

THE HIGH COURT

Record No. 2017 No. 5012P

[2024] IEHC 309

IN THE MATTER OF THE ARBITRATION ACT 2010

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

GERALD JEPHSON AND PAMELA JEPHSON

CLAIMANTS

AND

AVIVA INSURANCE IRELAND DAC

RESPONDENT

Judgment of Mr. Justice Mark Sanfey delivered the 21st day of May 2024

Introduction

1. In this case, the first named claimant seeks an order lifting the stay on High Court proceedings 2017 No. 5012P between the parties. This stay was granted by an order (“**the court order**”) of 22 January 2020 by Barniville J. (as he then was) to abide the determination of an arbitration between the parties. Essentially, the first named claimant seeks the reversal of that order due to matters which have occurred since the order was made.
2. There was wholesale confusion in the motion papers as to whether the parties were “plaintiffs and defendant” or “claimants and respondent”. The notice of motion adopts the latter terminology, although the court order which imposed the stay which is sought to be

lifted used the former terminology. The plaintiff/claimant uses the “claimants and respondent” version throughout the grounding affidavit; while I am not sure that he was correct to do so, I regard the difference as one of form rather than substance. The parties may wish to consider which version should be used when drawing up the orders which I shall make as a result of this judgment. For the purposes of this judgement, I shall adhere to the approach of the plaintiff/ complainant in the motion of using the “claimants/respondent” nomenclature.

3. The circumstances in which the court order came to be made are singular to say the least, and will require to be set out at some length. It is necessary to refer to the order as “the court order”, as the making of that order was informed by what the parties called “the agreed order”, the terms of which they concluded between themselves in a manner which I explain below.

4. The application was made by a notice of motion issued on 4 February 2022, and the substantive reliefs sought were as follows:

“1. An order pursuant to paragraphs 4 and 5 of the Agreed Order made on 22 January 2020 (a certified true copy of which is annexed to this Notice of Motion) and/or an order pursuant to the inherent jurisdiction of this Honourable Court lifting the stay on the High Court proceedings bearing record number 2017/5012P between Gerald Jephson and Pamela Jephson (Plaintiffs) and Aviva Insurance Ireland DAC (Defendant).

2. Such directions for the purpose of progressing the High Court proceedings bearing record number 2017/5012P between Gerald Jephson and Pamela Jephson (plaintiffs) and Aviva Insurance Ireland DAC (defendant) as to this honourable court shall seem fit.”

5. The grounding affidavit was sworn by Mr. Thomas Murran, the claimant's solicitor, on 24 November 2021. Mr. Michael Corrigan, the respondent's solicitor, swore a replying affidavit on 3 March 2022. Mr. Murran then swore a supplemental affidavit on 21 March 2022. Both sides proffered substantial written submissions in addition to the oral submissions at the hearing.

Background

6. The claimants issued a plenary summons on 1 June 2017 ("**the High Court proceedings**") which named "Aviva Insurance Ltd" as the defendant.

7. The first claimant, Gerald Jephson ("**the claimant**"), is an accountant and is the son of Robert C. Jephson ("**the deceased**"), who died on 04 March 2010. The second claimant was the mother of the first claimant and the widow of the deceased; she unfortunately passed away on 10 May 2020.

8. The deceased died on 4 March 2010 having made a last will and testament on 3 January 2006. The will appointed the second claimant and another person as executor of the deceased's will. Probate was granted to the second claimant on 6 December 2011.

9. The estate of the deceased included, inter alia, the fee simple estate and/or interest in a property known as Yellow House, Dunmore East, Waterford ("**the property**"). The property had been used by the deceased and his family as a holiday home.

10. The claimants contended that as the property was insured against certain risks. The statement of claim, delivered on 21 May 2019, pleads as follows:

"6. At all material times, there was a policy of insurance, being Policy Number HA648080099, in force between the Estate of the Deceased and the Defendant pursuant to which the Defendant provided buildings household insurance cover for the Property ("**the contract of insurance**"). The contract of insurance insured, covered and applied to, inter alia, property loss and damage (including consequential

loss and damage) caused to the Property by subsidence, landfall, landslip and/or land heave. The Plaintiffs will refer to and rely upon the terms and provisions of the contract of insurance for their full force, meaning and effect at the trial of the action.

7. In particular, and further or in the alternative and without prejudice to the generality of the foregoing plea, at all material times, there was an Aviva HomeChoice policy of insurance, being Policy Number HA648080099, in force between the estate of the Deceased and the Defendant pursuant to which the Defendant provided buildings household insurance cover for the Property. The Plaintiffs will refer to and rely upon the terms and provisions of the Aviva HomeChoice Policy for their full force, meaning and effect at the trial of the action.”

11. It is pleaded in the statement of claim at para. 8 that the Aviva HomeChoice policy provided as follows:

“We will provide cover for loss or damage to your buildings and contents in your home caused by the following... Subsidence, heave or landslip of the land on which your home stands.”

