Kluwer Arbitration Blog

Irish High Court Lifts Order Staying Court Proceedings to Refer the Matter to Arbitration: Be Careful What You Consent to for You Might Just Get It

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The Irish High Court ("the High Court") in a recent decision in *Jephson & Jephson v. Aviva Insurance Ireland DAC [2024] IEHC 309* ("the Jephson decision") made an Order to lift a stay previously made on court proceedings where there was an arbitration agreement. The judgment to lift the stay previously granted is an unusual one but the court determined on the facts of the case that the agreed terms between the parties allowed the Claimant to come back before the High Court to lift the stay if the Respondent did not engage with the arbitration in a timely and efficient fashion.

Facts of the Case

The background to the case involves a lengthy process in which the Claimant submitted a claim for indemnity to the Respondent insurance company to be paid under a policy of insurance for damage to a property insured with the Respondent. The Claimant commenced court proceedings in 2019 seeking to be paid under the insurance policy for the value of the property which became uninhabitable following a partial collapse of the cliff on which the property was built.

In the court proceedings, the Claimant sought judgment in default of defence. In response, the Respondent made an application pursuant to Article 8(1) of the UNCITRAL Model Law as adopted by the *Arbitration Act 2010* to stay proceedings and refer the dispute to arbitration pursuant to an arbitration clause in the insurance policy. Both court applications were listed to be heard together and came before the court on 22 January 2020. The applications were dealt with on consent, the terms of which were agreed between the parties and reflected in the court Order as follows:

> "[T]he Court noting the undertaking of the Solicitor for the Defendant… that he will on behalf of his client participate in the arbitration in a timely and efficient fashion
>
> BY CONSENT IT IS ORDERED that …
>
> 2. the dispute the subject of this action is hereby referred to arbitration

> 3. subject to the aforesaid undertaking of the Solicitor of the Defendant the within action is stayed to abide the determination of the arbitration …
> 4. Liberty to the Plaintiffs to apply to the Court for the stay to be lifted in the event of any non-compliance with the said undertaking…"
>
> **[emphasis added]**

The parties further agreed that the Statement of Claim and "Points of Defence" (which the Respondent had filed instead of the usual Statement of Defence so as not to accede on its intention to refer the case to arbitration) already delivered would be treated as the written submissions in the arbitration. Procedural steps, including timeframe to deliver discovery, were agreed between the parties and the parties jointly appointed an Arbitrator.

The arbitration did not progress as intended. There was, according to the Claimant, significant delay on the part of the Respondent in making discovery which the Claimant argued was a breach of the agreed undertaking given and justified its application to lift the Order staying the court proceedings. The Respondent did not dispute the serious delay on its part but asserted that any issue in relation to its delay ought to be made to the Arbitrator rather than the court. The Respondent maintained that the delay was in part due to Covid-19 disruptions and to the Claimant's not agreeing to its proposal to bifurcate the arbitral proceedings. The Claimant had disagreed with that bifurcation proposal and stated that it was under the impression that the Respondent would make this preliminary application to the Arbitrator. In any event, there was never a case management conference, and no application in relation to delay, discovery or otherwise was made to the Arbitrator by either party.

Frustrated by the over two-year delay from the Order staying court proceedings, the Claimant issued a Motion to the Irish High Court in February 2022 to have the stay lifted pursuant to the agreed Order made on 22 January 2020.

The Court's Determination

Delivering his judgement, Mr. Justice Sanfey largely relied on the Order made following the parties' consent agreement which made express reference to an undertaking to the court by the Respondent's solicitor to participate on behalf of his client in the arbitration in a "*timely and efficient*" manner and the provision in the Order that any non-compliance would entitle the Claimant to apply to the court to lift the stay. Commenting on the agreed Order, which was made by consent between the parties, the trial Judge noted that the Order was a "*curious*" one.

In reply, the Respondent sought to resist the Claimant's application to have the Order lifted relying on Article 8(1), submitting that the undertaking given could not undermine Article 8(1) and suggesting that it was only in the event that the non-compliance could be shown to have made the arbitration agreement null and void, inoperative and incapable of being performed that the court could decide that the arbitration was at an end.

In relation to the Order made the Judge noted that:

> "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."

The Judge determined that Respondent did not engage with the arbitration in a timely and efficient fashion and failed to comply with the undertakings given to the court. Having made this determination, and as outlined in the Consent Order, the court noted that this gave the Claimant the right to come to court to have the stay lifted. Given that this was a unique position which the parties themselves had agreed to, the court made the Order giving effect to the parties' agreement by lifting the stay.

Impact of the Decision

Although there is some brief discussion in the judgment on the inherent jurisdiction of the court to lift a stay, it seems clear that but for the particular terms which the parties had agreed and which were reflected in the original Consent Order, Mr. Justice Sanfey would not have made an Order to lift the stay on the proceedings. The Irish courts have demonstrated unequivocally that, where there is a valid arbitration agreement and an application to stay proceedings is made, the courts will refer the parties to arbitration. See for example the decision in *Ocean Point Development Company Ltd (In Receivership) v. Patterson Bannon Architects Ltd & ors [2019] IEHC 311* and *K&J Townmore Construction Limited v. Kildare and Wicklow Education and Training Board [2019] IR 688* in which Mr. Justice Barniville noted that "the Irish Courts have consistently held that where the requirements of Article 8(1) of the Model Law are met, the court is subject to a mandatory obligation to refer" the parties to arbitration. In the Jephson decision, there is no determination that the court was taking a step to move away from the established jurisprudence. It is thus evident that had the court been satisfied that the referral to arbitration was solely on the basis of Article 8(1), the Claimant's application to lift the stay would have been unsuccessful.

The decision also raise an unusual question in relation to the impact and validity of the agreed terms drafted by the parties which became the Order made by the court. It is well noted from the *Travaux Préparatoires* commentary on Article 8 and court decisions from jurisdictions applying the Model Law that Article 8 prevents a court from referring an action to arbitration of its own motion and that the power to do so only arises where there was a valid agreement to arbitrate the dispute and an application is made by at least one of the parties to refer to arbitration. Once a referral is made there is ordinarily no right to bring the dispute back before the courts to litigate the issue. However, in this case herefore, the parties' agreement made the referral to arbitration subject to the Respondent's solicitors' undertaking, and therefore allowed for the possibility for an application to lift the stay in the event of non-compliance with the undertaking

It is unclear why in this case the Claimant did not raise its grievances in relation to the Respondent's delay before the Arbitrator, in particular since the parties had agreed any disputes in relation to the agreed timeframe were to be made to the Arbitrator. It is also unfortunate that the issue in relation to a bifurcated hearing was not made by either party to the Arbitrator and that no

case management conference was held.

Conclusion

This decision outlines the court's willingness to give effect to the terms agreed between the parties and serves as a warning to parties to ensure careful consideration before an agreement is made which forms part of a court Order. In terms of its value as a case precedent, this decision is best confined to the unique facts of the case and terms agreed between the parties. The decision does not overturn the long-established position in Irish law on referrals under Article 8(1) of the Model Law that demonstrates unequivocal support for the arbitral process.

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