Tesco (Ireland) Ltd v Moffett & Ors [2015] NIQB 68 (1 July 2015)

[2015] NIQB 68	Ref:	WEA9720
Judgment: approved by the Court for handing down	Delivered:	01/07/2015
(subject to editorial corrections)*		

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN''S BENCH DIVISION (COMMERCIAL)

TESCO (IRELAND) LIMITED
Plaintiff

v

WILLIAM MOFFETT, RICHARD McLAUGHLIN, JAMES McLAUGHLIN and ANSON LOGUE
Defendants

WEATHERUP J

[1] This is an application by the plaintiff pursuant to section 101(2) of the Arbitration Act 1996 for leave to enforce the award of an Arbitrator against the defendants in the same manner as a judgment or order of the Court. Mr Coghlin appeared on behalf of the plaintiff and Mr Gowdy on behalf of the second and third defendants (“"the McLaughlins”").

[2] The McLaughlins oppose the application under section 103(2)(c) of the Act which provides a discretion to refuse enforcement if no proper notice is given of the arbitration proceedings or the defendants are otherwise unable to present their case.

[3] The Arbitration Act 1996 provides for the enforcement of arbitration awards as follows -

> ***“" Recognition and enforcement of awards***
>
> ***101. - (1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.***
>
> ***(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.***

Refusal of recognition or enforcement

103. - (1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves-

> ***(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."***"

[4] The McLaughlins'' case is that they were not on notice of the appointment of the Arbitrator or of the arbitration proceedings, that notice had been given to solicitors for the defendants partnership, that the McLaughlins had earlier left the partnership and were not notified of the arbitration by the solicitors, that only after a liability hearing did the McLaughlins receive notice of the arbitration and they then appeared by other solicitors at a quantum hearing and they were then unable to present their case on liability.

[5] The plaintiff engaged the defendants in the construction of a supermarket in Monaghan in the Republic of Ireland. A dispute was referred to arbitration. The Arbitrator was appointed in 2001 and interim awards were made in 2004 and 2007. A second Arbitrator took over in 2012. The seat of the arbitration was the Republic of Ireland.

[6] The final award of the Arbitrator was made on 24 July 2013. The terms of the final award state that the arbitration arose from a Development Agreement dated 2 December 1994 between the parties to this action, there was a meeting on 9 October 2012 with Mr Hayes of Gore & Grimes, Solicitors, acting for all the defendants. Mr Hayes advised that William Moffett and Anson Logue were in bankruptcy and would not be in a position to defend the case. The Arbitrator received a letter from Alan Woods of Orpen Franks, Solicitors, advising that that firm was representing the McLaughlins and confirmation was received from Mr Hayes that he was still representing Moffett and Logue.

[7] The arbitration hearing commenced on 5 February 2013 and concluded on 7 February 2013 and was attended on behalf of the defendants by Gavin Rolston, Senior Counsel instructed by Orpen Franks, Solicitors. The Arbitrator determined and awarded the amount due by the four defendants to the plaintiff as €1.174m, with interest at 5% after 30 days and the defendants were to bear the fees and expenses of the Arbitrator fixed in the total sum of €53,505.00 and the costs of the reference.

[8] The affidavit of Richard McLaughlin states that in the early to mid-1990s his brother and he became involved in a property development known as Newbay Properties and it sought to develop Monaghan Shopping Centre and entered into a development agreement of 2 December 1994 with Power Supermarkets Ltd, the plaintiff''s predecessor in title. On 18 January 1995 the McLaughlins agreed with the

other defendants to sell their interest in Newbay Properties and that sale was completed on 25 August 1997. The McLaughlins only became aware of the arbitration proceedings in December 2011. The other defendants instructed Gore & Grimes, Solicitors, to draft an indemnity whereby they agreed to indemnify the McLaughlins against all proceedings, which indemnity was signed on 5 January 2012. The McLaughlins had no involvement in the arbitration proceedings until September 2012 when they instructed Orpen Franks in connection with the arbitration and were represented at a case management meeting from 9 October 2012. In respect of matters prior to that date they were not aware of the request for arbitration of 22 December 2000 and were not given notice of or involved in the appointment of Mr Roughan in January 2001 and were not given an opportunity to make representations before he made his two interim awards on 14 January 2004 and 2 February 2007 nor were they involved in or given notice of the appointment of Mr Campbell in January 2012. The McLaughlins have commenced proceedings against Gore & Grimes.

