Neutral Citation [2013] IEHC 286

THE HIGH COURT

[2010 No. 11587P]

BETWEEN

MOUNT JULIET PROPERTIES LIMITED

PLAINTIFF

AND

MELCARNE DEVELOPMENTS LIMITED TRADING AS WALSH BROTHERS, CAMPBELL CONROY HICKEY PARTNERSHIP, McCARRICK WOOD LIMITED TRADING AS McCARRICK WOOD CONSULTING ENGINEERS AND HENDRICK RYAN & ASSOCIATES LIMITED

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 19th day of June, 2013.

The applications in the context of the proceedings and procedural background

1. These proceedings have arisen out of the development of part of the Mount Juliet Estate in County Kilkenny, specifically, the development from around 2006 of ten residential dwelling houses on the site of the old Equestrian Centre, which were to be known as "The Walled Garden Lodges". The development took place and the ten houses were built and sold between November 2006 and June 2008.

2. The involvement of the parties to the proceedings in that development was as follows:

> (a) The plaintiff was the developer, in the sense that it was associated with the company which was the legal owner of the land, Mount Juliet, it applied for and obtained planning permission for the development, it retained the defendants who were involved in the development and it was the vendor of the houses to the purchasers thereof.
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> (b) The first defendant was engaged as a building contractor to carry out the development. The Court was informed that the first defendant is now in liquidation.
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> (c) The second defendant, a firm of architects which had been retained in and around the late 1990s to act as the plaintiff's retained architect for various projects on the Mount Juliet Eestate, was retained to design and procure the construction of the development. The plaintiff's position is that the other defendants were retained on the recommendation of the second defendant.
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> (d) The third defendant, which the evidence before the Court indicates has been in creditors' voluntary liquidation since 21st September, 2011 although this is not obvious from the title to the proceedings, which traded as consulting engineers, was retained by the plaintiff to provide mechanical and electrical engineering services for the development.
>
> (e) The fourth defendant, which trades as consulting structural engineers, was retained by the plaintiff to provide structural engineering services in relation to the development.

3. These proceedings were initiated by a plenary summons which issued on 17th December, 2010. The primary relief sought in the general endorsement of claim on the plenary summons is a declaration that the defendants and each of them are obliged, jointly and severally, to fully indemnify the plaintiff in respect of all claims, damages, losses, costs, expenses, and outlay of every nature whatsoever, together with continuing interest thereon, that the plaintiff, as vendor, has suffered or will hereafter suffer arising from loss, damage, inconvenience and expense suffered by the plaintiff and by the purchasers of the ten dwellings in the development and claims made by the purchasers against the plaintiff arising therefrom. In addition, the plaintiff claims damages for negligence, breach of duty, breach of contract and injury to reputation and damages for misrepresentation and negligent misstatement. Damages are also claimed against the four defendants individually. For instance, in the case of the third defendant, damages are claimed in respect of loss suffered by the plaintiff as a result of the breach of contract and/or negligence and/or breach of duty of that defendant arising out of its failure to carry out its obligations "as Mechanical

and Electrical Engineers". As counsel for the third defendant pointed out, the basis of the contract is not stated.

4. An alternative claim in these proceedings is for damages in relation to dwelling houses Nos. 1, 3, 4, 5, 6, 7, 8 and 10 of the development on the basis that the liability of the defendants and each of them in respect of properties No. 2 and No. 9 is the subject of separate proceedings, namely:

> (a) Proceedings by Jon O'Sullivan and another, as plaintiffs, and the plaintiff, the second defendant, and the third defendant, as defendants, and in which the first defendant and the fourth defendant were joined as third parties (the O'Sullivan Proceedings), which were instituted in this Court under Record No. 2008 No. 7476P.
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> (b) Proceedings by John J. Enright and another, as plaintiffs, and the plaintiff and Mount Juliet, as defendants, in which the first defendant, the second defendant, the third defendant and the fourth defendant have been joined as third parties (the Enright Proceedings), which were instituted in this Court under Record No. 2009 No. 2444P.

As between the plaintiffs therein and the plaintiff in these proceedings, the O'Sullivan Proceedings and the Enright Proceedings have been settled. However, the issues between the defendants *inter se* and between the defendants and the third parties are proceeding.

5. On 8th February, 2011, the second defendant served notice of contribution and indemnity in these proceedings on the first defendant, the third defendant and the fourth defendant. On 9th March, 2011, the first defendant served a notice of contribution and indemnity in these proceedings on the second defendant, the third defendant and the fourth defendant.

6. On 21st February, 2011, the fourth defendant entered an appearance in these proceedings. No statement of claim has been delivered by the plaintiff in these proceedings.

7. The next step in these proceedings taken by the fourth defendant was to issue the application which is the subject of this judgment on 22nd June, 2012. In the notice of motion the fourth defendant sought an order pursuant to Article 8 of the Model Law and the Arbitration Act 2010 (the Act of 2010) referring the plaintiff and the fourth defendant in these proceedings to arbitration on the grounds that the disputes between them the subject of the proceedings are the subject of an arbitration agreement. At the time that the notice of motion was issued the fourth defendant was awaiting judgment on an application to set aside the third party notices against it in the O'Sullivan Proceedings and in the Enright Proceedings. However, subsequently, by order of the Court (Murphy J.) made on the 10th day of July, 2012 the application of the fourth defendant to set aside the third party notices was refused.

8. By order of the Court (Murphy J.) made in these proceedings on 9th July, 2012, it was ordered that these proceedings and the O'Sullivan Proceedings and the Enright Proceedings be consolidated. It appears that the title to the O'Sullivan Proceedings may be incorrect in that order.

