Neutral Citation [2013] IEHC 285

THE HIGH COURT

[2013 No. 54 MCA]

BETWEEN

SAM SNODDY, TOM SNODDY, FERGAL BROWNE AND PAUL BROWNE

APPLICANTS

AND

DAVID MAVROUDIS

RESPONDENT

AND

DAVID O'LEARY

NOTICE PARTY

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

Factual background

1. Although this application arises in a situation in which an arbitration has commenced, the originating notice of motion does not comply with Order 56, rule 2 of the Rules of the Superior Courts (the Rules) in that it is not entitled in the matter of the arbitration to which it relates nor in the matter of the Act invoked. In any event, the Act invoked is the Arbitration Act 2010 (the Act of 2010). The applicants must file an amended notice of motion in compliance with the Rules.

2. The source of the arbitration and of this application is an agreement dated 21st August, 2007 (the 2007 Agreement) made between the applicants, therein referred to as Snoddy & Browne Partnership (the Client) of the one part and the respondent (the Architect) of the other part, whereby the Client appointed the Architect and the Architect agreed to act as architect in connection with the project identified in the 2007 Agreement on the terms and conditions attached to the 2007 Agreement, being terms entitled "Conditions of Appointment of Architect" and Appendix 1 annexed thereto entitled "Scope of Services Agreement". The provisions in relation to payment of fees were set out in Appendix 1. Only one aspect of the terms of the 2007 Agreement is at issue on this application and that relates to one aspect only of the terms in relation to payment of fees to the Architect. The term in question appears as follows in Appendix 1:

> "TIME CHARGE RATE AGREED FOR ABNORMAL/ADDITIONAL SERVICES: senior staff €100/Hour, or part thereof, services to be authorised and agreed in writing by both parties before commencement."

3. The 2007 Agreement contained an arbitration clause wherein the parties agreed that any dispute between them should be referred to arbitration. In October 2010, disputes having arisen between the parties, the Architect invited the Client to agree to the appointment of one of three persons nominated by him as arbitrator to determine the dispute. One of the disputes identified in that notice was a dispute in relation to "the proper evaluation and payment of additional work". Apparently the parties could not agree on an arbitrator and ultimately the Notice Party (the Arbitrator) was appointed as arbitrator by the High Court. As the Client is seeking relief under Article 34 of the Model Law, it was necessary that notice of this application should be given to the Arbitrator. However, the Arbitrator did not participate in the proceedings.

4. The Architect was the claimant in the arbitration and the Client was the respondent. The Architect delivered his Arbitration Statement of Case on 28th March, 2011. In that document the Architect made the following claims, which are relevant to the issue before the Court:

> (a) as a result of changes in design standards/legislation in respect of sustainability, the Architect "had to provide additional design works in the course of preparing and completing a validated planning permission application";

(b) the Architect "had to carry out 524 hours additional work which was beyond the scope of that included in the unit rate" to satisfy further information requests from the planners in Carlow County Council; and

(c) the Architect "was required to complete 524 hours for abnormal/additional services" relating to the requests for further information, at the contract rate of €100/hour plus VAT, and that gave an additional sum due of €52,400 plus VAT".

In order to meet the quibbles of the Client's solicitors, by letter dated 28th September, 2011 the Architect indicated that the foregoing claims should be amended to include the words "and did" after the words "had to" and "required to" in the foregoing claims. In the Amended Statement of Defence and Counterclaim delivered by the Client it was denied that the Architect had to and did carry out 524 hours of additional works as alleged and it was also denied that the alleged 524 hours of additional work were authorised and agreed in writing by the parties before the commencement thereof. Accordingly, it was denied that the Client owed the Architect €52,400 plus VAT or any amounts for abnormal/additional services.

5. The arbitration hearing took place between the 8th and the 10th May, 2012. The Arbitrator had the benefit of three sets of written submissions on behalf of the Client. The Court's attention was drawn to two paragraphs in the opening written submissions.

6. The first appeared under the heading "Possible Claim based on *Quantum Meruit*" and, in order to understand its relevance, it is necessary to note the first clause under that heading which stated:

> "The [Architect] might claim to be entitled [to] a fee based on a theory of *quantum meruit*, though this claim was not expressly made. The [Client] submit that a very generous per unit fee in similar circumstances where time was not of the essence might be a maximum of €500 plus VAT per unit, which at 208 units – not withstanding that the claimant did not provide services in relation to the permission for the development of all of the 208 units ultimately obtained by the [Client] – would be a maximum of €104 plus VAT."

