**Neutral Citation No. [2015] NIQB 23** | *Ref:* **WEA9496**

*Judgment: approved by the Court for handing down* | *Delivered:* **08/01/2015**
*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION (COMMERCIAL)**

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**TRUNK FLOORING LTD**

**Plaintiff**

**v**

**HSBC ASSET FINANCE (UK) LTD**

**First Named Defendant**

**and**

**COSTA RICA SRL**

**Second Named Defendant**

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**WEATHERUP J**

[1] This is the plaintiff's application for removal of a stay of proceedings granted to the second defendant on 13 February 2013 for referral of the dispute to arbitration. Mr Gibson appeared on behalf of the plaintiff and Mr Stevenson on behalf of the second defendant.

[2] The Writ of Summons was issued on 20 March 2012. The Statement of Claim pleads that the second defendant is the manufacturer of plant and machinery used inter alia for the processing of timber flooring and has a registered address in Italy. In 2008 the plaintiff identified a machine manufactured by the second named defendant which would allow the plaintiff to manufacture two layer and three layer flooring using slats of pine instead of birch wood which had previously been used by the plaintiff. On 23 July 2008 the plaintiff entered into a Hire Purchase agreement with the first defendant in respect of the machine and a deposit of £73,000 was paid and credit was required for a balance of £384,000.

[3] The dispute between the parties arose because the machine failed to operate properly with the result that the plaintiff claims to have sustained loss by reason of

the defendant's negligence and breach of contract. The particulars of loss claim loss on the purchase of £193,000, increased costs incurred of £21,000, loss of profits on the North American market of £700,000 and an additional loss of profits described as gross margin of £325,000 with the total claim amounting to £1.249m.

[4] The contract contained an arbitration clause. The arbitration clause provided that any dispute arising out of the contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Wein by three arbitrators appointed in accordance with the Rules.

[5] Upon the plaintiff issuing the proceedings herein the second defendant applied for a stay of the proceedings under section 9 of the Arbitration Act 1996 so that the dispute would proceed to arbitration. Section 9 provides –

> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> (4) On an application under this section the court shall grant the stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

[6] On foot of the second defendant's application an Order was made on 13 February 2013 providing first of all that the plaintiff's action against the second defendant be stayed pending arbitration and secondly that unless the arbitration proceedings were commenced within 28 days the stay against the second defendant would be lifted.

[7] The second defendant submitted a request for arbitration before the International Court of Arbitration. Various steps were taken over the succeeding 18 months and the end result of that process was a ruling made by the International Court of Arbitration on 4 September 2014 as follows:

> "Following the [second defendant's] objection to the application of Article 36(6) of the Rules [which contained provisions as to the payment of costs], on 4 September 2014, the International Court of Arbitration of the International Chamber of Commerce ("Court") decided that the claims are considered withdrawn….. without prejudice to the reintroduction of the same claims in another arbitration."

[8] The plaintiff and the second defendant blame each other for the impasse that developed in the arbitration. Article 36 of the Arbitration Rules deals with costs. It is provided that after receipt of the request the Secretary General may request the claimant to pay a provisional advance in an amount intended to cover the costs of the arbitration until the terms of reference have been drawn up. As soon as practicable the court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses. The advance on costs fixed by the court shall be payable in equal shares by the claimant and the respondent. The amount of any advance on costs fixed by the court may be subject to re-adjustment at any time during the arbitration. In all cases any party shall be free to pay any other party's share of any advance on costs should such other party fail to pay its share. Where a request for an advance on costs has not been complied with and after consultation with the Arbitral Tribunal the Secretary General may direct the Arbitral Tribunal to suspend its work and set a time limit which much be not less than 15 days on the expiry of which the relevant claim shall be considered as withdrawn - as has happened in this case.

[9] Notice was given by the ICC on 15 May 2013 that having three arbitrators increased the Arbitral Tribunal's fees and expenses, for example travel and hotel expenses. They applied a cost calculator which was said to be available on the court's website which provided estimated fees. With one arbitrator the fee was $11,437 and with three arbitrators $34,311, where the claim made by the first defendant was valued at €100,000. It was stated that if the parties agreed to have one arbitrator the court should be informed as soon as possible.

[10] Upon notice being given of a single arbitrator the ICC issued a Notice on 8 October 2013 stating that the Secretary General had re-adjusted the provisional advance to $11,000 taking into account that there was to be a sole arbitrator. The second defendant had already paid $3,000 so there was a balance of $8,000 due to be paid for fees.