12. The property is apparently situated on a north facing clifftop that overlooks the main beach in Dunmore East, County Waterford. It is pleaded in the statement of claim that, on or around 15 January 2010, a portion of the cliff on which the property is situated collapsed. As a result, the foundation of the property on which the portion of the cliff that had collapsed is situated “is exposed and the stability of the foundation of the property is severely undermined. The corner of the property on which the portion of the cliffs collapsed is situated is now unsupported. Due to the loss of the ground under and adjacent to the property as a result of the collapse of the cliff on or around 15 January 2010, there is an ongoing risk of further collapse of the ground under and adjacent to the property and, also, an ongoing risk of

collapse of the building. Indeed, further minor collapses in the ground have occurred since.”

[para. 9]

13. The statement of claim pleads that the damage to the property was caused by subsidence, landfall, landslip and/or land heave “within the meaning of the contract of insurance” between the deceased and respondent; it is pleaded that, further or in the alternative and without prejudice to the foregoing, the damage was covered by the Homechoice policy wording. It is pleaded that the occurrence of the damage was notified to the respondent in January 2010, and that a claim for indemnity was made to the respondent; however, it is pleaded that, in a letter of 20 January 2017, “... the defendant wrongfully and in breach of the contract of insurance reversed its position ... and stated that the policy wording enforced at the time of the occurrence of the damage caused to the property on or around 15th January, 2010 was the Aviva HomePak policy wording, which, in the case of property and buildings damage, excludes loss and damage to property caused by subsidence, landslip or heave. The defendant declined the plaintiff’s claim under the contract of insurance on this basis”. [para. 21].

14. The claimants pleaded that the respondent’s decision to decline indemnity was wrongful and in breach of contract, and the claimants sought declaratory relief and damages. On 3 July 2019, the respondent delivered “points of defence” which contained a full defence to the claimants claim. The respondent pleaded specifically that the policy wording that applied to the contract of insurance was the respondent’s HomePak policy wording, which specifically excluded property damage caused by subsidence, landfall, landslip and/or land heave from the scope of cover under the contract of insurance for the property.

The orders of 22nd January, 2020

15. In the event, the respondent issued a motion on 7 October, 2019 seeking an order pursuant to Article 8 of the Model Law staying the High Court proceedings to allow the

subject matter of the High Court proceedings to be referred to and determined by arbitration. This application was listed for hearing together with a motion by the claimants for judgment in default of defence before Barniville J. on 22nd January, 2020.

16. In the event, the parties concluded an “agreed order” which was presented to the court on the day of hearing. As this order is of some importance, the substantive part of it is reproduced in full below:

- “1. The title of the Defendant to be amended to read: “*Aviva Insurance Ireland DAC*”.
2. The dispute [the] subject of this action is hereby referred to arbitration.
3. Subject to the position at 4, the within action is stayed to abide the determination of the arbitration. No order for costs is to be made on the Defendant’s application for a stay of these proceedings pursuant to Article 8(1) of the Uncitral Modal Law.
4. The Defendants’ solicitor, Michael Corrigan solicitor of Corrigan and Corrigan Solicitors, hereby undertakes to the court through counsel that he will on behalf of his client participate in the arbitration in a timely and efficient fashion.
5. The Plaintiffs are entitled to apply to the court for the stay to be lifted in the event of any non-compliance with the condition at 4 above.
6. The Plaintiff’s motion for judgment in default of Defence is hereby struck out with an order for costs in favour of the Plaintiffs as against the defendant, such costs to be adjudicated in default of agreement.
7. The execution of the order for costs at 6 above is stayed pending the determination of the arbitration.”

17. The notable feature of this “agreed order”, and a matter on which the claimants place heavy reliance, is the undertaking of Mr. Michael Corrigan to the court that he would “on behalf of his client participate in the arbitration in a timely and efficient fashion”. This undertaking was acknowledged in the formal order of the court; the recital to the order

acknowledged that the court was "...noting the undertaking of the Solicitor for the Defendant Mr. Micheal Corrigan of Corrigan and Corrigan Solicitors through counsel that he will on behalf of his clients participate in the arbitration in a timely and efficient fashion...".

18. The substantive part of the formal order of the court is as follows:

"By consent it is ordered that

1. Pursuant to **Order 17 Rule 4** of the Rules of the Superior Courts that the within proceedings herein be amended so as to disclose the correct title of the defendant to read 'Aviva Insurance Ireland DAC' **the title hereof to be duly entered in the central office of the High Court with the proper officer;**
2. The dispute the subject of this action is hereby referred to arbitration;
3. [S]ubject to the aforesaid undertaking of the Solicitor for the Defendant the within action is stayed to abide the determination of the arbitration with no Order for costs of the Defendant's Motion dated the 7th day of October, 2019 to stay these proceedings pursuant to Article 8(1) of the Uncitral Modal Law;
4. Liberty to the Plaintiff to apply to the Courts for the stay to be lifted in the event of any non-compliance with the said undertaking;
5. [T]he plaintiff's motion dated 6th day of August 2019 for Judgment in default of Defence be and the same is hereby struck out and that the Defendant do pay to the Plaintiff the costs of the said Motion to be adjudicated upon in default of agreement..." [Emphasis in original].