9. The third defendant entered an appearance in these proceedings on 4th September, 2012. On the same day the third defendant issued the application which is the subject of this judgment, in which it sought:

> (a) an order referring these proceedings as between the plaintiff and the third defendant to arbitration pursuant to s. 6 of the Act of 2010 and/or pursuant to Article 8 of the Model Law on the grounds that the matter between the plaintiff and the third defendant is a matter which is the subject of an arbitration agreement which the plaintiff and the third defendant had agreed in a written agreement (within the meaning of the Act of 2010); and/or
>
> (b) an order pursuant to the inherent jurisdiction of the Court staying the proceedings pending arbitration.

10. I will now deal with the factual basis of each of those applications, in the order in which they were initiated and in the order in which they were heard.

The factual basis of the application of the fourth defendant

11. There is no consensus as to when the engagement of the fourth defendant by the plaintiff commenced, but it was probably in late 2003. What is clear is that prior to its involvement in the development of the Walled Garden Lodges, the fourth defendant had been involved in a large number of projects at the Mount Juliet Estate, approximately twenty two in all. The fourth defendant's involvement in relation to the Walled Garden Lodges commenced at planning stage, but its involvement in the planning

application in July 2004 was limited. Its involvement continued until November 2007 when, on completion of the structural work on the site, it issued an Opinion on Compliance.

12. On 13th October, 2004, Brian Hendrick, on behalf of the fourth defendant, sent an e-mail to Patrick Hegarty, then Managing Director of the plaintiff, the purpose of which was expressed to be to confirm the fourth defendant's "appointment as Civil & Structural Engineers of various future projects at Mount Juliet". The projects were listed and included the Walled Garden Lodges. In the e-mail it was stated as follows:

> "Engineering services are provided in accordance with the standard conditions in Agreement SE 9101 as published by the Institution of Engineers of Ireland. Engineering services include all necessary designs, specifications, drawings and schedules for the proper tendering and construction of the project. Monitoring of the construction will be carried out by visits of inspection in the normal manner. Form BRSE 9101 'Opinion on compliance with building regulations' will be provided on completion on the engineering aspects of the works."

The fees proposed by the fourth defendant were then set out. The e-mail ended by referring to a meeting planned for the following Friday and a statement that the fourth defendant trusted that the details set out met the plaintiff's approval. As counsel for the fourth defendant put it, there was no demurrer by the plaintiff from the proposal in the e-mail. The fourth defendant proceeded to furnish the services in question.

13. By letter dated 15th December, 2006 to the plaintiff, which was addressed to Mr. Hegarty, Mr. Hendrick wrote on behalf of the fourth defendant in relation to fees for engineering services and addressed some detail in relation to fees. What is of particular significance is that the last paragraph of the letter stated:

> "Engineering services are provided in accordance with the standard conditions in Agreement SE 9101 as published by the Institution of Engineers of Ireland."

Enclosed with the letter were a number of Fee Advice Notes, one of which related to the Walled Garden Lodges.

14. The Opinion on Compliance in relation to the Walled Garden Lodges was issued by the fourth defendant on 6th November, 2007. The Opinion was in the form which had been proposed in the e-mail of 13th October, 2004: Form BRSE 9101, which designation appeared at the top of the form. There are several references to Agreement SE 9101 in the form, the first indicating that the form is for use where a consulting engineer is appointed under "Conditions of Engagement Agreement SE 9101".

15. The version of "Conditions of Engagement Agreement SE 9101" relied on by the fourth defendant is the revised version of April 2000 as reprinted in August 2005, although it is common case that an agreement in this form was not executed by the plaintiff and the fourth defendant. It is clear on the evidence that this is the industry standard for consulting engineers engaged in structural engineering work, which is published by the Institution of Engineers of Ireland in agreement with the Association of Consulting Engineers of Ireland. There is a model form Memorandum of Agreement appended to the Agreement for execution by the client and the consulting engineer. As has been stated, it is common case that Agreement SE 9101 was not executed by the plaintiff and the fourth defendant. There are four pages of a Foreword and a Preamble leading into the Agreement. The Agreement itself is a comprehensive document which sets out the rights and obligations on each side. Clause 4 is headed "Settlement of Disputes". Clause 4.1 provides that, in the event of any dispute or difference arising between the parties, either party may request conciliation/mediation. Clause 4.2 deals with arbitration and provides as follows:

> "In the event of any dispute or difference arising between the parties in connection with or arising from this Agreement then either party may require that the matter be referred to the arbitration of a person to be agreed upon between the parties or, if the parties fail to appoint an arbitrator within one calendar month of either party serving on the other party a written notice to concur in the appointment of an arbitrator, a person to be appointed on the application of either party by the President for the time being of the Institution of Engineers of Ireland. . . .
>
> The award of the arbitrator shall be final and binding on the parties and any reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Acts 1954 – 1980 or any statutory re-enactment or amendment thereof for the time being in force.

16. In the pre-litigation interaction between the plaintiff and the fourth defendant, the fourth defendant's solicitors wrote to the plaintiff's solicitors by letter dated 26th November, 2010 denying liability fully but

stating, without prejudice to that position, that, in the event that the plaintiff was intent on pursuing the fourth defendant, the fourth defendant elected to invoke Clause 4.2 of its terms of retainer, the Conditions of Engagement Agreement SE 9101, pointing out that, in accordance with that clause, the dispute on liability should be referred to a private arbitration to be held between the respective clients. In response, the plaintiff's solicitor sought a copy of Agreement SE 9101. Eventually, by letter dated 6th January, 2011, the plaintiff's solicitors informed the solicitors for the fourth defendant that they did not accept the fourth defendant's position in relation to the referral of the matter to arbitration under Agreement SE 9101. By further letter dated 15th June, 2011, referring to Article 7 of the Model Law and also referring to the fact that there was no reference to an arbitration clause in the e-mail of 13th October, 2004, the plaintiff's solicitors asserted that the terms of Agreement SE 9101 do not govern the contractual relationship between the plaintiff and the fourth defendant and that the arbitration clause contained in Agreement SE 9101 was not binding on the plaintiff. It was that letter which triggered the application of the fourth defendant.

