THE HIGH COURT

COMMERCIAL

[2010 No. 5910P]

BETWEEN

BARNMORE DEMOLITION AND CIVIL ENGINEERING LIMITED

PLAINTIFF

AND

ALANDALE LOGISTICS LIMITED, PYNEST LIMITED, DUBLIN AIRPORT AUTHORITY PLC AND BARRY DONOHUE (AS LIQUIDATOR OF PYNEST)

DEFENDANTS

Judgment of Mr Justice Feeney delivered on the 11th day of November, 2010.

1. The first and second named defendants have sought an order pursuant to Article 8(1) of the Model Law and s. 6 of the Arbitration Act 2010 referring the plaintiff's claim as against the first and second named defendants to arbitration and staying the proceedings as against those defendants. Those defendants assert that the plaintiff's claim is subject to an arbitration agreement within the meaning of the Arbitration Act 2010. That application is resisted by the plaintiff. The plaintiff's core ground of opposition is that there is no arbitration agreement between the plaintiff and either of the first or second named defendants.

2. Section 6 of the Arbitration Act 2010 adopts the Model Law and provides that subject to that Act the Model Law shall have the force of law in the State and shall apply to arbitrations under arbitration agreements. The text of the UNCITRAL Model Law on international commercial arbitration is set out in Schedule 1 to the Arbitration

Act 2010. Article 8 deals with arbitration agreements and substantive claims before the Court. Article 8(1) provides:

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

The issue in dispute in this case is whether there is an arbitration agreement between the plaintiff and either or both of the first two defendants. Section 2 of the 2010 Act identifies that an arbitration agreement shall be construed in accordance with option 1 of Article 7 of the Model Law. Option 1 Article 7 provides for the definition and form of arbitration agreement in the following terms:

(1) "'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means .....

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

In Article 7(1) arbitration is placed in quotation marks in recognition of a well established concept which emanates from the doctrine of separability which applies to arbitration clauses in contracts. That doctrine recognises that an arbitration agreement has a separate existence from the matrix contract for which it provides the means of resolving disputes. It recognises that the agreement to arbitrate is an independent agreement and it follows that the doctrine of separability is a recognised feature of arbitration clauses. The independence of an arbitration agreement under U.K. law was dealt with in the judgment of Lord Steyn in the case of *Lesotho Highlands Development Authority v. Impregilo SpA and Others* [2005] UKHL 43 at paragraph 21 of the judgment in the following terms:

> "It is part of the very alphabet of arbitration law, as explained in *Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd.* [1993] QB 701, 724-725, per Hoffman L.J. (now Lord Hoffmann) and spelled out in section 7 of the Act, that the arbitration agreement is a distinct and separable agreement from the underlying or principal contract. It is in the arbitration agreement, read with the curial law, in this case the Arbitration Act 1996, that the powers of the tribunal are to be found and not in the underlying contract. In the present case one is dealing with an ICC arbitration agreement. In such a case the terms of reference which under article 18 of the ICC rules are invariably settled may, of course, amend or supplement the terms of the arbitration agreement. The terms of reference too are a source of the powers of the arbitrator. This is the context in which the terms of reference in the present case expressly provided for the dispute to be settled in accordance with the provisions of the 1996 Act."

That analysis is equally applicable to the position in this State under the Arbitration Act 2010. This is clear from Article 16(1) of the Model Law incorporated into law by the Arbitration Act 2010 which states, *inter alia*, -

> "... For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract."

3. Whilst it is the case that an arbitration agreement has a separate existence from the matrix contract for which it provides the means of solving disputes, it is not the case that an arbitration agreement does not have to be agreed between the parties for the parties to be bound by such agreement even though such agreement can be independent or separate. Absent there being an agreement to arbitrate a matter is not the subject of an arbitration agreement and therefore is not covered by Article 8.