19. The parties also agreed an "Agreed Directions" timetable as to pleadings in the arbitration as follows:

"1. The Statement of Claim and Points of Defence already delivered ... to be treated as pleadings to date in the arbitration.

2. The Claimants to deliver a Reply within on or before 12th February, 2020 (3 weeks).
3. Within 2 weeks of the date of receipt of the Reply, the parties shall exchange requests for discovery.
4. If both requests for discovery are mutually agreed, the parties shall make discovery of the categories of documents specified in the agreement within six weeks of the date of the said agreement.
5. In default of agreement as to discovery, the parties to shall [sic] apply to the Arbitrator in respect of discovery and the Arbitrator is empowered to determine, order and direct the categories of documentation that the parties are to discover and the time and manner for discovery.
6. On completion of discovery, either party may apply (on 7 days notice to the other) to the Arbitrator for further directions to be made for the purposes of the Arbitration.

Correspondence re discovery since making the order

20. The grounding affidavit of Mr. Murrans of 24 November 2021 sets out the course of correspondence between the parties for the purpose of establishing what the claimant contends is unacceptable delay and, accordingly, a breach of Mr. Corrigan's undertaking to the court. It seems that the parties exchanged discovery requests in accordance with the Agreed Directions, and on 21 April 2020, following discussions between counsel, a period of eight weeks from 21 April 2020 for the exchange of affidavits of discovery was agreed.

21. By 17 June 2020, the claimants' solicitors informed the respondent's solicitors that the claimants were in a position to exchange affidavits of discovery and documentation. On 16 July 2020, the respondent's solicitors wrote to the claimants' solicitors, stating that there had been considerable delay in retrieving documentation from the respondent due to covid-19

restrictions. However, despite a number of telephone contacts from the claimants' solicitors, three further months elapsed without any documentation being furnished by the respondent. By letter of 17 September 2020 from the claimant's solicitors, it was intimated that, unless they heard from the respondent's solicitors within ten days with confirmation that the respondent's solicitors were in a position to exchange immediately the respondent's affidavits and discovery documentation, the claimants would apply to court to lift the stay on the High Court proceedings on the basis of non-compliance with the undertaking to court. By letter of 7 October 2020, the respondent's solicitors apologised for the delay; after further communication between the parties, they provided the claimant's solicitors on 12 October 2020 with an "unsworn and incomplete" draft of the respondent's affidavit of discovery. In its cover letter, the respondent's solicitors confirmed that a sworn copy would be provided as soon as Mr. Corrigan was in a position to have the affidavit sworn.

22. Further correspondence ensued in which the claimant's solicitors complained about the affidavit being "unsworn and incomplete", ultimately threatening by letter of 6 November 2020 – by which date no response had been received from the respondent's solicitors – to apply to court to lift the stay if no reply was received by 13 November 2020.

23. On 10 November 2020, the respondent's solicitors wrote to the claimant's solicitors enclosing an unsworn affidavit of discovery of Alan Darcy of the respondent. In that letter, it was stated that the unsworn affidavit would not differ in any way from the sworn affidavit of discovery to be furnished to the claimant's solicitors. It was contended that there were still practical logistical difficulties with having the affidavit of discovery sworn due to covid-19 restrictions then in force. In the letter, Mr. Corrigan stated that he was unable to access the claimant's discovery documentation via the electronic link previously provided and requested a hard copy of the claimant's discovery documentation. He stated that as soon as he was in a

position to furnish the claimant's solicitors with a sworn affidavit of discovery, he would do so.

24. In his affidavit of 24 November, 2021, Mr. Murran averred at para. 94 that "...as of the date of swearing of this affidavit, [the unsworn affidavit of Mr. Darcy] is the only version of the respondent's affidavit of discovery that we have received from the respondent solicitors".

25. Mr. Murran avers at para. 101 of his affidavit that:

"(f) Seventeen (17) months have passed since the agreed timeframe for the mutual exchange of Discovery expired and the Respondent's solicitors have still not furnished the Sworn Affidavit of Discovery of the Respondent;

(g) Ten (10) months have passed since my office raised a query concerning the Respondent's discovery documentation on 28 January 2021 and the Respondent's solicitors have not responded to or dealt with this query;

(h) Two (2) months have passed since my office on 25 September 2021 repeated the query concerning the Respondent's discovery documentation made on 28 January 2021 and requested the Respondent's sworn Affidavit of Discovery and the Respondent's solicitors have not responded to my office's letter dated 25 September 2021 in this regard."