That submission, which clearly did not relate to the additional services, was followed by a reference to Article 28(3) of the Model Law, which will be referred to later. It was then stated in the paragraph emphasised on behalf of the Client that the parties had not expressly authorised the Arbitrator to make an equitable award, and that compliance with agreed procedures would prevent the Arbitrator from making an equitable award such as one based on *quantum meruit*, but the Client would consider the position should the Architect seek to amend his pleadings.

7. The other submission to which the Court's attention was drawn was a submission under the heading "Abnormal/Additional Services Payment" that "applying the *expressio unius est (sic) exclusio alterius* doctrine, because the [Architect] had expressly added 'plus 21% VAT' to all other fees payable to him but had not done so in relation to abnormal/additional services, the "€100 per hour fee" for abnormal/additional services was inclusive of VAT.

8. The Client's closing submissions, which were furnished to the Arbitrator, were also put before the Court and the Court's attention was drawn to a submission in which it was reiterated that the Client's opening submissions had pointed out that *quantum meruit* was not pleaded, and that, despite being invited to do so, the Architect had not amended his pleadings. The invitation to amend was repeated. It was stated that the Client would consider its position in relation to agreeing to authorise the Arbitrator to make an equitable award should the Architect ask for its agreement.

9. In the Client's reply to the Architect's closing submissions, which has also been put before the Court, the Client submitted that the Architect was not entitled to any consideration for abnormal/additional services because the work was not authorised by the Client in accordance with the contract terms. Further, the claimant had been invited to seek a remedy in *quantum meruit* but failed to do so.

10. The Client received the Arbitrator's interim award on 6th December, 2012, which was an extremely comprehensive document running to 143 pages. The Arbitrator addressed the claim for abnormal/additional services as follows in the interim award:

(a) he recorded the payment provision in Appendix 1, which I have quoted at para. 2 above, accurately (para. 251);

(b) in considering "payments due" he recorded that provision again accurately (para. 310);

(c) the claim for fees due in respect of the additional work was addressed in para. 480 *et seq*. and the Arbitrator's determination was set out in para. 487.

Having referred to the evidence of Patrick W. Byrne, who was a witness for the Client and was called as an expert witness, the Arbitrator made a finding (at para. 484) that 500 hours was a reasonable period for dealing with further information requests and that the 500 hours was not part of the unit rate and should be paid under the same time rate for abnormal/additional services. Significantly, he also found (at para. 485) that, while additional services were not specifically authorised in writing by the Client, Paul Browne, the fourth named applicant, being a member of the Client partnership, confirmed under cross-examination that the Client was aware that the Architect was carrying out the additional services on their behalf. The Arbitrator continued:

> "I also note that a written instruction was not a condition precedent to an entitlement to payment."

The Arbitrator agreed with the Client's submission that the quoted rate of €100 per hour was deemed to include VAT at the rate of 21%. Therefore, he reduced the rate from €100 per hour to €82.64 per hour. On that basis, the Arbitrator determined the fee due to the Architect by the Client for abnormal/additional services at €41,320 (500 hours at €82.64 per hour). Purely for the purposes of putting that aspect of the claim into perspective, it is to be noted that the Arbitrator determined that the total fees due by the Client to the Arbitrator under the 2007 Agreement amounted to €220,210 of which €64,368.35 had been paid to date, leaving an outstanding balance of €155,841.65.

11. A claim for interest was also dealt with in the award. The Architect contended that there was an error in the determination of the interest due and by letter dated 17th January, 2012, the Client's solicitor agreed to the award being amended to properly reflect the award insofar as it related to interest. In the same letter the Client's solicitors requested the Arbitrator to interpret the award so as to address the issue which is the subject of this application.

12. The issue had previously been raised in a letter dated 20th December, 2012 from the Client's solicitors to the Arbitrator dated 20th December, 2012. Having referred to the findings in the award in relation to the quantum of fees due from the Client to the Architect for additional services, the Client's solicitors requested that the Arbitrator give an interpretation to the phrase ". . . a written instruction was not a condition precedent to an entitlement to payment . . ." in para. 485 of the award in the context of the relevant contract provision, as set out in para. 251 of the award. In relation to that request, by letter dated 7th January, 2013 to both parties to the arbitration, the Arbitrator stated that he could not consider the request for interpretation without the agreement of the Architect as required by Article 33(1)(a) of the Model Law. That agreement was not forthcoming.