4. The definition of an arbitration agreement set out in Article 7 requires that the arbitration agreement shall be in writing. However there is no requirement for it to be recorded in any particular form as long as it is in writing and Article 7(3) provides that an arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. It is therefore unnecessary for a party seeking to establish the existence of an arbitration agreement to prove that a particular contract was executed or signed but rather what is required by statute is that the arbitration agreement be in writing. It is possible for the agreement to arbitrate to be concluded orally or by the conduct of the parties or by other means provided the content of the arbitration agreement is recorded in any form. There have been a number of decisions of the Irish courts which have identified agreements to arbitrate based on the business dealings between the parties, business realities and standard form contracts.

5. Article 16 of the Model Law provides for the competence of arbitral tribunals to rule on their own jurisdiction. It does so in the following terms 16(1):

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

That Article permits an arbitral tribunal to decide questions of jurisdiction including the existence of an arbitration agreement. It is the existence of an agreement to arbitrate which is the core issue before this Court. However, Article 16 is not mandatory and the existence of the power does not have the consequence that the Court is obliged in every instance to refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so itself is disputed. The Model Law does not require a party who contends that there is no arbitration agreement to have that question decided by an arbitral tribunal. The Court in exercising its jurisdiction under Article 8 has to consider whether the litigation in which an application is brought is the subject matter of an arbitration agreement. Therefore, whilst the doctrine of "Kompetenz-Kompetenz" which is given effect in Article 16 provides that the arbitral tribunal has the jurisdiction to determine whether or not the arbitration agreement ever existed, that power does not mean that the Court does not have the power to consider and decide whether or not an arbitration agreement exists and the Court is not precluded from making such inquiry and deciding if there is an arbitration agreement. Article 8, which is the Article invoked by the defendant applicants in this case gives the Court the jurisdiction to decide if a matter is subject to an arbitration agreement. This Court has the jurisdiction to rule on whether the arbitration agreement relied upon by the defendants exists or was ever agreed. In exercising its jurisdiction under Article 8 the Court can only do so if the

Court is satisfied that the action is in a matter which is the subject of an arbitration agreement.

6. The entitlement of both the Court and the arbitral tribunal to rule on the existence of an arbitration agreement has given rise to extensive discourse. In light of the fact that both a court and the arbitral tribunal have jurisdiction to consider and rule on the existence of an arbitration agreement the issue arises as to the standard of judicial review which should be applied by the Court in exercising its jurisdiction on this matter under the Model Law. This matter is summarised in the textbook by Gary B. Born entitled *International Commercial Arbitration* at Chapter 6, p. 881 where he deals with the issue of prima facie versus full judicial consideration of interlocutory jurisdictional challenges under the Model Law. He states:

> "When a party seeks an interlocutory judicial determination of jurisdictional objections, prior to any arbitral award on the subject, there is uncertainty regarding the standard of judicial review that should be applied by a court under the Model Law. As discussed below, the text of the Model Law, and many judicial authorities, strongly suggest that full judicial review of the jurisdictional objection is appropriate, at least in some circumstances. In contrast, as also discussed below, some judicial authority, and some aspects of the Model law's drafting history, suggest that only *prima facie* interlocutory judicial consideration is ever appropriate."

At the hearing before this Court counsel on behalf of the defendants contended that the appropriate approach to take was for this Court to hold that if the defendants established a *prima facie* case for the existence of the arbitration agreement that then the Court should refer the matter to arbitration and allow and permit the arbitral tribunal to consider the matter and if necessary to rule on the existence of the

arbitration agreement. Counsel on behalf of the plaintiff contended that the correct approach to Article 8 was for the Court to give full judicial consideration as to whether or not an arbitration agreement existed.