17. Mr. Hegarty swore an affidavit in response to the application of the fourth defendant on 30th July, 2012 in which he averred that he was at no stage aware of any of the terms contained in Agreement SE 9101 prior to the dispute and he was never provided with a copy of that document. At no point was any reference made to arbitration or to the understanding of the fourth defendant that any dispute in relation to the subject matter of the arrangement between the plaintiff and the fourth defendant would be referred to arbitration. Mr. Hegarty averred that he never agreed to any disputes being referred to arbitration. In essence, the position of the plaintiff is that the arbitration clause contained in Agreement SE 9101 was never sufficiently identified to make it part of the agreement between the parties and that its officers were never aware of the contents thereof or the arbitration clause contained in it.

18. The fourth defendant has exhibited a report dated 1st September, 2010 furnished by Punch, Consulting Engineers, to the plaintiff's solicitors which was obviously exhibited in the context of the applications by the fourth defendant to set aside the third party notices in the O'Sullivan Proceedings and the Enright Proceedings, in which it was stated by Punch that the fourth defendant's civil and structural agreement with the plaintiff was based on providing engineering services in accordance with the standard conditions in Agreement SE 9101, which statement is obviously based on the e-mail dated 13th October, 2004. The opinion of Punch in relation to the contractual relationship of the fourth defendant and the plaintiff is not material.

The factual basis of the application of the third defendant

19. The professional relationship between the plaintiff and the third defendant dated back to approximately 2003. The third named defendant was retained on numerous occasions as Consulting Mechanical and Electrical Engineers in respect of a number of different developments at the Mount Juliet Estate. It is the position of J. Paul Woods, a former director and secretary of the third defendant, that in respect of each of those projects it was clearly understood by all the parties that the retention of the third defendant by the plaintiff was pursuant to the terms of IEI Agreement ME 9101. As regards the Walled Garden Lodges, by letter dated 21st June, 2006 to the plaintiff, which was marked for the attention of Mr. Hegarty, the third defendant submitted a fee proposal in relation to that project. The letter continued:

> "Our fee relates to the design, preparation of drawings and specification, reviewing tenders and reporting, as generally set down in the Agreement ME 9101 in relation to Mechanical and Electrical Services.
>
> We offer to provide Consulting Engineering design services on the above basis, including negotiations with the Utility Services Companies where required, full cost control of the services sub-contracts, monitoring of the installations on site and attendance at site meetings as required based on a lump sum fee of €32,500 excluding VAT but inclusive of expenses.
>
> We trust the above offer is acceptable however if you require any further information please do not hesitate to contact the undersigned."

20. The plaintiff raised no queries in relation to that letter and did not seek any copy of Agreement ME 9101.

21. The third defendant proceeded to provide the services as set out in the letter of 26th June, 2006. On 1st November, 2006 the plaintiff paid the third defendant seventy per cent of the agreed fee of €32,500.

22. On 7th March, 2008, the third defendant issued its "Opinion on Compliance and Building Regulations" to the plaintiff in respect of the Walled Garden Lodges project. In outlining the professional services provided, it was stated in the Opinion that the services had been provided by the third defendant in accordance with Agreement ME 9101 (October 1991 Edition).

23. The version of Agreement ME 9101 put before the Court is dated October 1991. It is described in the front page as being "for the appointment of consulting engineers where engineering services and associated equipment for building and other structures (abridged duties)". Like Agreement SE 9101, it contains a foreword and a preamble and the actual agreement itself is comprehensive. Clause 20 deals with settlement of disputes. Clause 20.1 envisages either party requesting conciliation or mediation. Clause 20.2 deals with arbitration and is in the same terms as Clause 4.2 of Agreement SE 9101. It is common case that an agreement in the form of Agreement ME 9101 was not executed by the plaintiff and the third defendant.

24. In response to the application of the third defendant, Mr. Hegarty swore an affidavit on 27th September, 2012 in which he averred that Agreement ME 9101 was not attached to the letter of 21st June, 2006. He further asserted that the letter deals with fee arrangements only and that the third defendant was retained "through the good offices" of the second defendant and that the only issues that were negotiated between the parties related to fee arrangements. Mr. Hegarty averred that he was not familiar with Agreement ME 9101 and was not aware of its terms. At no point was any reference made to arbitration or to the understanding of the third defendant that any dispute between the plaintiff and the third defendant in relation to the subject matter of their arrangement was to be referred to arbitration. As far as he was concerned he never agreed to refer disputes to arbitration. No copy of Agreement ME 9101 was ever furnished to the plaintiff by the third defendant. Similarly to the approach adopted in relation to the application of the fourth defendant, the position of the plaintiff in relation to the third defendant's application is that the arbitration clause contained in Agreement ME 9101 was never sufficiently identified to make it part of the agreement between the parties.

25. An additional point has been made on behalf of the plaintiff in relation to the application of the third defendant, that is to say, the third defendant has been guilty of delay in bringing the application. In this connection, the plaintiff has exhibited a letter dated 9th February, 2011 from solicitors for the third defendant to the plaintiff's solicitors, which post-dated the service of the plenary summons in these proceedings on the solicitors for the third defendant. In that letter, the solicitors for the third defendant stated:

> "We were surprised that you issued High Court proceedings given the earlier exchange of correspondence between us, specifically your letter of 5th October, 2010 suggesting arbitration and our response of 3rd November, 2010, stating that while [the third defendant] has no objection in principle to arbitration, we would suggest mediation in the first instance (as provided for in the IEI Agreement ME 9101, which governs the agreement between our respective clients). We note that you have not yet responded to our letter of 3rd November, 2010 and we would be grateful for a response now."