[11] On 7 November 2013 the ICC issued a further Notice whereby the ICC stated the amount in dispute to be $1.756m which was stated to be the £100,000 for the second defendant's claim and the £1.249m to represent the plaintiff's counterclaim. As a result the fees then due in respect of the arbitration amounted to $95,000, for which each party was liable to pay one half. Thus the payment then due by the second defendant was $36,500, the second defendant having already paid £11,000, and the plaintiff was due to pay $47,500.

[12] The parties were not satisfied with the amount they were being required to pay as fees in respect of the arbitration. On 26 May 2014 the ICC issued another Notice stating that the plaintiff had consistently refused to pay its share of the advance on costs and the ICC had invited the first defendant to pay the outstanding share of the advance on costs in its entirety. However despite its failure to pay its share of the advance on costs the plaintiff was not invited to make any payment to

the Secretariat. It was stated that this failure to date did not have any impact on the plaintiff's general obligation under the rules to pay 50% of the advance on costs.

[13] By letter of 11 August 2014 from the second defendant's legal representative to the ICC it was stated that the continuation of the dispute was completely uneconomical for the second defendant. The costs seemed arbitrary and unfair for both parties and the only benefiting party was the ICC. The contracting parties were said to be the great losers in the arbitration.

[14] The ICC issued the Notice of 4 September 2014 indicating that the claims were considered to have been withdrawn.

[15] The result was the present application by the plaintiff for removal of the stay.

[16] It is agreed between the parties that the grounds on which the stay might be removed are the grounds on which a stay might not be granted under section 9 of the Act, namely that the agreement -

(i) is null and void;

(ii) is inoperative; or

(iii) is incapable of being performed.

[17] *Russell on Arbitration* at paragraph 7.046 comments on each of the three grounds. As to the agreement being null and void it is stated that this will be the case where the arbitration agreement (as opposed to the matrix agreement) was never entered into or where it was entered into but subsequently has been found to have been void ab initio. That is not this case and the issue of the agreement being null and void is not applicable.

[18] Secondly, on the agreement being inoperative, *Russell* states that this applies where for example the arbitration agreement has been repudiated or abandoned or contained such an inherent contradiction that it could not be given effect. I will return to that issue in a moment.

[19] Thirdly on the agreement being incapable of being performed, *Russell* states that an arbitration agreement will be incapable of performance where, even if the parties were ready, willing and able to perform, the agreement could not be performed by them. The poverty of the proposed claimant will not render the arbitration agreement incapable of being performed nor will the inability of the party seeking the stay to satisfy any subsequent award.

[20] In the present case it is not stated that the parties find the fees unaffordable but it is apparent that, while they may be able to afford the fees, they regard the fees as exorbitant or that they are such fees as should not be paid in order to facilitate the

arbitration agreement. Has that circumstance rendered the arbitration agreement incapable of performance? Paczy v Haendler and Natermann GmbH [1981] 1 Lloyds Reports 302, a decision of the Court of Appeal of England and Wales, concerned an arbitration clause in proceedings that had been commenced for breach of contract and misuse of confidential information. The stay having been granted for arbitration the plaintiff later sought a removal of the stay on the ground that his poor financial circumstances meant that he was unable to commence arbitration proceedings and the defendant would not do so. It was held the words 'incapable of being performed' did not cover the situation where one party to the agreement was unable to carry out his part of the agreement. The distinction was drawn between a 'party' being incapable of performing the agreement as opposed to the 'agreement' being incapable of being performed. It is the agreement that must be incapable of performance.

[21] Further, it was held that there was no obligation on the defendant to initiate the arbitration proceedings or to finance those proceedings in the event that the plaintiff was unable to pay. Failure to do so could not amount to repudiation of the arbitration agreement. In the course of the judgment Buckley LJ stated:

> "In my judgment, on the true construction of these words, 'incapable of being performed' relates to the arbitration agreement under consideration. The incapacity of one party to that agreement to implement his obligations under the Agreement does not, in my judgment, render the agreement one which is incapable of performance….
>
> The agreement only becomes incapable of performance in my view if the circumstances are such that it could no longer be performed, even if both parties were ready, willing and able to perform it. Impecuniosity is not, I think, a circumstances of that kind.
>
> It has been suggested by Mr Budd that the defendants here are under an obligation to provide the whole of the deposit because of the plaintiff's inability to provide any part of it and because the defendants have entered into the arbitration agreement (clause 12 of the contract). I can see no good basis, if Mr Budd will forgive me saying so, for that submission. Still less do I think it can be said that the defendants in failing to offer to provide the deposit have been guilty of a repudiatory breach of the arbitration agreement, when, as Mr Rokison points out, they have not in fact been asked to provide any part of it by anybody."

[22] Thus the circumstances of the present case do not amount to the agreement being incapable of being performed.