7. In the United Kingdom the courts have determined that any argument as to the existence of the arbitration clause itself or as to the scope of the clause will, other than in exceptional circumstances, generally be dealt with by the court itself on the basis that even though the arbitrators have the necessary jurisdiction to decide the matter themselves, the existence or validity of a clause is a matter more appropriately dealt with by the court itself. This is identified as being in recognition of the fact that the existence or validity of an arbitration agreement constitutes a threshold to the application before the court. It is acknowledged that this issue raises an inherent tension between the jurisdiction of the court to determine whether an arbitration agreement exists or is valid and whether it extends to the dispute in question and the power of the arbitrators to determine their own jurisdiction under the Kompetenz-Kompetenz principle set out in what is s. 30 of the UK Act of 1996. (See *Birse Construction Ltd. v. St. David Ltd.* [1999] BLR 194 and [2000] BLR 57 (C.A.) and *Al Naimi (t/a Buildmaster Construction Services) v. Islamic Press Agency Inc* [1999] CLC 212 and [2000] CLC 647 (C.A.)). Whilst the English courts in resolving the threshold issues in relation to the validity and scope of arbitration clauses have adopted an approach that such issues are to be determined by the court and not by the arbitrators, that is not an approach universally adopted in other jurisdictions. Counsel for the plaintiff argues that the correct approach for this Court to follow, based upon the wording in Article 8(1), is that full judicial consideration should be given to the issue as to whether or not there is an arbitration agreement between the plaintiff and either or both of the first two defendants. Counsel for the first two defendants

contend that the correct approach to follow is for the Court to consider whether or not on a *prima facie* basis it has been established that an arbitration agreement exists and if so an order under Article 8 should be granted.

8. Born in his textbook *International Commercial Arbitration* in dealing with the issue of *prima facie* versus full judicial consideration of interlocutory jurisdictional challenges under the Model Law concluded as follows (at Chapter 6, p. 885):

> "Not surprisingly, given the statutory text and drafting history, the weight of better reasoned national court authority in UNCITRAL Model Law jurisdictions has interpreted Article 8(1) as permitting full judicial consideration (rather than only *prima facie* review) in either all or some cases involving interlocutory challenges to the existence, validity or legality of the arbitration agreement (but not as to the scope of that agreement which is treated differently). That is the case with judicial decisions in Germany, Canada, New Zealand, Hong Kong and Australia.
>
> Despite these decisions a number of other courts in Model Law States have reached the opposite result, particularly in cases involving disputes over the scope of the arbitration agreement, holding that only *prima facie* interlocutory judicial review was appropriate in determining whether to refer a matter to arbitration."

Given the terms of Article 8(1) of the Model Law which refers to the matter being the subject of an arbitration agreement, there appears to be a particularly strong case for the argument that any review as to the very existence of the arbitration agreement should be on the basis of full judicial consideration as, if the Court were to stay proceedings where the existence of an arbitration agreement was in issue, such a stay would in effect be a finding in favour of the existence of a valid arbitration clause.

9. On the facts of this case, it is unnecessary for the court to make any determination as to whether a *prima facie* or a full judicial consideration should apply in relation to the issue as to whether or not there was an arbitration agreement in this case. That arises from the fact that the Court is satisfied, as hereinafter set out, that on either of those tests the defendants have failed to identify that the action is the subject of an arbitration agreement. Even if the Court was to apply the *prima facie* test to the existence of the arbitration agreement contended for by the first two defendants, the Court is satisfied that on that test the defendants have failed to establish that there was any arbitration agreement.

10. The first two defendants claim that there is an arbitration agreement which is binding on the plaintiff set out in writing and to be found in Clause 18 of a document entitled "Alandale Logistics Limited Bespoke Form of Subcontract 2006 Edition". That document is an unexecuted draft contract and the documents and evidence available to the Court confirm that that contract was never agreed. The weight of the defendants' case is that there was "an agreement in principle pending confirmation and acceptance for our respective companies". No such confirmation was ever made by either side. Nor is there any evidence that the arbitration clause was isolated and formed the subject matter of a separate, distinct or severable agreement. The documents and evidence available to the Court establishes that the bespoke form of subcontract was sent to the plaintiff and that thereafter negotiations and discussions occurred leading to the stage where it was agreed that the plaintiff would enter into an agreement with the second named defendant then known as Alandale Logistics (Ireland) Ltd. but that the terms and provisions of such contract were never concluded. The evidence goes no further than identifying a process by which the plaintiff had indicated an agreement to agree. The fact that the bespoke form subcontract was