[9] The plaintiff''s affidavit sworn by Liam McCabe, a solicitor of William Fry, refers to a letter of 23 June 2000 from Arthur Cox, Solicitors, for the plaintiffs, who wrote to Gore & Grimes referring the matter to arbitration and requesting the defendants trading as Newbay Properties to concur in the appointment of an Arbitrator pursuant to the development agreement. In a letter of 5 July 2000 Gore & Grimes noted that their clients were not agreeable to the person appointed and stating that they wanted a lawyer appointed. On 4 January 2001 they wrote to Arthur Cox stating that the McLaughlins were not parties to the dispute, that they had assigned their interest in Newbay Properties to the other two defendants and no longer had any interest in the development. However, Arthur Cox replied on 9 January 2001 to state that they disagreed with the contention that the McLaughlins were no longer parties to the dispute as they were stated to be contractually bound to the plaintiff by the Development Agreement of 2 December 1999. On 20 September 2001 a preliminary meeting was convened by Mr Roughan and Gore & Grimes represented that they appeared on behalf of all defendants and again made the submissions on behalf of the McLaughlins that they should not be parties to the arbitration because they were no longer investors in Newbay Properties.

[10] The McLaughlins were informed of the potential exposure to liability in the arbitration in December 2011. On 21 September 2012 Gore & Grimes wrote to Mr Campbell referring to the bankruptcy proceedings initiated against Moffett & Louge and that they were no longer in a position to actively participate in the arbitration and noting that the McLaughlins should not have been joined as parties to the arbitration. On 5 October 2012 Orpen Franks wrote to say that they acted for the plaintiff in relation to the arbitration, that Gore & Grimes went on record for all the defendants, that they were now being asked to represent the McLaughlins, that they had been totally unaware of the arbitration and had never been contacted by Gore & Grimes, that they requested an adjournment of the arbitration which was due to resume on 15 October 2012. The Arbitrator acceded to the request to adjourn and the matter was eventually resumed in February of 2014.

[11] The Development Agreement was entered into between Power Supermarkets Ltd, the plaintiff''s predecessor, and the four defendants trading as Newbay Properties. At Clause 11 of the Development Agreement stated that:

> *“"Any notices required to be served by any party hereunder shall be deemed to be validly served if sent by pre-paid registered post to the developer addressed to it at 6 Cavendish Road, Parnell Square, Dublin 1 and in respect of the company if sent as aforesaid to its address specified in the description of the parties and the developer irrevocably appoints Gore & Grimes as their agent for the service of any proceedings hereunder.*

[12] Clause 14 contained the arbitration clause providing for the reference of any dispute or difference between the parties to a single Arbitrator to be agreed by the parties.

[13] There are two parts to clause 11. First of all it refers to any ‘''notices’'' requiring to be served under the agreement and such notices shall be deemed to be validly served if sent by pre-paid registered post. The notices in the present case were sent by post and not by pre-paid registered post. As Counsel points out this is a deeming provision and it states that service, if sent by pre-paid registered post, shall be deemed to have been validly served. The clause is not stating that the only method of service is by pre paid registered post. Reliance on the first part of clause 11 is not necessary if a notice required to be served by any party to the agreement was validly served.

[14] The second part of clause 11 relates to the service of ‘''proceedings’''. I am satisfied that the notice of arbitration constituted proceedings for the purposes of the second part of clause 11 and applies to the arbitration proceedings in the present case. The notice was served on Gore & Grimes by post. No method of service is stated in the second part of clause 11. It is contended by Counsel that the requirement for pre-paid registered post in respect of notices should also be read into the provision in respect of proceedings. I am not prepared to read the second part of clause 11 in that manner because it does not so state in clause 11. There is no stated method of service and therefore the issue becomes whether notice by post to the appointed agent Gore & Grimes constituted ‘''proper notice’'' for the purposes of the 1996 Act.

[15] Proper notice I consider to be notice that is compliant with the applicable law as to the notice of proceedings. Section 3 of the Arbitration Act 1954 applicable in the Republic provides for the commencement of arbitration and states that an arbitration shall be deemed to be commenced where one party to the arbitration agreement serves on the other party or parties a written notice requiring him or them to appoint or concur in appointing an Arbitrator. Section 3(2)(a) states that any notice under section 3(1) may be served in any manner provided in the arbitration agreement. There is no further manner of service provided in the arbitration agreement other than that there may be service on Gore & Grimes as agent of the defendants. I am satisfied that service by post on the nominated agent constituted valid service under the agreement. In any event the solicitors clearly accepted service on behalf of the defendants and the

solicitors had authority to do so as stated in the Development Agreement. There is no evidence that their authority was revoked prior to service of the notice on the solicitors. The notice was compliant with the applicable law as contained in section 3 of the 1954 Act.

[16] The grounds for refusal of enforcement are not limited to the failure to give proper notice of the appointment of the Arbitrator or of the arbitration proceedings but extend to the party concerned being ‘'otherwise’' unable to present their case. A solicitor did appear for the McLaughlins in the liability hearings even though that solicitor had not informed the McLaughlins. There is no evidence that the authority of the solicitor to accept service of proceedings as provided for under the Development Agreement and by implication to represent all the defendants in those proceedings, ceased to apply to the McLaughlins. The solicitors raised the position of the McLaughlins before the Arbitrator and were able to present their case through their appointed legal representative. If the solicitors concerned mismanaged that process that is an issue between the McLaughlins and the solicitors. It is noted that the McLaughlins have issued proceedings against the solicitors. The McLaughlins were able to present their case in the arbitration by their nominated solicitors.