[23] I return to whether the agreement has become inoperative. *Russell's* two examples are where the agreement has been repudiated or abandoned. As already noted in Paczy the refusal of one party to pay the fee that might be due for the purposes of proceeding with the arbitration does not in itself amount to a repudiation. From Downing v Al Tameer [2002] EWCA Civ 721 a number of propositions may be stated.

First, an arbitration agreement is a separate contract which can survive the ending of the obligation of the parties to perform the primary obligations created by the main contract in which the arbitration agreement is contained or to which it relates (paragraph 21).

Second, the obligation of the parties to perform the arbitration agreement would remain in force, despite its repudiation by the defendant, unless and until the claimant communicated to him that he accepted such repudiation as bringing to an end the obligations of both parties to perform the arbitration agreement, it being necessary for such acceptance to be unequivocal (paragraph 21).

Third, conventional contractual principles must be applied, albeit those principles may not be easy to apply in a case of a secondary contract, which requires separate consideration from the main contract to which it is collateral or ancillary, which is said to have been repudiated (paragraph 25).

Fourth, the Court approaches the question of whether or not a party has lost the right to arbitrate under the secondary contract by applying the traditional principles of the law of contract and in particular the doctrine of repudiation whereby if one party, by words or conduct, demonstrates an intention no longer to be bound by the contract it is open to the other party to accept such demonstration as a repudiation and thereby to bring the contract to an end (paragraph 25).

[24] Thus it is not sufficient that one party may have treated the arbitration agreement as not binding on them. There must be acceptance of the repudiation by the other party. I do not accept that the circumstances of the present case can be said to be such that the agreement has been repudiated or that any repudiation has been accepted.

[25] Finally, as to whether the agreement has become inoperative by having been abandoned? In Allied Marine Transport Ltd v Vale do Rio Doce Navegacao S.A.[1984] 1 WLR 925 a dispute arose between the charterers and the owners of a vessel and in 1976 each party appointed an arbitrator. The matter did not proceed and in 1981 the charterers served points of claim in the arbitration. Next, the charterers appointed another arbitrator in respect of the same dispute intending to institute a fresh arbitration should it be held that the original arbitration had been

abandoned. The owners sought an injunction restraining the charterers from taking any further steps in the arbitration. It was held that, in the absence of special circumstances, an offer to abandon the reference to arbitration and the acceptance of such offer could not be inferred from the silence and inactivity of the parties so that there was no binding agreement between them whereby the charterer was obliged to treat the claim as having been abandoned.

[26] The passage of time without any step in arbitration does not by itself constitute the abandonment of an arbitration agreement. Lord Brightman in The Hannah Blumenthal [1983] 1 AC 854 stated that to enable one party, the sellers, to rely on abandonment it was enough for them to show that the buyers so conducted themselves as to entitle the sellers to assume *and that the sellers did assume* that the contract was agreed to be abandoned sub silentio. If one party, O, so acts that his conduct, objectively considered, constitutes an offer, and the other party, A, believing that the conduct of O represents his actual intention, accepts O's offer, then a contract will come into existence, and on those facts it will make no difference if O did not in fact intend to make an offer, or if he misunderstood A's acceptance, so that O's state of mind is, in such circumstances, irrelevant.

[27] On the question as to whether or not a binding agreement to abandon could be inferred from silence and inaction Robert Goff LJ stated that –

> "In the absence of special circumstances, silence and inaction by a person to a reference are, objectively considered, just as consistent with him having inadvertently forgotten about the matter; or with his simply hoping that the matter will die a natural death if he does not stir up the other party; or with his office staff, or his agents, or his insurers, or his solicitors, being appallingly slow. If so, there should, on ordinary principles, be no basis for an inference of an offer. Exactly the same comment can be made of the silence and inaction of the other party; for the same reasons, there appears to be no basis for drawing the inference of an acceptance in response to the supposed offer, still less than the communication of that acceptance to the offeror."

[28] Turning to the present case I do not consider this is a case of silence. The arbitration proceedings have been treated as withdrawn by the ICC by their recent letter to that effect. Neither party to the arbitration intends to proceed. The plaintiff and the second defendant are not now acting under the arbitration agreement. Both the plaintiff and the second defendant accept that the other party will not act under the arbitration agreement. The opportunity has been available for them to do so and they have allowed that opportunity to be withdrawn. The concept of abandonment as described by Lord Brightman applies in the circumstances of the present case. The parties have abandoned the arbitration agreement. That being so I am satisfied

that on the ground of abandonment the agreement has become inoperative and the stay on proceedings should be removed. Accordingly, I will remove the stay and the dispute will continue in the present proceedings.