Correspondence re modular hearing of arbitration

26. Mr. Murran avers at para. 102 of the grounding affidavit that, in a letter dated 12 November 2020, "...the Respondent's solicitors identified the fundamental issue between the parties as whether the cover underwritten by the Respondent at the time of the loss herein was on the basis of a Homechoice or HomePak policy and suggested that this should be dealt with by way of a preliminary hearing without dealing with the issue of quantum at the same time

and that should the Respondent succeed at the preliminary hearing, the issue of quantum becomes moot”.

27. After some reminders from the respondent’s solicitors and holding letters from the claimants’ solicitors, the latter wrote to the respondent’s solicitors on 29 January 2021 confirming that the claimant was not prepared to agree to the suggestion that the issue of whether the insurance policy that applied at the time of the loss was a Homepak policy or a Homechoice policy be tried as a preliminary issue in the arbitration. The claimant’s position was that the arbitration should proceed by means of unitary proceedings in which all issues of fact and law would be heard, tried and determined at the same time.

28. By a letter of 10 February 2021, the respondent’s solicitors requested the claimants to reconsider their position in this regard, and indicated that in the event that the claimants did not reconsider their position, a formal application would have to be made to the arbitrator in which the respondent would seek a direction of the arbitrator that this preliminary issue should be tried.

29. The claimant’s solicitors replied by letter of 11 February 2021, stating that the claimant’s position had not changed. The said letter set out the claimant’s detailed reasons for his position. By a letter of the following day, the respondent’s solicitors noted the claimant’s position and indicated they would seek counsel’s advice. The respondent’s solicitors indicated by letter of 30th March, 2021 that they had written to counsel seeking advice and awaited hearing from counsel in this regard. Mr. Murran avers at para. 10 of his affidavit that his office “heard nothing further from the respondent solicitors concerning the trial of a preliminary issue until 20 August 2021 – just under 5 months later” [emphasis in original]. On that date, the respondent’s solicitors called upon the claimants to consent within fourteen days to the trial of the arbitration taking place on a modular basis, failing which the

respondent “would make the necessary arrangements to make an application to the arbitrator for a direction to this effect”.

30. The claimant’s solicitors wrote by letter of 26 August 2021 confirming that the claimant’s position had not changed and that the claimant was not prepared to consent to the hearing of the arbitration on a modular basis for the reasons set out in the letter of 11 February 2021. The respondent’s solicitors replied by letter of 1 September 2021, noting the claimant’s position and stating that an application would have to be made to the arbitrator for directions on the issue; they stated that they were liaising with counsel and “would hope to revert to you without delay”.

31. Mr. Murran avers that, as of the date of swearing of the affidavit – 24 November 2021 – the respondent’s solicitors “have not reverted to my office concerning an application by the respondent to the arbitrator for directions on the issue of whether the arbitration should proceed by way of a modular hearing”.

32. At para. 114 of his affidavit, Mr. Murran points out that:

- There was a delay of ten months between the making of the agreed order and the respondent’s solicitor’s initial suggestion that the arbitration should proceed by way of modular hearing; as of the date of swearing of the affidavit, “a year has passed since the Respondent’s solicitors first suggested that the arbitration should proceed by way of modular hearing...”;
- Nine months have passed since the respondents were first informed that the claimant would not agree to a modular hearing;
- Five months delay ensued between the respondent’s solicitors informing the claimant’s solicitors on 30 March 2021 that they were taking counsel’s advices and the letter of 25 August 2021 in which the demand that the claimant agree to the arbitration proceeding by way of modular hearing within

fourteen days was made, failing which the respondents would make arrangements to make an application to the arbitrator for a direction to this effect;

- Three months have passed since the respondent’s solicitors were informed that the claimant’s position had not changed;
- Two months have passed since the respondent’s solicitors indicated that they intended to make an application to the arbitrator for directions, apparently without any such application being made.

The respondent’s reply

33. By an affidavit of 3 March 2022, Mr. Corrigan swore an affidavit on behalf of the respondent replying to Mr. Murran’s grounding affidavit. He averred that the Respondent did not accept that there is any basis for the application to the court, “...and, in particular, for the court granting an order lifting the stay placed on the proceedings pursuant to Article 8(1) of Uncitral Model Law staying the proceedings so as to allow the matters in dispute between the parties to be referred to arbitration pursuant to the arbitration clause contained in the policy agreed between the Claimants and the Respondent and pursuant to the “Agreed Order” document (the “**Agreed Order**”) and the “Agreed Direction” document (the “**Agreed Direction**”) also agreed between the parties on the 22nd January 2020...” [para. 4].

