Doyle v. Irish National Insurance Company plc [1998] IEHC 13; [1998] 1 IR 89; [1998] 1 ILRM 502 (30th January, 1998)

THE HIGH COURT

1997 No. 3729p
BETWEEN

BERNARD DOYLE

PLAINTIFF

AND
IRISH NATIONAL INSURANCE COMPANY PLC

DEFENDANT
JUDGMENT of Mr Justice Kelly delivered on the 30th day of January 1998.

1. On Monday last I acceded to the Defendant's application to stay these proceedings pursuant to the provisions of Section 5 of the Arbitration Act, 1980. On that occasion I indicated that I would state my reasons for making that Order today. I now do so.

2. From 1983 until 1996 the Defendant was the motor insurer of the Plaintiff. On the 27th October, 1990 the Plaintiff was involved in an accident which caused personal injuries to his son. The Plaintiff's son made a claim against the Plaintiff arising from the accident. The Plaintiff sought indemnity from the Defendant in respect of any liability for this claim.

3. In the course of investigating the son's claim the Defendant became aware that the Plaintiff had been convicted of the offence of being in charge of a mechanically propelled vehicle with excess alcohol in his blood contrary to Section 50 of the Road Traffic Act, 1961. That conviction had been recorded at Cappawhite District Court on the 10th May, 1983. The Defendant contends that that conviction was not disclosed to it at any renewals of the policy of insurance or indeed at any time. The Defendant takes the view that the failure to disclose this conviction amounts to a non-disclosure of a material fact. Accordingly, on the 5th January, 1996 the Defendant wrote to the Plaintiff and indicated that it was exercising its entitlement to avoid the policy of insurance on the grounds of non-disclosure of a material fact. It also notified the Plaintiff that it would not be indemnifying him in respect of his son's claim. The letter went on to point out that the effect of the Defendant's avoidance was to retrospectively invalidate each renewal of the policy which occurred after he had been convicted of the offence in question.

4. On the 12th January, 1996 the Defendant sent a cheque for £3,433.16 to the Plaintiff. It was accompanied by a letter which indicated that the cheque was a refund in respect of "unexpired term on the above policy following cancellation of same".

5. The Plaintiff does not accept the validity of the Defendant's purported avoidance of the policy of insurance. Consequently he began these proceedings on the 2nd April, 1997 seeking specific performance of the contract of insurance.

6. The Defendant countered by bringing the motion which I ruled on last Monday and which sought to stay these proceedings on foot of an arbitration clause contained in the policy of insurance pursuant to the provisions of Section 5 of the Arbitration Act, 1980.

7. The insurance policy contained the following condition

"All differences arising out of this policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators, one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties, or, in case the Arbitrators do not agree, of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company. If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder".

8. The Plaintiff's answer to the application to stay the proceedings can be stated simply. He says that since the insurance company is effectively treating the policy as void with retrospective effect, it cannot seek to rely upon the arbitration clause because if the

Defendant is correct, that clause has also been avoided as part of the policy. He says that his position is fortified by the return of the premia to him. His case is that if the contract is no longer valid then neither is the arbitration clause.

9. Over the years the Courts have had to consider the question of whether an Arbitrator has jurisdiction to rule upon the existence of the very contract under which he is appointed. In considering this topic the Courts have traditionally drawn a distinction between two questions. First, did the contract ever come into existence at all? Second, if it did once exist, has something occurred to bring it to an end?

10. In this case I am concerned only with the second question.

11. The starting point for my consideration of this issue is the decision of the House of Lords in ***Heyman -v- Darwins*** [1942] AC 356. In that case the House of Lords drew a distinction between an arbitration clause and the remaining provisions of a contract. In his speech Lord MacMillan said

"... an arbitration clause in a contract ... is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other... but the arbitration clause does not impose on one of the parties an obligation in favour of the others. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution ... What is commonly called repudiation or total breach of a contract ... does not abrogate the contract though it may relieve the injured party of the duty of further fulfilling the obligation which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract".