never executed arose in circumstances where the terms to be included and contained within the contract were never finalised. The defendants contend that the fact that the contract was never executed or that all the terms were not agreed should not result in the arbitration clause in the draft agreement being unenforceable. However, for that to be the case the defendants would have to establish that the agreement to arbitrate as set out in writing in Clause 18 was a separate, independent or distinct agreement and there is no evidence to that effect. The clause dealing with arbitration within the bespoke form of subcontract remained no more than one of the many clauses within that agreement and that agreement was never concluded and that clause was never the subject of a separate or distinct agreement. The Court is also satisfied that the evidence establishes that there was no course of conduct or business dealings between the parties which would lead the Court to conclude that the parties expected or knew that an arbitration clause would govern their dealings. Nor was there a history of business dealings and contracts between the parties where arbitration agreements were habitually agreed and in place and, indeed, the evidence to the Court was that the only other dealing between the plaintiff and the defendants was between the plaintiff and the first named defendant where there was no arbitration agreement. Nor is it the case that the arbitration clause found at Clause 18 of the draft bespoke subcontract is a standard industry or profession wide clause but rather it is a unique clause and there was no agreement, understanding or evidence of any expectation in relation to that clause which would lead the Court to conclude that either the plaintiff or the first or second named defendants knew that their dealings were subject to an arbitration clause or agreement. The clause dealing with arbitration was one of a number of clauses contained in a draft agreement which was never concluded nor were the terms accepted. There was no separate agreement, understanding or dealings between the

parties which would lead the Court to conclude that the basis upon which the plaintiff was carrying out work was subject to an arbitration agreement.

11. It is the case that when the courts come to consider the terms of an agreement to arbitrate that the Court should do so with due regard to business realities and not seek too much in aid by way of technicality, where it is clear on what basis the plaintiff went upon a site and commenced work. As stated by Peart J. in *McCrory Scaffolding v. McInerney Construction Ltd.* [2004] 3 I.R. 592 (at p. 601):

> "I prefer to follow the thinking of Morris P. in *Lynch Roofing Systems Ltd. v. Bennett & Son Ltd.* [1999] 2 I.R. 450, which accords with my own sense that, in the business dealings between parties such as the parties before this court, one must have regard to the business realities and not seek too much in aid by way of technicality, where it must be clear on what basis the plaintiff went upon the site and commenced the work.
>
> I am satisfied that the arbitration clause should be read into the dealings between the parties."

In this case there is no evidence that the business dealings between the parties or business realities lead to the conclusion that it must have been clear that the plaintiff was carrying out work subject to an arbitration agreement or clause. There was no such agreement to arbitrate and the plaintiff had carried out and completed work for the first named defendant and been fully paid for that work prior to any arbitration clause being included in a draft contract. Further, the plaintiff had gone on site and commenced work on the works which form part of the claim herein prior to the plaintiff receiving the draft bespoke subcontract and there is no basis for suggesting that it must have been clear to the plaintiff or that the plaintiff went on to the site and commenced work knowing that such work and the agreement to do such work would

be subject to a arbitration agreement or clause. The previous dealings between the plaintiff and the first named defendant did not identify any "usual conditions" which would apply in respect of arbitration and the full extent of any reference to arbitration was no more than the fact that it was a clause contained within a draft agreement, the terms of which were never concluded or accepted. An examination of Clause 18 itself and the preceding Clause 17 also demonstrate that that clause along with a number of other terms within the draft contract were incomplete, inconsistent and in some instances factually incorrect. The draft bespoke subcontract in the form in which it was transmitted was so drafted and laid out that it required the insertion of additional information as well as amendment and correction. Nor is this a case where the Court can exercise a wide discretion in interpreting and applying an arbitration agreement as the Court would only be entitled to exercise that discretion where there was evidence that an arbitration agreement had been agreed between the parties or where it must have been clear to the parties on what basis the plaintiff went upon the site and commenced work.

12. The documents and evidence available to the Court identifies the following factual matters relevant to the issue of the arbitration agreement claimed by the first and second named defendants.