34. Mr. Corrigan averred that “...all of the issues identified in Mr. Murran’s extensive affidavit are matters which should more appropriately be raised with the Arbitrator, Mr. Michael Counihan S.C.... each of the matters upon which Mr. Murran relies are matters concerning the conduct of the arbitration and should be the subject of an application for directions to the Arbitrator. No such application has been made and instead, the Applicant has simply referred the matter to this court.” [para. 5]. In this regard, Mr. Corrigan refers to paras. 5 and 6 of the agreed directions “... which clearly provide that any issues in dispute between

the parties concerning discovery are matters which either party can raise with the arbitrator by way of a formal application to the arbitrator, who is empowered to direct the categories of documents that the parties are to discover and the time and manner for discovery”. [para. 6]..

35. In relation to his undertaking to the court, Mr. Corrigan avers as follows:

“9. While the applicant refers to the undertaking that I gave to this Honourable Court on 22 January, 2020 that, on behalf of the Respondent, I would participate in the arbitration in a timely and efficient fashion, and that the Applicant should have liberty to apply to the court in the event that I did not, that provision did not and does not displace the exclusive jurisdiction of the Arbitrator to make directions for the conduct of the arbitral proceedings. Undoubtedly, in the event that the arbitrator had made directions and the Respondents failed to comply with those directions in a timely and efficient manner, then the Applicant would have been entitled to apply to lift the stay. However, this is not what has occurred.”

36. Mr. Corrigan then avers as follows:

“10. As Mr. Murran since the 22nd January 2020 on behalf of the Claimants has not invoked the jurisdiction of the arbitrator and, in particular, has not made any formal application to the Arbitrator with regard to the issues which he extensively sets out in his affidavit of the 24th November, 2021, it is the Respondent’s position that the court should not entertain the application now before the court, as it effectively seeks to bypass and ignore the jurisdiction of the arbitrator, who is exclusively seized [sic] of the dispute between the parties by virtue of this court order of the 22nd January, 2020”.

37. In relation to the issue of discovery, Mr. Corrigan does not dispute that there was delay on his part in addressing the issue of discovery [para. 16]. He also accepts that there is a duty on the respondent to furnish a sworn affidavit of discovery. However, he avers that no

prejudice in the sense of delaying the progress of the arbitration was caused by the respondent furnishing an unsworn affidavit of discovery on 10 November 2020. He avers at para. 20 that he had “now furnished” the claimant solicitor with a copy of the respondent’s sworn affidavit of discovery and a copy of the documents sought by Mr. Murran initially in his letter of 28 January 2021, and again subsequently on 25 September 2021.

38. In relation to the issue of whether or not there should be a modular hearing, Mr. Corrigan accepts “that there was a degree of delay in advancing the issue of a modular hearing ...”, but does not accept that Mr. Murran was justified “in relying on his dissatisfaction with the Respondent’s failure to apply to the Arbitrator as a valid ground for issuing the motion which is now before the court”. [para. 24].

39. Mr. Corrigan expresses the respondent’s position as follows:

“25. It is the Respondent’s position that the very same considerations which I have identified with regard to the issue of discovery in opposing the application now before the court, also apply with equal validity to the issue of the modular hearing. This was an issue which Mr. Murran could have readily sought direction from the Arbitrator if he was dissatisfied with the Respondent’s failure to do so. Indeed, he could have chosen to simply ignore the suggestion that I had made that the arbitration should be conducted by way of modular hearing and could instead have proceeded to simply apply to the Arbitrator for a hearing date for the arbitration ...”.

40. Mr. Corrigan complains about Mr. Murran’s failure to raise the issue in correspondence with his firm and indicate that it was the claimant’s intention to pursue an application to court to lift the stay because of the respondent’s failure to apply to the arbitrator for a modular hearing. He avers that it was “a complete surprise to me when my firm was served with a copy of the notice of motion and a copy of Mr. Murran’s affidavit and exhibits...” [para. 27]. He reiterates that he does not accept “that it is open to Mr. Murran to

swear an affidavit grounding an application on behalf of the claimants to seek an order in terms of paras. 1 and 2 of the notice of motion without the claimant having first invoked the jurisdiction of the arbitrator to deal with the issues in question ...” [para. 28]. He further avers that “...it is the respondent’s position that Mr. Murran on behalf of the claimants should not be allowed to seek an order from the court exiting the arbitration process, without the claimants themselves having invoked the jurisdiction which they, like the respondent, are also subject and bound subsequent to the making of the order at the 22nd January 2020, the Agreed Order” and the “Agreed Directions”. [para. 29].