13. Finally, one matter is adverted to in the grounding affidavit sworn by the third named applicant, Fergal Browne, on 28th February, 2013, the significance of which is not clear. Mr. Browne is a solicitor in the firm Fergal Browne & Company, Solicitors, which firm is on record for the Client in this matter. Mr. Browne has averred that on 21st September, 2012, the partnership of the four named applicants ended. He has referred to an exhibit which is supposed to be a notice in relation to that event published in Iris Oifigiúil. However, I can see no reference to the Snoddy Browne Partnership in the issue of Iris Oifigiúil exhibited, which was the issue of Friday, 1st February, 2013. Whatever the significance of the partnership having ceased to exist, my understanding is that Fergal Browne & Co. are acting for all of the applicants (referred to as the Client, on this application), and, indeed, Mr. Browne has averred that he has "discussed all events surrounding the case with the other members of the former partnership" and he has "their authority to act as their solicitor" on this application.

The application

14. The relief sought by the Client on this application is as follows:

> (a) an order pursuant to Article 34(2)(a)(iii) of the Model Law setting aside part of the Arbitrator's interim award; or
>
> (b) orders –
>
> > (i) directing the Architect to agree to the Arbitrator giving an interpretation of the award;
> >
> > (ii) directing the Arbitrator to make such an interpretation; and

(iii) granting liberty to the Client to apply for an order setting aside the award or part of the award during a period not exceeding three months from receipt of the Arbitrator's interpretation.

15. A replying affidavit was sworn by the Architect on 7th March, 2013. The only factual matter adverted to therein was that the Arbitrator had heard evidence from the Architect to the effect that he had asked the Client to provide written instructions in relation to the additional services he was providing, and which they knew he was providing, but they failed to do so.

The legislation invoked

16. The Client has invoked provisions of the Model Law, which, by virtue of s. 6 of the Act of 2010 have force of law within this State.

17. The first provision of the Model Law invoked is Article 34(2)(a)(iii). Article 34 regulates applications for setting aside arbitral awards. Paragraph (1) provides that recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of the Article. The provision of paragraph (2) which the Client invoked provides as follows:

> "An arbitral award may be set aside by the Court . . . only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) . . .
>
> (ii) . . .
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions and matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; . . .."

18. Counsel for the Client at the hearing also invoked paragraph (4) of Article 34 which provides:

> "The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

19. While not referred to in either the notice of motion or in the grounding affidavit of Mr. Browne, in relation to the alternative reliefs sought the provision of the Model Law invoked by the Client is Article 33, which deals with correction and interpretation of an award or an additional award. Article 33(1) envisages an arbitrator making a correction to, or giving an interpretation of, an award in the limited circumstances outlined with the agreement of the parties. Paragraph (2) envisages an arbitrator correcting an error in computation, or of a clerical or typographical nature on his own initiative. Paragraph (3) envisages an arbitrator, if he considers it justified, making an additional award in relation to a claim presented but omitted from the original award. The jurisdiction conferred by Article 33 is conferred on the arbitrator in the circumstances outlined, not on a court.

20. Article 28(3) of the Model Law was also cited in submissions to the Court and, as recorded earlier, it had been referred to in the Client's opening written submissions to the Arbitrator, Article 28 deals with rules applicable to the substance of the dispute, primarily, the law to be applied. Article 28(3) provides:

> "The arbitral tribunal shall decide *ex aequo et bono or as amiable compositeur* only if the parties have expressly authorized it to do so."

21. Before considering the application of the legislation it is necessary to analyse the basis of the Client's claim for relief.

Analysis of basis of Client's claim for relief

22. The Client's position is that under the terms of the 2007 Agreement the Architect had only a contractual entitlement to the payment of fees for additional services if the services were authorised and agreed in writing by both parties before commencement. As a matter of fact, the Client did not agree in

writing to the additional services in respect of which the Architect claimed €52,400 plus VAT, that is to say, for 524 hours at €100 per hour plus VAT. Therefore, the Arbitrator could not have made an award for the amount claimed by the Architect on the basis that the Client was contractually bound to discharge it.