The delay point being made on behalf of the plaintiff is that the third defendant did nothing until 4th September, 2012.

26. The full sequence of correspondence between the plaintiff's solicitors and the solicitors for the third defendant has been exhibited in an affidavit sworn on 26th April, 2013 by Aoife Gaughan, a solicitor in the firm acting for the third defendant. This discloses the following:

> (a) in the letter of 3rd November, 2010 the solicitors for the third defendant suggested three potential mediators and sought a response to their request that their dispute be mediated;
>
> (b) the letter of 9th February, 2011 referred to above requested the plaintiff's solicitors, if the plaintiff was not prepared to mediate the matters in dispute, to set out the reasons why, referring to Order 99, rule 1A of the Rules of the Superior Courts;
>
> (c) there was no response to the letter of 9th February, 2011 and a reminder was sent by the solicitors for the third defendant on 23rd February, 2011;
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> (d) a further reminder was sent by the solicitors for the third defendant on 15th June, 2012 in which it was made clear that the third defendant intended to rely on the dispute resolution clauses in Agreement ME 9101; and
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> (e) the letter of 15th June, 2012 did elicit a response, which was dated 20th June, 2012, in which it was stated that the plaintiff did not accept that Agreement ME 9101 was binding on the plaintiff.

27. There are two other factual matters which it is appropriate to record in relation to the application of the third defendant. The first is that in the O'Sullivan Proceedings and in the Enright Proceedings the third

defendant served notice for particulars on 6th December, 2010. The second is that counsel for the plaintiff placed some emphasis on a suggestion made by the plaintiff's solicitors in a letter dated 5th October, 2010 to the solicitors for the third defendant in relation to arbitration. In that letter it was stated as follows:

> ". . . as an alternative to court proceedings against your client and the other parties named herein, our client believes that a single arbitration, at which all the disputes (in relation to all the homeowners' claims) would be dealt with, would be a much more efficient and cost effective manner in which to deal with the matter. Accordingly, we now call upon your client (and we are also calling upon the other parties named herein) to confirm within 7 days from the date hereof, that your client agrees to the referral of all the disputes (in relation to all the homeowners' claims) as between all the parties referred to in this correspondence to one single arbitration before a single arbitrator to be appointed by agreement between the parties."

The response of the solicitors for the third defendant was the letter of 3rd November, 2010 referred to earlier, in which all liability on the part of the third defendant was denied and mediation was suggested. In any event, the plaintiff appears to have abandoned the proposal to have a single arbitration, apparently because it does not have an arbitration agreement with the second defendant.

28. The evidence indicates that IEI Agreement ME 9101 is an industry standard form of terms and conditions used by mechanical engineers.

The legislation

29. Article 8(1) of the Model Law is invoked by both the fourth defendant and the third defendant. While the third defendant also invoked the Court's inherent jurisdiction, the reality is that little emphasis was placed on it.

30. The Model Law has force of law in the State by virtue of s. 6 of the Act of 2010 and applies to arbitrations under arbitration agreements. The text of the Model Law is set out in Schedule I to the Act of 2010. In the interpretation section in the Act of 2010 it is provided that the expression "Arbitration agreement" shall be construed in accordance with Option 1 of Article 7.

31. Section 8 of the Act of 2010 deals with the construction of the Model Law and also the construction of arbitration clauses. Sub-section (1) provides that judicial notice shall be taken of the *travaux préparatoires* of the United Nations Commission on International Trade Law and its working group relating to the preparation of the Model Law. Sub-section (2) provides that the *travaux préparatoires* may be considered when interpreting the meaning of any provision of the Model Law and shall be given such weight as is appropriate in the circumstances.

32. Section 11 of the Act of 2010 provides that there shall be no appeal from any court determination of a stay application pursuant to Article 8(1) of the Model Law. Article 8(1) provides as follows:

> "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."

The core issue which arises on the applications before the Court is whether there is an arbitration agreement between the plaintiff and the fourth defendant and between the plaintiff and the third defendant.

33. Option 1 of Article 7, insofar as is relevant for present purposes, provides as follows:

> "(1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (2) The arbitration agreement shall be in writing.
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> (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) . . .

(5) . . .

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."

34. The evolution of the definition of arbitration agreement to its current form in the 2006 version of the Model Law is outlined in Binder's *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd Ed., 2010). Paragraph (6) of Article 7 of the 2006 version is a modified version of the third sentence of paragraph (2) of Article 7 of the 1985 version, in respect of which Binder makes the following observation (at para. 2 – 32):

> "The third sentence of art. 7(2) is concerned with a contract containing a reference to a document that contains an arbitration clause. Provided that the main contract is in 'writing' and that the reference 'is such as to make that clause part of the contract', the arbitration agreement is valid. The necessity of including this provision arose from problems and divergent court decisions on the issue in the context of the New York Convention.
> The *travaux* explain that it is sufficient if the reference only refers to the document; specific mention of the arbitration clause is not necessary . . .."