41. Mr. Murran swore a brief replying affidavit on 21 March 2022 in which he took issue with the positions adopted by Mr. Corrigan in his affidavit. In particular, he avers at para. 14 that “...[C]lear warnings were given to Mr. Corrigan of the Claimant’s intention to proceed with a motion to lift the stay if Mr. Corrigan failed to participate in the Arbitration in a timely and efficient fashion. In this regards, I refer to correspondence from my office to Mr. Corrigan dated 17 September 2020, 7 October 2020 and 6 November 2020, all exhibited in the grounding affidavit”. He also refers at para. 40 to his belief that “...the proposal for a modular hearing was made by Mr. Corrigan on behalf of the Respondent and as the Claimants had made it clear on 29 January 2021, 11 February 2021 and 25 August 2021 they would not agree to a modular hearing, the onus was on the respondent to apply to the arbitrator for directions concerning a modular hearing of the arbitration. I say and believe that there was no such onus on the Claimants in this regard”.

The circumstances leading to the order

42. It is important to understand the circumstances in which the court order was made, and the applications which were before the court at that time.

43. By a notice of motion issued on 03 August 2019, the claimant sought judgment in default of defence against the respondent pursuant to O.27, r.8 of the Rules of the Superior

Courts. By a notice of motion of 07 October 2019, the respondents sought an order pursuant to Article 8(1) of the UNCITRAL Model Law staying the proceedings to allow the disputes and differences between the parties to be referred to arbitration pursuant to the arbitration clause in the insurance policy on foot of which the claimant was prosecuting the proceedings.

44. The respondent referred to discussions between the parties, and the agreement that Mr Counihan would act as arbitrator. Mr Corrigan, who swore the grounding affidavit for the Article 8 motion, averred at para. 11 that “[t]he issue which brings the matter back before this Court is the Plaintiff’s decision to treat the delay [on the part of the respondent in finalising the submission to arbitration] which has occurred as an alleged repudiation by the Defendant of the arbitration process...the Defendant has made it clear that any issue or grievance which the Plaintiff may have with the delay which has occurred is a matter for the Arbitrator...”.

45. Mr Murran swore a replying affidavit on 18 November 2019 on behalf of the claimant complaining of lengthy delays by the respondent. In particular, Mr Murran at para. 16 made the point that “[a]fter my office returned the draft Submission to Arbitration to the Defendant’s legal representatives on 26 November 2018, nothing further was heard from the Defendant’s legal representatives, either concerning the draft Submission to Arbitration or generally”. A “points of defence” was however served on the respondent on 03 July 2019; Mr Murran comments at para. 26 of his affidavit that the respondent appeared “to have mistakenly treated the Plaintiff’s Statement of Claim *in the High Court proceedings* delivered on 23 May 2019 as being the Plaintiff’s Points of Claim *in the arbitration*” [emphasis in original].

46. The motions were listed together, and the parties reached an accommodation. The essence of the orders, both agreed and made by the court, was that the matter would be referred to arbitration, but subject to the undertaking of Mr Corrigan “that he will on behalf of his clients participate in the arbitration in a timely and efficient fashion...”.

The undertaking

47. The wording of the undertaking is curious. What is clearly intended is that Mr Corrigan was undertaking that the conduct of the respondent's participation in the arbitration would occur "in a timely and efficient fashion...", and the undertaking was effectively an assurance by Mr Corrigan that he would be responsible for the respondent's conduct in this manner. It is important to state that, while the claimant undoubtedly contends that the terms of the undertaking were breached in as far as the respondent's role in the arbitration was not conducted "in a timely and efficient fashion", it was not at any point suggested that Mr Corrigan was in deliberate or wilful breach of his undertaking to the court. However, the claimant contends that, in accordance with Clause 4 of the court order, there was clear non-compliance with the undertaking, and that the claimant was accordingly entitled to an order lifting the stay on the proceedings. It is argued that the court has an inherent jurisdiction to grant a stay, and equally a jurisdiction to lift the stay in appropriate circumstances.

48. The respondent does not contest that the court has an inherent jurisdiction to grant a stay. However, the respondent argues that, once an order is made pursuant to Article 8, the court can only decide that the arbitration process is at an end in the circumstances set out in Article 8. Counsel submitted that the undertaking "cannot have the effect of undermining Article 8". The failure to comply with the undertaking must be such that it renders the arbitration "null and void, inoperative and incapable of being performed" – the criteria set out in Article 8(1). The respondent argued that the delay "does not come close" to the threshold set out in Article 8(1).

Article 8(1) of the Model Law

49. 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”.

50. While the respondent’s application for a reference to arbitration was pursuant to Article 8(1), it is not apparent from the face of the court order that the referral to arbitration was made pursuant to Article 8(1). While para. 3 of the court order refers to Article 8(1), that is merely to identify the respondent’s application; the order makes it clear that the referral to arbitration was “by consent”, but not that the referral was pursuant to Article 8(1): see para. 2 of the order.

51. Paragraph 3 of the order states that “subject to the aforesaid undertaking of the solicitor for the defendant...”, “...the within action is stayed to abide the determination of the arbitration...”. Once again, it is not indicated that Article 8(1) is the authority under which the referral to arbitration is made.