13. It is claimed by the first two defendants that the agreement to arbitrate is between the plaintiff and the second named defendant and that agreement is to be found in Clause 18 of the draft bespoke subcontract. That document was forwarded to the plaintiff in mid-April 2008. Prior to that date the plaintiff was unaware of the existence of the second named defendant which was known at that time as Alandale Logistics (Ireland) Ltd. That company had been incorporated on the 13th June, 2007 but prior to mid-April 2008 the existence of such company was not made known to

the plaintiff. Prior to April 2008 the plaintiff had carried out work at Dublin Airport for the first named defendant. Prior to the incorporation of the second named defendant the plaintiff had submitted a tender to the first named defendant in January 2007 and had carried out and completed works as a sub-contractor for the first named defendant in respect of Pier C at Terminal 2 at Dublin Airport. The first named defendant was appointed as the main contractor to the third named defendant by appointment which occurred on the 19th September, 2007 and prior to the plaintiff being appointed sub-contractor for the works, the first named defendant had engaged the plaintiff to carry out other works at Dublin Airport which works were undertaken between October 2007 and February 2008 and in April 2008 it was agreed that the plaintiff would receive payment in the sum of €600,000 in respect of such works from the first named defendant. Those works were carried out by the plaintiff for the first named defendant in circumstances where there was no arbitration agreement in place between the parties. By the 18th April, 2008 the plaintiff had carried out extensive works for the first named defendant and on that date Kieran Farrell sent an e-mail to the plaintiff enclosing a document entitled "Alandale Logistics Ltd. Bespoke Form of Subcontract 2006 Edition". That document is in the name of the first named defendant but gave the registered office of the second named defendant. The draft contained a substantial number of blanks and an entire lack of any financial detail or particulars relating to the proposed contract. It was drafted by reference to English law even though Clause 20 identified that the subcontract should be governed by and construed in accordance with the laws of the Republic of Ireland. It is clear that the telex of the 18th April, 2008 together with the enclosed draft subcontract raised the possibility of the plaintiff entering into contractual relations with the second named defendant, then known as Alandale Logistics (Ireland) Ltd. This is apparent from the

replying telex of the 22nd April, 2008 sent by Brendan O'Halloran of the plaintiff to John McKeon wherein it was stated:

> "It is very late on their side to suddenly change the employing party without reasonable notice and expecting that the directors of Barnmore would just go along with it."

That e-mail also identified that Brendan O'Halloran had had a "cursory look" over the proposed contract and that a few items popped up immediately to him and he identified some of those items in three numbered paragraphs. From the receipt of the e-mail and the draft subcontract on the 18th April, 2008 up until the 10th June, 2008 there were discussions between the parties which included the issue as to whether or not the plaintiff would be prepared to enter into a contract with the second named defendant, that is the Irish company, and if so, on what basis. In an exchange of e-mails a number of matters were dealt with including the three matters which had popped up on a cursory look and by the 6th June, 2008 the stage had been reached which was identified in a letter of that date from Kieran Farrell of the first two defendants to the plaintiff wherein it was stated on the third page:

> "My immediate concerns are to bring your payments up to date and get your contract agreed and signed. We have made payments to you to date from Alandale Logistics Ltd. and you are not in contract with. However all subsequent payments will be made through Alandale Ireland Ltd., hence the reason why you need to be in contract with the latter. At present you are working at risk and the sooner we have a contractual framework in place to work to the better for all concerned."

That was responded to by e-mail wherein it was indicated by John McKeon on behalf of the plaintiff that the plaintiff would be responding in full and due course but that