The last sentence in that quotation is of particular significance. Counsel for the plaintiff had to acknowledge that, having regard to the *travaux*, there does not have to be explicit reference to the arbitration clause in a document incorporated in a contract. 35. That remains the position under paragraph (6) of Article 7 in the 2006 version, in respect of which Binder states as follows (at para. 2 – 073):

> "Article 7(6) is a slightly modernised version of a concept already contained in art. 7(2) third sentence of the original 1985 version of the Model Law. The Working Group was mindful to avoid departure from the original text, which was 'widely understood as deferring to applicable law to determine what linkage between the reference and the clause was needed to incorporate the clause into the contract' [A/CN.9/592, para. 71].
>
> In its final note before submission of the wording to the Commission, the Secretariat summarised the Working Group's view of this provision as follows:
>
> > '17. The Working Group recalled that the principal purpose of paragraph (6) was to confirm the formal validity of arbitration agreements incorporated by reference. For example, parties might conclude by performance a contract whose terms were established in a standard form but that form might, in turn, not contain within it an arbitration clause but might, instead, incorporate an arbitration clause by reference to another document that contained its terms. The Working Group agreed that, as a matter of general policy, the reference or other link to a written contractual documentation containing an arbitration clause should be sufficient to establish the formal validity of the arbitration agreement, and that domestic or other applicable law should determine whether the reference was such as to make that clause part of the contract or the separate arbitration agreement, notwithstanding that the contract or separate arbitration agreement had been concluded orally, by conduct or by other means not in writing' [A/CN.9/606 para. 17]".

General observations

36. The Court has had the benefit of exceptionally thorough and comprehensive written submissions, as well as oral submissions, from each of the parties. The structure I propose adopting for the remainder of this judgment is to address the principal bases on which it is contended by the plaintiff that the applications of the fourth defendant and the third defendant should be refused, namely:

> (a) that the arbitration clause in the relevant standard Agreement, whether SE 9109 or ME 9109, has not been incorporated by reference in the contract between the plaintiff and the fourth defendant or the contract between the plaintiff and the third defendant;
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> (b) because of the implications of the fourth defendant and the third defendant remaining in these proceedings because of the claim for contribution and indemnity by the second defendant; and

(c) that the fourth defendant and the third defendant have lost their right to invoke Article 8(1) because of the steps they have taken in the O'Sullivan Proceedings and the Enright Proceedings and alleged delay on the part of the third defendant.

37. The parties addressed the relevant standard to be applied by the Court in making a determination under Article 8(1) on the issue whether it is obliged to refer the parties to arbitration, suggesting that whether it is full judicial consideration leading to a determination on the civil law standard, the balance of probabilities, or the test is that an arguable case or that a *prima facie* case has been made out, has not been determined definitively in this jurisdiction, citing two recent High Court cases:

(a) *Barnmore Demolitiion and Civil Engineering Ltd. v. Alandale Logistics & Ors.*(Unreported, High Court, Feeney J., 11th November, 2010); and

(b) *P. Elliott & Co. Ltd. (in receivership and in liquidation) v FCC Elliott Construction Ltd.* [2012] IEHC 361.

As the outcome on the application of the law to the facts in this case, in my view, is the same irrespective of the threshold which the fourth defendant and the third defendant have to meet, it is not necessary to express any view on that controversy. In other words, the determination made later is made on the basis that the fourth defendant and the third defendant have established their respective cases on the balance of probabilities.

Arbitration agreement – incorporation by reference?

38. On a consideration of the facts, counsel for the plaintiff submitted that the e-mail of 13th October, 2004 falls short of a stipulation that the standard conditions in Agreement SE 9101 are to govern the contractual relationship between the plaintiff and the fourth defendant. Similarly, it was submitted that the letter of 21st June, 2006 falls far short of what would be required to make the terms of Agreement ME 9101 part of the contract between the plaintiff and the third defendant. Further, it was submitted that, as a matter of fact, the officers of the plaintiff were not familiar with the standard terms and were not aware that the standard terms contained any arbitration provisions. Without prejudice to those submissions, it was then argued that the fourth defendant and the third defendant could not rely on Article 7(6) as the basis of an arbitration agreement because a mere reference to any document containing an arbitration clause is not enough in and of itself to incorporate the arbitration clause. The reference must be such as to make the clause part of the contract and, in relation to each of the fourth defendant and the third defendant, all that has been established in this case is a mere reference and the arbitration clause has not been incorporated by reference.

39. Counsel for the plaintiff supported its submissions in relation to the effect of Article 7(6) mainly by reference to authorities from England and Wales and Northern Ireland. As counsel for the fourth defendant submitted, unlike the situation in this jurisdiction, the Model Law has not been incorporated *in toto* into domestic law in the United Kingdom. The UK jurisprudence on the topic relates to s. 6(2) of the Arbitration Act 1996. Having said that, it seems to me that, as a matter of construction, there is very little difference between Article 7(6) and s. 6(2), which provides:

"The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement."

Accordingly, I think there is some guidance to be obtained from academic commentary and the decisions of the courts in the United Kingdom.

40. The Court was referred to *Russell on Arbitration* (23rd Ed., 2007) and, in particular, to the commentary on incorporation by reference. The editors of *Russell* state (at para. 2 – 044) that, where the terms of a contract have to be ascertained by reference to more than one document, the issue of ascertaining which documents constitute contractual documents and in what, if any, order of priority they should be read has to be determined by applying the usual principles of construction and attempting to infer the parties' intentions by means of an objective assessment of the evidence. The editors state (at para. 2 – 046):

"The basic juridical exercise involved in all of these cases is the proper construction of general words of incorporation in one contract referring to the terms of another contract or document. 'The imputed mutual intention of the parties has to be arrived at by general principles of construction applicable to any contractual term' [per Colman J. in *Excess Insurance Co. Ltd. v. Mander* [1997] 2 Lloyd's Rep. 119 at 124]."

The editors then go on to explore differing views which have been advanced by the Court of Appeal and the subsequent development of the case law.