52. The Irish courts have repeatedly confirmed that, where the requirements of Article 8(1) are satisfied, the court is under a mandatory obligation to make the referral and does not have a discretion whether to refer or not: see the dicta of Barniville J. (as he then was) in *K&J Townmore Construction Limited v Kildare and Wicklow Education and Training Board* [2019] 2 IR 688, and *Ocean Point Development Company Limited (In Receivership) v Patterson Bannon Architects Limited* [2019] IEHC 311.

53. The respondent proceeded on the basis that the referral to arbitration in the order was pursuant to Article 8(1). The claimant did not argue that it was not made pursuant to Article 8(1). I propose to deal with the issue on the basis that Article 8(1) governs the referral to arbitration in the order, given that the respondent’s application to the court was on this basis.

54. The respondent argues that, given that Article 8(1) must be applied by the court where its terms are fulfilled, the court cannot lift the stay unless the arbitration agreement is “null

and void, inoperative or incapable of being performed”. In my view, there are numerous difficulties with this line of argument.

55. Firstly, it is absolutely clear that the respondent agreed expressly that the referral to arbitration was subject to the observance by Mr Corrigan of his undertaking as to the respondent’s conduct of the arbitration, and that the consequence of a failure to comply with the undertaking – “in the event of any non-compliance with the condition at 4 above”, as the “agreed order” states – would be the lifting of the stay. The respondent now seeks to resile from that agreement by saying that, far from “any non-compliance” with the undertaking resulting in the lifting of the stay, the claimant must now establish that the arbitration agreement is “null and void, inoperative and incapable of being performed” – clearly far more exacting criteria than were agreed between the parties.

56. Secondly, the court order expressly permits an application to lift the stay “in the event of any non-compliance with the undertaking”. The intention of the order is clear, and reflects the terms to which the parties consented. Any deviation from the “timely and efficient” standard may result in an application to lift the stay. To hold the claimant to the more exacting standard of “null and void, inoperative and incapable of being performed” runs contrary to the intention of the parties and the express order of this Court.

57. Thirdly, the court, with the consent of the parties, exercised its inherent jurisdiction to stay the proceedings to facilitate the referral to arbitration on a specific basis – an assurance to the court by the respondent’s solicitor as to the conduct of the respondent’s participation in the arbitration. In my view, it is axiomatic that, if the court can exercise its inherent jurisdiction to grant a stay, it must equally have inherent jurisdiction to lift the stay. Where the circumstances in which it might do so are agreed by the parties, its jurisdiction to lift the stay when those circumstances occur cannot be doubted.

“Timely and efficient fashion”

58. The court order gives liberty to the claimant to apply to lift the stay “in the event of any non-compliance with the said undertaking...”. It is clear that both the parties and the court intended that the arbitration proceed promptly and efficiently, and that any failure in that regard might result in the resumption of the proceedings.

59. In my view, it is clear beyond doubt that, for whatever reason, the respondent did not conduct the arbitration in a “timely and efficient fashion”. The delays to which Mr Murran avers in his affidavit – and which are not disputed by the respondent – manifestly justify the respondent in invoking para. 4 of the court order and applying to the court to lift the stay.

60. The respondent suggests that the claimant should have taken up any question of delay in the arbitration in the period after the court order on the part of the respondent with the arbitrator. Certainly, the claimant could have done this. However, having been subjected to unacceptable foot-dragging by the respondent, the claimant chose to avail of the process the parties themselves agreed and which was ordered by the court, and applied to court to lift the stay. In my view, he was plainly entitled to do so.

61. It is also suggested that the claimant, having decided not to agree to a modular hearing, could simply have applied to the arbitrator for a direction that there be a unitary hearing. Once again, the claimant could have done this. However, from February 2021 onwards – see para. 28 *et seq* above – the respondent was intimating its intention to apply to the arbitrator for a direction that a preliminary issue applied. The respondent suggested on a number of occasions throughout 2021 that it would make such an application. I do not think that the claimant can be faulted for waiting to see if the respondent would carry out its intention, and then regarding its failure to do so as further evidence of failure to conduct the arbitration in a “timely and efficient fashion”. The court order and the agreed order both envisaged that the respondent would change its ways and act in a “timely and efficient fashion”. The respondent now argues that further dilatory conduct on its part should have

caused the claimant to try to prevail on the arbitrator to make directions to improve the respondent's conduct of the arbitration. There is no reality to this; it is in my view perverse to suggest that, having applied to the court to try to get the respondent to mend its ways, the claimant should now do so again before the arbitrator, in circumstances where the claimant had a ready remedy supplied by the order agreed by the parties and the court order.

