes of the 1996 Act.

[12] The dispute arises because it is common case that the plaintiff has not agreed the terms of the letter of 5 July 1999, either in writing or orally. However it is said by the first defendant that the plaintiff has agreed the written terms by conduct. The issue becomes whether the terms can be agreed by conduct and if so whether that has happened in the circumstances.

[13] The plaintiff referred to Trygg Hansa v Equitas (1998) Lloyds Law Reports 439. The case was concerned with whether general words of incorporation in an excess of insurance and re-insurance contract were effective to incorporate an arbitration agreement in a primary insurance contract, to which the answer was no. The first defendant referred to Habas Sinai v Sometal SAL [2010] EWHC 29 (Comm) which established that in principle general words were effective to incorporate standard terms, including an arbitration clause. Neither of the cases relied on goes directly to the issue that I have identified.

[14] An offer can be accepted by conduct. That general principle will apply in present circumstances unless the legislative scheme indicates otherwise. The 1996 Act requires an agreement in writing. Section 5(3) provides that where parties agree otherwise than in writing by reference to terms which are in writing they make an agreement in writing. Thus it is clear from section 5(3) that while the written terms must be in writing they may be agreed otherwise than in writing. There is nothing to exclude such agreement by conduct.

[15] Was there such agreement by conduct in the present case and was any such agreement by reference to the written terms, namely those referred to in the letter of 5 July 1999? The first defendant's affidavit states that the services were rendered on the basis set out in the letter. The plaintiff's affidavit states that there is no evidence of agreement or of acceptance of the letter either orally or in writing. The plaintiff's affidavit does not state that the services were rendered on any other specified basis. The plaintiff's pleadings do rely on an agreement of 17 February 2000 but the plaintiff has not identified that agreement or its terms.

[16] I conclude that the first defendant's services were rendered to the plaintiff on the basis that the letter of 5 July 1999 set out the terms of the

engagement agreement between the plaintiff and the first defendant, that the letter incorporated the 1995 ACE Conditions, that the terms of engagement were in writing and the arbitration clause was in writing, that the arbitration terms apply to the dispute that has emerged between the parties, that the plaintiff agreed the written terms of engagement by conduct in proceeding with the acceptance of the services of the first defendant without identifying any other basis for the provision and acceptance of the services, that the conduct was equally effective to incorporate the written 1995 ACE Conditions and the written arbitration clause included therein as to the resolution of disputes. Thus there was incorporation of the arbitration agreement. As the parties agreed otherwise than in writing by reference to terms which were in writing they made an agreement in writing for the purpose of section 5(3) of the 1996 Act.

[17] The second issue is whether the first defendant has taken a step in the proceedings such as would bar any stay of the proceedings. Section 9 of the 1996 provides that a party against whom legal proceedings are brought in respect of a matter under which the agreement is to be referred to arbitration may apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. Subsection (3) provides that an application may not be made by a person before taking the appropriate procedural step to acknowledge the legal proceedings against him *"or after he has taken any step in those proceedings to answer the substantive claim."*

[18] The Statement of Claim was served on 27 September 2010. The plaintiff relies on steps taken by the first defendant after that date. First of all the first defendant made a request for discovery on 30 September 2010 and that was complied with on 19 October 2010. Secondly, the first defendant wrote letters to the plaintiff on 16 November 2010 and 7 January 2011 in relation to a timetable for the service of the defence.

[19] The first defendant says in relation to the discovery request that it was a request under Order 24 Rule 11 for disclosure of documents referred to in the Statement of Claim in order for the plaintiff to investigate the claim made in the Statement of Claim. The plaintiff referred to an engagement agreement of 17 February 200 and the first defendant queried that agreement. The plaintiff contends that the steps taken were aimed at investigating the claim that there was an agreement of 17 February 2000.