41. More significantly for present purposes, the editors of *Russell* then address the situation in which the reference is to "standard form terms" (at para. 2 – 048) stating:

> "If the document sought to be incorporated is a standard form set of terms and conditions the courts are more likely to accept that general words of incorporation will suffice. In *Sea Trade Maritime Corp. v. Hellenic Mutual War Risks Association (Bermuda) Ltd., (The Athena) No. 2* the Court drew a distinction between what it described as a 'two-contract case', that is where the arbitration clause is contained in a secondary document which is a contract to which at least one party is different from the parties to the contract in question, and a 'single contract case' where the arbitration clause is in standard terms to be found in another document. Relying on the dictum of Bingham L.J. in *Federal Bulk Carriers Inc. v. C Itoh & Co. Ltd.* . . ., Langley J. said that 'In principle, English law accepts incorporation of standard terms by the use of general words and I would add, particularly so when the terms are readily available and the question arises in the context of dealings between established players in a well known market. The principle, as the dictum makes clear, does not distinguish between a term which is an arbitration clause and one which addresses other issues. In contrast, and for the very reason that it concerns other parties, a 'stricter rule' is applied in charterparty/bills of lading cases. The reason given is that the other party may have no knowledge nor ready means of knowledge of the relevant term. Further, as the authorities illustrate, the terms of an arbitration clause may require adjustment if they are to be made to apply to the parties to a different contract'. The Court therefore reinforced the distinction between incorporation by reference of standard form terms and of the terms of a different contract, and concluded that in a single contract case general words of incorporation are sufficient, whereas by its nature a two-contract case may require specific reference to the other contract."
>
> Counsel for the plaintiff emphasised the references in the above passage to the following matters: the parties being expected to be more familiar with those standard terms, including the arbitration clause; incorporation of standard terms by use of general words being accepted particularly when the terms are readily available and the question arises in the context of dealings between established players in a well known market; and that the reason given for the stricter rule is that the other party may have no knowledge or no ready means of knowledge of the relevant term. Counsel also emphasised a statement in the next paragraph in *Russell* (para. 2 – 049) that the rationale for requiring specific words of incorporation, for example, in charterparty/bills of lading cases, is "the absence of knowledge of the terms of another contract between different parties and the need for adjustment for the terms as written".

42. As I have recorded, counsel for the plaintiff accepted that there does not have to be an explicit reference to the arbitration clause to achieve incorporation by reference. The kernel of the plaintiff's case was that the parties sought to be bound by the arbitration clause must know of the existence of the arbitration clause and, in this case, the evidence has established that the plaintiff's officers did not know of the existence of the arbitration clause in either Agreement SE 9101 or Agreement ME 9101. In my view, that argument is misconceived.

43. In this jurisdiction, the question of knowledge of standard terms by the parties sought to be bound has been most frequently considered in the context of choice of jurisdiction clauses. For instance, the decision of the Supreme Court in *Leo Laboratories Ltd. v. Crompton BV*[2005] 2 IR 225 concerned an application by a defendant Dutch company seeking an order staying proceedings initiated against it by the plaintiff, an Irish company, and it concerned the application of the Brussels Regulation. What is of interest for present purposes is the factual basis of the application, as set out in the judgment of Fennelly J. (at p. 228). The defendant had, for many years, supplied the plaintiff with raw materials for its business which was the manufacture of pharmaceutical products. Towards the end of 1998, the plaintiff placed a purchase order with the defendant for a product. The defendant replied with a form confirming acceptance of the order. The defendant thanked plaintiff for the order and stated that it had been accepted "subject to our general terms and conditions of sale and delivery as stated on the back hereof". The Court was informed that these terms were not, in fact, printed on the back. The plaintiff claimed not to have been aware of the actual printed terms. The plaintiff argued that the general terms and conditions did not form part of the contract between the parties. On that issue, Fennelly stated (at p. 236):

> "It is not in dispute that the plaintiff was on notice of the standard terms and conditions upon which the defendant traded. The defendant's order confirmation referring to them was exhibited in the plaintiff's own affidavit. Indeed, the plaintiff purported to rely on standard

> conditions of its own. I am quite satisfied that O'Higgins J. was correct to conclude that the plaintiff was fixed with the general terms and conditions of sale. It was put expressly on notice of their existence and thus put on inquiry as to their terms. The parties were engaged in international trade. It is a very general practice of suppliers in international trade to impose conditions relating to applicable law and jurisdiction."

As was made clear by Fennelly J. (at p. 235), the terms of the contract were being determined by the national court in accordance with Irish law. Similarly, in this case, it is for this Court, in accordance with Irish law, to determine whether the arbitration clause is part of the contracts entered into by the plaintiff with the fourth defendant and with the third defendant, even though the contract was concluded orally or by conduct or by other means.

44. Quite a number of authorities were considered at the hearing in which there was a factual and a legal issue as to whether the party contending that general or standard conditions did not apply had knowledge of the conditions, for example, the decision of the High Court (MacMenamin J.) in *Kastrup Trae-Aluvinduet A/S v. Aluwood Concepts Ltd.* [2009] IEHC 577. The High Court was there concerned with an application to enforce a Danish arbitration award in this jurisdiction. One of the arguments advanced by the respondent was that there was no award because there never had been a binding arbitration agreement in place between the parties. In dealing with the factual situation (at paras. 27 and 28) MacMenamin J. observed that there was no direct evidence at all before the Court that the respondent was not on notice of the general conditions, the affidavit averment having been made by the respondent's solicitor, which was hearsay. MacMenamin J. stated that he preferred the evidence of the applicant that the respondent must be taken to have been aware of these general conditions. However, aside from that, he went on to say that, as a matter of law, the respondent must be taken to have been on notice of the general conditions. In that context he considered the decision of the High Court (O'Hanlon J.) in *Sweeney v. Mulcahy* [1993] ILRM 289. He observed (at para. 30) that in the case before him the respondent had been informed in the first letter as to the existence of the conditions and it was open to the respondent to seek copies of those conditions but it did not do so. I consider that on the issue of notice, the decision of MacMenamin J. is consistent with the decision of the Supreme Court in *the Leo Laboratories Ltd.* case.