62. The respondent submitted that the courts have emphasised that parties to an arbitration agreement have mutual obligations to engage the arbitral process and to keep the arbitration moving up to and including a final determination by the arbitrator, and cite the following dicta of Lord Diplock in *Bremer Vulkan Schiffbau v South India Shipping Corp* [1981] AC 909 at 983-985:

“Where the arbitration agreement is in a clause forming part of a wider contract and provides for the reference to arbitration of further disputes arising under or concerning the contract, neither party knows when the agreement is entered into whether he will be claimant or respondent in disputes to which the arbitration agreement will apply. If it creates any contractual obligation to proceed with reasonable dispatch in all further arbitrations held pursuant to the clause...the obligation is, in my view, mutual... it obliges each party to cooperate with other in taking appropriate steps to keep the procedure in the arbitration moving, whether he happens to be claimant or the respondent in the particular dispute”.

63. This passage is relied upon by the respondent in aid of the argument that there was an obligation on the claimant, if the respondent was causing delay in the arbitration, to apply to the arbitrator to move things along. As I have made clear above, I do not consider that the claimant was under any obligation in this regard. While Lord Diplock's comments cited above are unexceptionable as a general expression of the mutual duty of parties to an arbitration to cooperate in the smooth running of the arbitration, it is somewhat ironic that the

respondent calls those comments in aid in circumstances where it had been the source of serious delay in the proceedings, agreed to mend its ways for the purpose of the arbitration, and then entirely failed to do so. To place the onus on the claimant to rectify this situation in the arbitration is inappropriate and unrealistic.

The Court's Inherent Jurisdiction

64. There can be no doubt that there is an inherent jurisdiction in the court to stay proceedings in support of arbitration notwithstanding the adoption of the Model Law in this country. In *P. Elliott & Company Limited v FCC Elliott Construction Limited* [2012] IEHC 361 MacEochaidh J confirmed this principle, and at para. 70 of his judgment, explicitly accepted that such a jurisdiction exists, referring to the judgment of Clarke J (as he then was) in *Kalix Fund Limited v HSBC Institutional Trust Services (Ireland) Limited* [2010] 2 IR 581, but also relying on judgments from Canada (a Model Law jurisdiction) and England and Wales (a non-Model Law jurisdiction).

65. As Barniville J points out at para. 66 of *XPL Engineering Limited v K&J Townmore Construction Limited* [2019] IEHC 665, a similar conclusion was reached by Cregan J in the *Lisheen Mine v Mullock & Sons (Ship Brokers) Limited* [2015] IEHC 50 although – as Barniville J. points out – in both that case and *Kalix*, the court found that there was no arbitration agreement between the parties and that, therefore, there was no basis on which the court's inherent jurisdiction could be exercised to stay the proceedings.

66. The Respondent does not dispute that the court has such a jurisdiction, notwithstanding the introduction of the Model Law into Irish law by the Arbitration Act 2010. It argues however that the parties *must* proceed by way of arbitration once a referral to arbitration is made in accordance with Article 8. This is what the parties in fact did pursuant to the Court Order. Article 8 governs the reference of disputes to arbitration; the court on 22 January 2020 made an order in that regard.

67. However, the parties expressly agreed that the inherent jurisdiction would be exercised to lift the stay in certain circumstances, which clearly subsequently occurred. The Court in such circumstances is entitled to lift the stay and give effect to its own previous order, which itself was the product of an agreement between the parties,

68. There is no basis upon which Article 8 could be proffered as a means by which the court could be prevented from giving effect to its previous order. Article 8 is the means by which the court is obliged to refer a dispute to arbitration; in this case the court did in fact refer the matter to arbitration, and stayed the proceedings to allow arbitration to proceed. However, in the circumstances which the parties agreed, the court is no longer prepared to stay the proceedings and accordingly the stay must be lifted in accordance with the court's own order of 22 January 2020; a situation for which the parties themselves provided.

Conclusion and orders

69. I consider that the claimant is entitled to an order lifting the stay on the proceedings, and I will make an order in terms of para.1 of the notice of motion. Paragraph 2 of the notice of motion seeks directions for the progressing of the proceedings. The parties should confer in this regard. I expect them both to agree directions with a view to getting the matter on as soon as possible. Likewise, if it is the intention of the respondent to apply to court for an order permitting the trial of a preliminary issue, that application should be made without further delay.

70. I will list the matter for mention on Tuesday 4 June 2024 so that the parties can address the court as to the steps necessary to progress the litigation. The parties might also consider whether any orders are necessary in relation to the status of the arbitration, although it appears clear that there has been little activity or progress in that sphere for the reasons set out above. I will also expect the parties to address the court on the issue of costs, although my indicative view is that the claimant is entitled to its costs of the application.

71. Finally, in circumstances where I have been critical of the delay on the part of the respondent, I am painfully conscious of the court's own delay in delivering this judgment. While this was due to heavy pressure of work, the parties should have received this judgment much sooner, and I apologise that it has taken so long to deliver it.