the plaintiff had not yet received a copy of the proposed revised contract and some three days later Kieran Farrell on behalf of the first two defendants responded to the plaintiff indicating that once he received comments from the plaintiff that he would re-issue the contract as there was no point issuing a document which the plaintiff was not going to sign on principle. The matter in issue was whether the plaintiff would contract with the second defendant. Thereafter a meeting took place between a representative of the plaintiff and representatives of the first two defendants. At that meeting it was agreed that the plaintiff would enter into an agreement with the Irish company and it was agreed in principle that the plaintiff would sign a contract "pending confirmation and acceptance from our respective companies". The evidence is that it was the joint understanding of both persons present at that meeting that neither of them had the authority to bind their respective companies. The extent of what was agreed in principle at that meeting is set out as being "an agreement in principle pending confirmation and acceptance from our respective companies" and it was an agreement that the plaintiff would enter into a contract. At that point in time a number of issues remained outstanding including the scope, programme, access and duration of the plaintiff's contract and also the second named defendant was to furnish the plaintiff with an amended version of the draft subcontract. No amended draft subcontract was ever sent by the second named defendant to the plaintiff. Indeed, in relation to a number of the matters outstanding the second named defendant adopted the position set out in its e-mail of 11th June, 2008, that in respect of those matters all were conditional on each other and none could be agreed in isolation. What occurred after the 11th June, 2008 was that one of the matters which had been agreed at the meeting of 10th June, 2008 was put in place, that is, a payment was made on the 19th June, 2008 in respect of sums outstanding for work already done by the

plaintiff. The defendants contend that that payment represented evidence of performance of the oral agreement of 10th June, 2008, which was an agreement in principle for the plaintiff to enter into a contract with the second named defendant. That contention is not supported by the evidence as there were a number of matters outstanding by that date and the second named defendant had failed to forward to the plaintiff an amended contract for the plaintiff's consideration and acceptance. Also at that stage no work been carried out to address the inaccuracies, inconsistencies and missing information in the draft subcontract. The extent of the agreement which is identified from the documents and the affidavit evidence is that the plaintiff had agreed in principle to enter into a contract with the Irish company but that the complete or final terms of that contract had not been identified.

14. The defendants further contend that two e-mails subsequent to the 10th June, 2008 from the plaintiff company effectively acknowledged the contract as set out in the draft subcontract. Those e-mails are dated 26th June, 2008 and the 11th July, 2008 and both are from John McKeon of the plaintiff company to the second named defendant. In the first of those e-mails the plaintiff company states "Your own document clearly shows" and in the second of those e-mails the plaintiff company makes reference to the draft subcontract in the following terms:

> "As a result of the ambiguities in s. 8 payments of the 'draft contract' it was agreed between Mr. Suba and our Dermot Hickey that payment would be made on the 11th July and Mr. Suba confirmed same in e-mail to me."

Neither of those two e-mails support the contention of a concluded agreement. In their terms they make it clear that the draft subcontract document is not viewed as being binding on the plaintiff as the document is referred to as "your own document" and a "draft document". Those statements are entirely consistent with the draft

subcontract being at a stage where its terms had not been agreed and indeed the draft subcontract remained at all times in a state and form where essential terms were missing. Clause 18 which is the clause in the draft subcontract dealing with arbitration referred to the English legislation in its reference to the Arbitration Act 1996 and that clause also referred to the fact that the arbitration clause at Clause 18 was subject to Clause 17 which was an adjudication process which applied under English law and has no equivalent in this jurisdiction.

15. The documents and evidence establish that what occurred on the 10th June, 2008 was that it was agreed that the plaintiff would enter into a contract with the second named defendant, that is the Irish company. A draft revised contract was to be forwarded and that never occurred. The agreement was an agreement in principle to enter into a contract and there was no acceptance of the terms of any specific contract nor was there the acceptance of any individual term or terms. The terms of the draft contract were never agreed nor was there any evidence of a separate, distinct or severable agreement whereby the parties agreed that their dealings would be subject to arbitration. The documents and evidence establish that there was never an agreement as to the terms of the subcontract nor was Clause 18 within the draft ever agreed or accepted by the plaintiff. The extent of the plaintiff's commitment was that, in principle, subject to the plaintiff company's confirmation, that it would enter into an agreement with the second named defendant. That agreement amounted to no more than an agreement to agree and clearly that agreement to agree was not intended to be enforceable. In the absence of an enforceable agreement and in the absence of any separate or independent agreement whereby the plaintiff and the first two defendants agreed that their dealings would be subject to arbitration, there is no arbitration agreement. Nor is there any history of dealing between the parties which

could lead the Court to conclude that the parties expected or knew that an arbitration clause would govern their dealings nor do the facts demonstrate that having regard to business realities that it must have been clear to the plaintiff that the plaintiff was carrying out works which were subject to an arbitration agreement. Indeed, the very terms of the arbitration agreement upon which the defendants seek to rely are themselves unclear and uncertain which is a further manifestation of the fact that an agreement to arbitrate was never concluded nor were the terms of such agreement identified.