45. The application before the Court in *Sweeney v. Mulcahy* was an application pursuant to s. 5 of the Arbitration Act 1980 (the Act of 1980) staying the proceedings which had been initiated by the plaintiff against the defendant. The factual context was that the plaintiff had engaged the defendant, an architect, to carry out renovation and restoration works on a dwelling house. The parties first met at the dwelling house on 22nd October, 1987. The defendant wrote to the plaintiff on 11th November, 1987 detailing the work to be carried out and stating that the conditions of engagement and scale of minimum charges laid down by the Royal Institute of Architects of Ireland (RIAI) would apply. However, the defendant did not send a copy of the RIAI conditions to the plaintiff, but stated that a copy would be available on request. The plaintiff had previously received a copy of the RIAI conditions 1984 from another architect whom she had engaged on another project. The plaintiff did not formally acknowledge the letter of 11th November, 1987 in writing but the parties met again and continued the project. The basis on which O'Hanlon J. determined that the RIAI conditions were incorporated in the contract is set out as follows in the judgment (at p. 291):

> "Having regard to the foregoing facts I am of opinion that the agreement between the plaintiff and the defendant must be regarded as incorporating the R.I.A.I. Conditions . . ., as this was expressly put forward by the defendant at the outset as the basis upon which she was prepared to act as architect in the matter, and the plaintiff allowed the work to proceed thereafter without expressing any dissent."

While O'Hanlon J. had noted the fact that the plaintiff had obtained a copy in 1984, which might have explained why she did not take up the offer made by the plaintiff to send a copy of the document, the rationale underlying the decision was not that the plaintiff thus had notice of the contents of the document. O'Hanlon J. also determined that an "arbitration agreement" within the meaning of s. 2 of the Act of 1980 had been brought into existence and he acceded to the application to stay the proceedings.

46. Finally, I consider it appropriate to refer to the judgment of Langley J. in *The "Athena" (No. 2),* referred to in *Russell* which is now reported in [2007] 1 Lloyds Law Reports 280. That case involved a claim by the owners of the vessel "The Athena" under a policy of war risk insurance, which they had entered into with the defendant and, in particular, an exclusive jurisdiction clause which the owners contended had not been incorporated in the insurance contract because it had not been specifically referred to and because they were unaware of it. Langley J. outlined the law on what he described as the "Incorporation issue" at paras. 62 – 80. He set out his conclusion at para. 81. He found for the defendant, stating that general words of incorporation may serve to incorporate an arbitration clause save in the exceptional two-contract cases in which some express reference to arbitration or perhaps provision of the

relevant clause is also required. He also considered what he referred to as the "Knowledge issue" at para. 87 *et seq*. However, he introduced that discussion by stating that the issue was academic in view of the conclusions he had reached on the incorporation and construction issues.

Application of incorporation principles to the fourth defendant
47. In the e-mail dated 13th October, 2004, the fourth defendant set out the basis on which it was providing engineering services to the plaintiff. The services were being provided in accordance with the standard conditions in Agreement SE 9101. That statement and what followed can only be regarded as an offer to provide the services on the basis of those standard conditions and no other basis. By its conduct the plaintiff accepted that offer, whereupon a contract came into existence between the parties, which incorporated Agreement SE 9101, including the arbitration clause. As happened in the *Leo Laboratories Ltd*. case, the plaintiff was expressly put on notice of the existence of Agreement SE 9101 and it was put on inquiry as to the terms of the Agreement. The plaintiff cannot avoid being bound by those terms because Mr. Hegarty asserts that he was not aware of them. The position adopted by him, to put it mildly, is naïve in the extreme. This was a situation in which Mr. Hegarty was managing the Walled Garden Lodges project for the plaintiff. The basis on which the project was implemented was that the plaintiff would contract directly with each of the service providers, including the fourth defendant and the third defendant. There were no "two-contract" type complications in this case, such as may arise in incorporation of terms in a sub-contract or a sub-sub-contract. The application of Agreement SE 9101 gave rise to no problem because that document was designed for the type of situation which arose between the parties. The reference to Agreement SE 9101 in the e-mail was sufficient to incorporate the terms of that Agreement, including the arbitration clause, in the contract between the plaintiff and the first defendant, which was concluded by conduct and, in the circumstances, the reference to the agreement was such as to make the arbitration clause part of the Contract.

48. Accordingly, I am satisfied that there is an arbitration agreement within the meaning of Article 7 between the plaintiff and the fourth defendant.

Application of incorporation principles to the third defendant
49. While the letter of 21st June, 2006 from the third defendant to the plaintiff opened with a submission of a fee proposal, the letter made it clear that the fee related to services which were being provided in accordance with Agreement ME 9101. The third defendant made it clear that it was offering to provide the services on the basis indicated, that is to say, by reference to Agreement ME 9101. Agreement ME 9101 is the industry standard terms and conditions in relation to a direct contract between the service provider and the client, which was the relationship being set up in the case of the plaintiff and the third defendant. In my view, it would not be proper to construe the incorporation of the Agreement as relating only to the type of services to be provided and the fee to be charged, because the Agreement is a composite document governing the entire relationship between the parties. The offer made by the third defendant in the letter of 21st June, 2006 was accepted by the plaintiff by its conduct. Everything that happened thereafter was consistent with the contractual relationship of the parties being governed by Agreement ME 9101. Once again, as happened in the *Leo Laboratories Ltd.* case, the plaintiff was put expressly on notice that the third defendant was offering its services on the terms set out in Agreement ME 9101 and, if, as he contends, Mr. Hegarty was not aware of those terms and, in particular, was not aware that they involved an arbitration clause he was put on inquiry in relation to those matters. In other words, he should have asked for a copy of Agreement ME 9101. What transpired between the third defendant and the plaintiff subsequently was consistent with their contractual relationship incorporating the terms and conditions of Agreement ME 9101.