23. However, the Arbitrator did make an award for additional services in favour of the Architect on the basis of payment of €82.46 per hour for 500 hours. Therefore, both the number of hours covered by the award and the charge rate per hour differed from what was provided in the 2007 Agreement. It was submitted that, accordingly, part of the award must have been made on a basis other than the application of the contractual principles. The Client's submission was that the Arbitrator applied the *quantum meruit* principle which it was submitted is an equitable principle. However, the parties, and, in particular, the Client had not expressly authorised the Arbitrator to decide the claim on the basis of equitable principles in accordance with Article 28(3) and, in fact, although invited so to do, the Architect had not amended his pleadings to make such a claim.

24. Therefore, it was submitted that in that part of the award the Arbitrator dealt with the claim for additional services in a manner which was not contemplated by and did not fall within the terms of the submission to arbitration. In other words, the Arbitrator exceeded his authority on the reference to him. That brought the matter within the parameters of Article 34(2)(iii), it was submitted.

25. A comparison of those submissions with what the Arbitrator actually did in the award, in my view, indicates that the claim does not stand up to scrutiny. The Arbitrator correctly identified the quantum of the Architect's claim for additional work under the terms of the 2007 Agreement. He correctly identified the provision that the services were to be authorised and agreed in writing by both parties before commencement. He found that the additional services in respect of which the Architect claimed had not been specifically authorised in writing by the Client. He determined that this did not preclude him from making an award in respect of this element of the claim in favour of the Architect, holding that the provision was not a condition precedent to an entitlement to payment, which obviously refers to the Architect's contractual entitlement to payment, which is what he was considering. The Arbitrator also determined the quantum of the claim by reference to what he considered to be the Architect's entitlement under the contract. As regards the charge rate per hour, on the basis of the submission of the Client, he expressly found that the quoted rate of €100 per hour, that is to say the rate stipulated in the 2007 Agreement, was inclusive of VAT, not exclusive of VAT as the Architect had claimed. Accordingly, the charge rate of €82.64 per hour which he applied was the rate of €100 exclusive of VAT at the rate of 21%. As regards the number of hours for which the Architect should be paid fees in respect of additional services, he did so on the basis of what was a reasonable estimate of the time it would take to do the work in question on the basis of the evidence and, in particular, the evidence of the Client's expert.

26. Therefore, it is patently clear that the Arbitrator determined that element of the Architect's claim by application of the terms of the 2007 Agreement and in accordance with what he considered to be correct contractual principles.

27. The Arbitrator may have been wrong in the application of contractual principles and, in particular, he may have been wrong in his finding that the agreement in writing of the Client to the additional services before commencement was not a condition precedent to the Architect's entitlement to payment for those services. What I propose considering now is what the scope of the provisions of the Model Law which the Client has invoked is. The objective of so doing is to determine, if the Arbitrator erred in making the award in relation to the additional services, and no view will be expressed in this judgment on that point, whether the Client is entitled to any of the reliefs claimed.

28. Before doing so it is pertinent to record that at the hearing counsel for the Client outlined the options open to the Court as follows:

> (a) to set aside the relevant part of the award pursuant to Article 34(2)(a)(iii);
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> (b) to suspend the setting aside and to remit the matter to the Arbitrator for the period to allow the Arbitrator to consider the matter in accordance with Article 34(4); or
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> (c) to direct the Architect to agree to the Arbitrator interpreting that element of the award in accordance with the Client's request.

Counsel for the Client suggested that the most appropriate form of relief would be the relief at (b) above. However, apart from submitting that the Client had not established the grounds for suspension, counsel for the Architect emphasised that no relief under Article 34(4) had been sought in the notice of motion.

Scope of articles of Model Law invoked

29. There has been very little, if any, judicial comment in this jurisdiction on the Articles invoked by the Client in this case. For that reason, I consider that the proper course is to set out the basic principles. In so doing, I propose primarily resorting to the helpful annotation on the relevant Articles in Mansfield's *Arbitration Act 2010 and Model Law: A Commentary.*

30. As a preliminary, it is important to note that s. 8 of the Act of 2010 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 and that the *travaux* may be considered when interpreting the meaning of any provision and shall be given such weight as is appropriate in the circumstances.