[17] Accordingly I am satisfied that the McLaughlins were given proper notice of the appointment of the Arbitrator and of the arbitration proceedings. I am further satisfied that the McLaughlins were otherwise able to present their case because they were represented by solicitors in the course of the liability hearing. The judgment may be enforced against the McLaughlins.

[18] If, contrary to the above finding, the grounds for refusal of enforcement under section 2(c) arise, it is provided that enforcement of an award may be refused. The Court thus has a discretion in relation to enforcement.

[19] In the Supreme Court in Dallah v The Ministry of Religious Affairs and the Government of Pakistan [2010] UKSC 46 the defendant government had succeeded in resisting enforcement of the arbitration award on the ground that the arbitration agreement was not valid under the law of the country in which the award was made. The argument was that the government was not a true party to the agreement and that there was no common intention on the part of the government and Dallah to make the government a party. Lord Mance stated that the upshot was that the course of events did not justify a conclusion that it was Dallah and the government’'s common intention or belief that the government should be or was a party to the agreement when the agreement was deliberately structured to be and was agreed between Dallah and a Trust. It was held that the government were not parties to the agreement and a ground not to enforce the award had been established.

[20] The Court proceeded to consider the issue of discretion to enforce. Counsel argued that it was open to the Court to hold that an award made in purported pursuance of a non-existent agreement should nonetheless be enforced. Lord Mance stated that the use of the word ‘'may’' in the Act could not have a purely discretionary force and must

in this context have been designed to enable the Court to consider other circumstances which might, on some recognisable legal principle, affect the prima facie right to have enforcement or recognition refused. He suggested possible examples of such circumstances being another agreement or an estoppel but stated that, absent some fresh circumstances such as another agreement or an estoppel, it would be a remarkable state of affairs if the word ‘''may'' would enable the Court to enforce or recognise an award which was found to have been made without jurisdiction.

[21] Lord Collins stated that section 103 gives effect to an international convention and the discretion should be applied in a way which gives effect to the principles behind the convention. He gave examples where that might arise, such as estoppel where there would be no prejudice to the party resisting enforcement or the refusal to apply a foreign law which made the arbitration agreement invalid where the foreign law outraged the Court''s sense of justice or decency such as where it was discriminatory or arbitrary. Lord Collins also referred to the failure by the resisting party to take steps to challenge the jurisdiction of the tribunal in the Courts being rarely, if ever, a ground for exercising the discretion in enforcing an award made without jurisdiction (paragraph 131). In the present case no challenge was raised in the courts in the Republic to the arbitration proceedings and there was power to do so under section 38 of their Arbitration Act.

[22] Another matter relied on by the plaintiff, rather than raising a challenge to the arbitration proceedings in the seat of the arbitration, was to consider the position within this jurisdiction of the Court that is being asked to enforce the arbitration award. Section 73 of our Arbitration Act 1996, under the title ‘''Loss of Right to Object'', provides that if a party to arbitration proceedings takes part or continues to take part in the proceedings without making either forthwith or within such time as it is allowed by the arbitration agreement or the tribunal or the Act any objection that there had been any irregularity affecting the tribunal or the proceedings he may not raise the objection later before the tribunal or the Court unless he shows that at the time he took part or continued to take part in the proceedings he did not know and could not with reasonable diligence have discovered the grounds for objection. The McLaughlins did take part in the quantum hearing at a later date. Should that be regarded as a waiver of their objection or the equivalent of the loss of the right to object?

[23] Mr Gowdy seeks to distinguish between the proceedings for liability and the proceedings for quantum and contends that the McLaughlins raised their objection and participated in the quantum hearing only. It is contended that they did not actually participate in the liability proceedings through their solicitors as they were not on actual notice of the arbitration proceedings. However I am satisfied that the McLaughlins were represented by solicitors at the liability hearings and their submissions were considered by the Arbitrator and they were found to be liable. They were represented by different solicitors at the quantum hearing. Under the domestic legislative provision the McLaughlins would be precluded from raising their objection at this stage to an irregularity alleged in a domestic arbitration. Their participation was the equivalent of an estoppel. I am satisfied that the defendants engagement in the

process constituted a waiver. If required to exercise discretion, which I am satisfied does not arise, I would exercise the discretion in favour of ordering enforcement. I find for the plaintiff.

[24] An Order will be made under section 101(2) of the Arbitration Act 1996 for leave to enforce the arbitration award against the defendants.