50. Accordingly, I am satisfied that there is an arbitration agreement within the meaning of Article 7 between the plaintiff and the third defendant.

Multiple actions
51. Article 8 is framed in mandatory terms. In other words, where the Court finds that the matter being litigated is the subject of an arbitration agreement which is neither null or void, nor inoperative nor incapable of being performed, the Court must refer the parties to arbitration. Indeed, it was acknowledged by counsel for the plaintiff at the hearing that under Article 8 the Court does not have a discretion. The purpose of referring to the multiplicity of proceedings in the plaintiff's written submissions, it was submitted, was to identify the inconvenience created by the remaining issues in the consolidated proceedings being prosecuted in this Court and the matters between the plaintiff and the fourth defendant and the plaintiff and the third defendant being arbitrated in separate arbitrations.

52. The issue of multiplicity of actions was raised in *Furey v Lurganville Construction Co. Ltd.* [2012] IESC 38. In that case, the stay on the proceedings was being sought pursuant to s. 5 of the Act of 1980. At para. 6.3 of his judgment, Clarke J. recorded that it had been submitted that that provision did not confer on an Irish court the same level of general discretion as had formally existed in the United Kingdom under

the relevant provisions of s. 4 of the Arbitration Act 1950. However, the Supreme Court did not have to determine the matter because the plaintiffs/appellants had accepted that analysis, Clarke J. observing that they had done so "correctly" in his view. Similarly, the Court does not have to address the issue in this case, because counsel for the plaintiff unequivocally accepted that this Court has no discretion in the matter under Article 8.

Delay/estoppel

53. In the plaintiff's written submissions it was submitted that the fourth defendant had lost the right to apply to Court under Article 8(1) of the Model Law on the basis that it had put in an appearance in the O'Sullivan Proceedings and the Enright Proceedings and had brought a motion in those proceedings for an order setting aside the third party proceedings, which applications were unsuccessful. It was asserted that the fourth defendant had taken a step in those proceedings, which have been consolidated in these proceedings.

54. Counsel for the fourth defendant pointed out that at all material times the fourth defendant has reserved its position under Agreement SE 9101 and, in particular, its entitlement to seek a reference to arbitration in respect of the same. Further, they relied on the decision of the Supreme Court in the *Furey* case and, in particular, paragraphs 5.2, 5.3 and 5.4 of the judgment of Clarke J. as to the circumstances in which an estoppel could arise. Clarke J. stated (at para. 5.3) that -

> ". . . it is necessary . . . there be a clear unequivocal promise or representation to the effect that the arbitration clause would not be relied on and also that the plaintiff had acted on the basis of that representation."

I am satisfied that, as regards the fourth defendant, there can be no basis for the estoppel alleged by the plaintiff.

55. In relation to the third defendant it was submitted that it had lost the right to apply to Court under Article 8(1) because it had put in an appearance in each of the O'Sullivan Proceedings and the Enright Proceedings and had raised a notice of particulars in each. It was submitted that it had therefore taken a step in those proceedings, which have now been consolidated with these proceedings. The fact that it was the subject of the notice of contribution and indemnity served by the second defendant was also adverted to. The delay point which was made on affidavit was not reiterated.

56. In response, counsel for the third defendant queried whether the jurisdiction to refer a matter to arbitration due to estoppel had survived the coming into force of the Act of 2010 and the Model Law and reserved the position of the third defendant on that. However, in reliance on the passage from the judgment of Clarke J. in the *Furey* case, which I have quoted at para. 54 above, it was submitted that the point is academic because the third defendant made no representation of the type envisaged in that passage. The action taken in the O'Sullivan Proceedings and the Enright Proceedings had been taken before those proceedings were consolidated with these proceedings. Counsel for the third defendant emphasised that the time limitation imposed in Article 8(1) is that the request to refer to arbitration must be made "not later than when submitting his first statement on the substance of the dispute". It was submitted that the third defendant had not submitted any statement on the substance of the dispute, as properly understood, referring to the commentary in Mansfield *Arbitration Act 2010 and Model Law: A Commentary* (at p. 117), prior to 4th September, 2012.

57. Having regard to the totality of the evidence, I am satisfied that there is no basis for finding that the third defendant is precluded by delay or is estopped from bringing its application.

58. In the plaintiff's written submissions it was suggested that, at the very least, the fourth defendant and the third defendant should be prevented from relying on Article 8 in relation to the elements of the claims against them that relate to the premises which are the subject of the O'Sullivan Proceedings and the Enright Proceedings. That point was not pursued with any vigour at the hearing. It is clear from the order of 9th July, 2012 that these proceedings were consolidated with the O'Sullivan Proceedings and the Enright Proceedings on the application of the plaintiff. The Court has no jurisdiction to segregate so much of the claims against the fourth defendant and the third defendant as relate to the premises which are the subject of the O'Sullivan Proceedings and the Enright Proceedings from the remainder of the claims.

Orders

59. The Court will make the order sought by the fourth defendant referred to at para. 7 above and the order sought by the third defendant referred to at (a) in para. 9 above.