[20] Further, in relation to the letters about the defence, the first defendant states that the plaintiff's solicitors wrote on 11 November 2010 requesting the first defendant's defence within seven days. The first defendant's solicitors replied stating that voluminous documentation was being copied to Counsel and the defence would be delivered within time. By affidavit the first defendant's solicitor avers that it was not intended to serve a defence without

sight of the agreement of 17 February 2000 referred to in the Statement of Claim. That intention is said to be borne out by the first defendant's solicitor's letter of 7 January 2011 which refers to the outstanding defence but also asks the plaintiff's solicitors to forward the terms of engagement of 17 February 2000. The first defendant's solicitors had a face to face meeting with their English based clients in London on 17 January 2011 at which the clients produced the letter of 5 July 2009 and it is stated that it was clear from the letter that the ACE Conditions 1995 formed the contractual terms of engagement between the plaintiff and the first defendant. This position was confirmed by the first defendant to their solicitors, who in turn spoke to the plaintiff's solicitors to that effect on 8 March 2011 and referred to the arbitration clause. On 24 March 2011 the plaintiff's solicitors requested a copy of the arbitration clause and on 12 April 2011 the first defendant's solicitors requested clarification of the terms of engagement that the plaintiff considered applied. No reply was received and the first defendant then moved on this application.

[21] Thus the Statement of Claim led to investigations as to the date and terms of the contractual arrangements between the parties. The first defendant admits that it took the steps referred to by the plaintiff but contends that they were taken to investigate the nature of the agreement in existence between the parties and that accordingly the first defendant did not take any steps to which section 9 of the 1996 Act applied, namely steps in the proceedings to answer the substantive claim.

[22] The plaintiff relied on Ford's Hotel v Bartlett (1896) AC 1 where the House of Lords refused an application for a stay on the ground that the defendant had taken out a summons for an extension of time, Parker, Gaines v Turpin (1918) 1 KB 358 where a stay was refused as the defendant had obtained discovery and Baker Hughes v Steadfast Engineering [2009] EWHC 3123 where the defendant had entered what was described as an extra judicial agreement to extend time for service of the defence.

[23] The defendant relied on Bilta (UK) Limited (in liquidation) v Nazir [2010] EWHC 1086 (Ch) where it was held that the making of an application to the Court by consent for an extension of time to serve the defence was not a step in the proceedings to answer the substantive claim. Sales J referred to the change of wording in the present legislation where the words "to answer the substantive claim" were added to the previous wording that referred to a step in the proceedings; noted that the present wording was drafted with the terms of the UNCITRAL Model Law on International Commercial Arbitration (1985) in mind; stated that the Model Law recognised the right to refer a dispute to arbitration provided the application was made before the party submitted his first statement on the substance of the dispute; was bound by a decision of the Court of Appeal in England that what counted as a step in the proceedings to answer the substantive claim continued to be governed by the

old case law that had applied before the addition of the words "to answer the substantive claim"; stated the relevant principle to be that a step in the proceedings must be one which "impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration"; used the language of estoppel, unequivocal representation, outright election and waiver in relation to the step taken by the defendant.

[24] Sales J found that it was entirely legitimate for the defendant to seek more information about the plaintiff's claim before deciding whether to submit to the Court or to move for arbitration and that it was sensible to seek more time for service of the defence in order to receive and consider such information. Seeking an extension of time for service of the defence could not objectively be construed as an election to waive any right to seek a stay or as an unequivocal representation that the defendant did not intend to contest the jurisdiction of the Court. The application to extend time was equally consistent with a desire to postpone an obligation to serve a defence until the defendant had a reasonable opportunity to decide whether or not to waive its right to arbitration.

[25] Similarly in the present case I am satisfied that the first defendant was investigating the nature and terms of the contractual arrangement between the parties. The request for discovery related to matters referred to in the Statement of Claim and included the contractual documents relied on by the plaintiff. The discussion of a timetable for delivery of the first defendant's defence was in the course of the ongoing exchange about the contractual documents. There was no unequivocal representation that the matter would proceed in Court and no election to waive any right to proceed by way of arbitration. The first defendant's actions were consistent with the investigative measures being undertaking to ascertain the terms of engagement between the plaintiff and the first defendant. While it would have been desirable if the first defendant had stated expressly in correspondence that the right to apply for a stay was reserved while the contractual arrangements were being investigated, that was not essential in order to maintain the right to make the application for the dispute to be determined by arbitration.

[26] Accordingly I am satisfied that the arbitration clause was incorporated into the contractual arrangements between the plaintiff and the first defendant and that the actions taken by the first defendant did not constitute steps in the proceedings to answer the substantive claim. I am satisfied that the Order should be made on behalf of the first defendant staying the proceedings and referring to arbitration.