12. Whilst that decision speaks of repudiation or total breach of contract the principle decided by it is equally applicable in circumstances where one party seeks to avoid or rescind a contract on the ground of a misrepresentation or non-disclosure. That is so whether the mis-representation or non-disclosure is fraudulent, negligent or innocent. Provided that the words of the clause are sufficiently wide, these are matters which can be referred to arbitration. (vide Mustill and Boyd: The Law and Practice of Commercial Arbitration in England: Second Edition at 112).

13. The Heyman decision has been consistently applied by the Courts in England since it was decided in 1942. In ***Bremer Vulkan Schiffbau und Maschinenfabrik -v- South India Shipping Corporation*** [1981] 1 All ER 289 at 297 Lord Diplock was able to say without further explanation *"The arbitration clause constitutes a self-contained contract collateral or ancillary to the ship-building agreement itself: see* ***Heyman -v- Darwins Limited*** *"*. Similarly in ***Mackender -v Feldia AG*** [1967] 2 QB 590, the Court of Appeal following the dicta in Heyman found that non-disclosure relating to the practice of smuggling did not abrogate a foreign jurisdiction clause contained in an insurance policy. The non-disclosure only made that contract avoidable and the dispute as to non-disclosure was one arising under the policy and remained within the arbitration clause.

14. More recently in ***Harbour Assurance Co. Ltd. -v- Kansa General International Assurance Co. Ltd.*** [1993] 3 All ER 897, the Court of Appeal concluded that an insurance agreement which one of the parties sought to declare void ab initio on the basis of non-disclosure of material facts and misrepresentation did not render the arbitration clause invalid. In so doing the Court reviewed the case law and found that the Heyman doctrine was a common thread running through all the cases. The Court went so far as to say that an issue as to the initial illegality of the contract was also capable of being referred to arbitration, provided that any initial illegality did not directly impeach the arbitration clause. The issue is whether the illegality goes to the validity of the arbitration clause and not whether the illegality goes to the validity of the contract.

In ***Hurst -v- Bryk*** [1997] 2 All ER 283, which concerned repudiation of a partnership agreement Simon Brown LJ relied on the established principle in the Heyman case in order to find that a repudiatory breach did not extinguish the contract altogether and the contract's clause pertaining to the apportionment of profits and losses of the firm remained intact.

15. In Ireland Morris J. (as he then was) declared Heyman's case to be a correct statement of the law when he held that the issue of fundamental breach in a building contract should be sent to arbitration. (vide ***Parkaran Limited -v- M & P Construction Limited*** [1996] 1IR 83).

16. In these circumstances I am therefore satisfied that the Plaintiff's contention that the arbitration clause in the instant case is no longer valid is not well founded as a matter of law.

17. Having concluded that the arbitration clause has survived the avoidance of the insurance contract it is then a matter of construction as to whether it is wide enough to cover the dispute. It is to be noted that it is worded so as to cover *"all differences arising out of this policy"* . In the ***Harbour Assurance*** case (supra) Hoffmann LJ (as he then was) was of the opinion that the words "all disputes or differences arising out of this agreement" should be given their natural meaning so as to produce a sensible and businesslike result and as such the words were wide enough to cover the dispute. In ***Heyman's*** case the words "any dispute" were said to be wide enough to cover the claim of repudiation. The use of the word "differences" has been said by Mustill and Boyd (supra) to confer the widest possible jurisdiction. Similarly the phrase "arising out of" has been given a wide meaning. It has been said these words cover every dispute except a dispute as to whether there was ever a contract at all (per Pilcher J. in ***H E Daniel Limited -v- Carmel Exporters and Importers Limited*** [1953] 2 QB 242. This phrase embraces the issue of non-disclosure (vide ***Stebbing -v- Liverpool & London & Globe Insurance Co Limited*** [1917] 2 KB 433).

18. In these circumstances I was satisfied that the Defendant was entitled to have this dispute referred to arbitration in accordance with condition 5 of the policy of insurance.

19. The Defendant makes no secret of the fact that it intends to rely upon the limitation provision contained in the last sentence of condition number 5 which I have already quoted. In making the Order which I did and in stating my reasons for it now I express no view as to whether the Defendant is entitled to rely upon that provision or as to whether it has been avoided in the same manner as the other provisions of the contract.