16. In considering and applying the test of whether the defendant applicants have on the basis of a *prima facie* review established that this action is the subject of an arbitration agreement, the Court has considered the approach adopted by this Court when dealing with similar but not identical type of review. The Supreme Court has on two occasions considered the legal approach to be followed when considering applications for directions and a dismissal of an action at the conclusion of the plaintiff's evidence. In particular, the courts address the issue as to what approach the trial judge should take when considering such applications. Keane C.J. in *O'Donovan v. The Southern Health Board* [2001] 3 I.R. 385 stated (at p. 386) as follows:

> "However, counsel having reserved the right to go into evidence, which I think is the best way to put it, in the event of the application being unsuccessful, the trial judge was required to approach the question in accordance with the well established test dating indeed, from the days of trial by jury, in these cases, that is to say, as to whether assuming that the tribunal of fact was prepared to find that all the evidence of the plaintiff was true, and in other words treating the plaintiff's case at its highest, whether in those circumstances the tribunal of fact would be entitled to arrive at the conclusion that making those

assumptions, sometimes thought of but perhaps not entirely accurately described as the *prima facie* test, the defendant had a case to meet."

That approach followed and was consistent with the earlier statement of law in *O'Toole v. Heavey* [1993] 2 I.R. 544 to the effect that where a plaintiff had not made out any form of plausible case against any of the defendants, it remained clearly within the discretion of the trial judge to dismiss the action in its entirety at the conclusion of the plaintiff's evidence. Clearly there are different circumstances in this case but the approach identified by Keane C.J. in *O'Donovan v. The Southern Health Board* is of assistance to this Court in determining how to approach the issue as to whether the defendants and moving party have established a *prima facie* case that this action is the subject of an arbitration agreement. Adapting and applying the approach identified by Keane C.J. the Court has considered the defendant applicants' application on the basis that all items of evidence as relied upon by those parties are true and treating the applicants' case at its highest and whether in those circumstances the defendant applicants have established a *prima facie* case that the matter in issue in these proceedings is the subject of an arbitration agreement. There is no doubt that an arbitration clause was contained in the draft subcontract. However, the undisputed evidence is that the terms of that subcontract were never either finalised or agreed. A term within the subcontract provided for arbitration but that term was never the subject of any separate consideration or agreement. The defendant applicants' case at its highest is that the plaintiff agreed in principle pending confirmation and acceptance by the respective companies to enter into a contract. That was not an agreement to enter into the actual subcontract and the defendant applicants' case taken at its highest is that the subcontract was to be submitted to the plaintiff so that it could be considered and agreed. It is also the case that the defendant applicants' evidence

taken at its highest identifies no agreement, act or conduct by the plaintiff subsequent to the agreement in principle which could amount to the acceptance of the subcontract or any of the clauses therein including the arbitration clause. The defendant applicants have established a *prima facie* case that an arbitration clause was under consideration but there is an entire lack of evidence that the plaintiff accepted such arbitration clause. In those circumstances, even applying the *prima facie* test and taking the defendant applicants' case at its highest, there is no arbitration agreement between the plaintiff and the defendant applicants. For there to be such an agreement there would have to be acceptance of the arbitration clause or process by the plaintiff and there is no evidence of such acceptance either by express agreement, acknowledgement, action or conduct and absent such acceptance there is no arbitration agreement.

17. In the light of above, the Court is satisfied that even on a *prima facie* basis the action which is brought by the plaintiff in this Court is not the subject of an arbitration agreement, there being no arbitration agreement between the plaintiff and either the first or second defendant. It follows that the order sought by the first two defendants pursuant to Order 8(1) of the Model Law and s. 6 of the Arbitration Act referring the plaintiff's claim to arbitration should be refused.