31. The very limited jurisdiction which this Court has under the Act of 2010 and the Model Law to set aside an arbitral award is outlined in Mansfield's note on Article 34 (at p. 213) as follows:

> "Where a party is unhappy with an award made by an arbitral tribunal, the only recourse available to it is to apply to set aside the award. The Model Law provides limited grounds for setting aside an award. The*travaux* . . . suggest that there can be no grounds to set aside an award that are not contained in the Model Law and the *travaux* . . . suggest that an 'application for setting aside constitutes the exclusive recourse to a court against the award in the sense that it is the only means for actively attacking the award, i.e. initiating proceedings for judicial review'. An award may not be set aside for some reason not specified in the Model Law as a result of the courts' inherent jurisdiction."

That passage correctly reflects the law as it now stands and, indeed, it reflects the heading to Article 34, which refers to an application for setting aside "as exclusive recourse" against an arbitral award.

32. Sub-paragraph (a) of paragraph (2) of Article 34 sets out four circumstances in which an award may be set aside at the suit of a party to the arbitration, who proves that one or more of such circumstances exists. The circumstance with which the Court is concerned in this case is the third circumstance, that is to say, the circumstance set out in Article 34(2)(a)(iii). Mansfield's commentary on that provision is that it is a ground –

> "That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. Commentators have noted that 'this ground is infrequently invoked and it is even less frequently accepted by national courts to set an award aside' and international case-law decided under the Model Law has held that this ground is to be narrowly construed."

The commentators cited in that passage are Brekoulakis and Shore in Mistelis on *Concise International Arbitration* (1st Ed., Kluwer, 2010). In that text, the commentators also state (at p. 647) that "a strong presumption should exist that a tribunal acts within its mandate".

33. It is generally recognised that the excess of authority ground in Article 34(2)(a)(iii) of the Model Law is modelled on the corresponding provision in the New York Convention, Article V(1)(c). As was pointed out by Lord Steyn in *Lesotho Highlands Development v. Impregilo SpA*[2006] 1 AC 221, s. 68 of the UK Arbitration Act 1996 was modelled on the New York Convention and on the Model Law. In considering the application of that statutory provision, Lord Steyn considered Article V(1)(c) of the New York Convention stating (at p. 236):

> "It deals with cases of excess of power or authority of the arbitrator. It is well established that article V(1)(c) must be construed narrowly and should never lead to a re-examination of the merits of the award."

Lord Steyn cited a decision of the US Federal Courts as authority for that last proposition: *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier* (RAKTA) (1974) 508 F 2d 969 (2nd Circuit). The limits on the excess of jurisdiction ground for setting aside an arbitration are, in my view, clearly brought home by the following passage from the opinion of Judge Smith in the *Parsons* case where he stated:

> "Although the Convention recognises that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement. The appellant's attempt to invoke this

> defense, however, calls upon the Court to ignore this limitation on its decision making powers and usurp the arbitrator's role."

34. In reality, what the Client is asking the Court to do in this case is to second-guess the Arbitrator's construction of the 2007 Agreement. If this Court were to set aside the part of the award dealing with the fees for additional services, the Court would be usurping the Arbitrator's role. Accordingly, I am satisfied that the Client's attempt to have that part of the award set aside on the ground of excess of jurisdiction under Article 34(2)(a)(iii) is wholly misconceived and the application to set aside must be refused.

35. As regards Article 34(4), as is pointed out by Mansfield (at p. 219), the *travaux* suggest that the power to remit an award "would enable the arbitral tribunal to cure certain defects which otherwise would necessarily lead to a setting aside of the award". I consider that counsel for the Architect was correct in her submission that the Court's jurisdiction to remit under Article 34(4) is dependent upon the Court being satisfied that a ground has been proved for setting aside the award. That has not happened in this case. Therefore, the Court has no power to set aside under Article 34(4).

36. As regards Article 33 of the Model Law, it confers no jurisdiction on this Court to compel a party to an arbitration to seek, or an arbitrator to give, an interpretation of a specific point or part of an award. In any event, by seeking an order compelling the Architect to agree to the Arbitrator giving an interpretation, in reality, as counsel for the Architect submitted, the Client is attempting to re-visit the merits of the Arbitrator's award. Having regard to the analysis of the Client's claim conducted earlier, the aspect of the award with which the Client takes issue could not be regarded as requiring interpretation because there is no ambiguity in it. In my view, it does not require clarification.

Conclusion and order

37. The Client has failed to establish an entitlement to any of the reliefs sought. Accordingly, there will be an order dismissing the application.