THE HIGH COURT

[2021] IEHC 244

[2020 No. 4748 P.]

BETWEEN

PATRICK COEN and ELLEN COEN

PLAINTIFFS

AND

MARK DOYLE, MARK DOYLE BUILDING CONTRACTORS LIMITED, BALLINAGAM UPPER CONSULTING LIMITED T/A MARK DOYLE BUILDING CONTRACTORS and MICHAEL BROWNE T/A BBA ARCHITECTURE

DEFENDANTS

***EX TEMPORE* JUDGMENT of Mr. Justice David Barniville delivered on the 25th day of March, 2021**

Introduction

1. This is my judgment on an application by the first, second and third named defendants, Mark Doyle ("Mr. Doyle"), Mark Doyle Building Contractors Ltd (the "Company") and Ballinagam Upper Consulting Ltd trading as Mark Doyle Building Contractors (the "New Company")(together, the "applicants"), for an order under Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), which has force of law in the State by virtue of s. 6 of the Arbitration Act, 2020 (the "2020 Act"), referring the dispute between the plaintiffs and the Company, which is the subject of these proceedings, to arbitration and staying the proceedings consequent upon such referral.

In their notice of motion, the applicants asserted that an arbitration agreement was entered into between the plaintiffs and the Company *"in or around April 9, 2016"*.

2. While the applicants also sought an order pursuant to the inherent jurisdiction of the court staying the proceedings in order to allow all disputes between the parties to be referred to (non-binding) conciliation and then arbitration pursuant to the alleged agreement entered into between the plaintiffs and the Company *"in or around April 9, 2016"*, the applicants' counsel indicated at the outset of the hearing that the applicants were not pursuing that relief.

3. I was also informed at the outset of the hearing that, following an intervention made by the court on a previous occasion on which the applicants' motion was before the court for directions, all of the parties (and not just the parties to this application) have agreed to mediate the disputes the subject of the proceedings and arrangements are at an advanced stage for the appointment of a mediator. That was very welcome news, as disputes such as those which have arisen between the various parties to these proceedings would seem to me to be ideally suited to mediation as, even if the applicants were to succeed in this application, unless there is further agreement between the parties, the issues between some of the parties might have to be determined at arbitration and the issues between some of the other parties might have to be determined in the court proceedings. Ideally, that scenario should be avoided, if at all possible.

4. Despite the parties' agreement to go to mediation, the applicants and the plaintiffs/respondents to the application wanted the court to proceed to hear and determine the applicants' Article 8(1) application so that, in the event that the mediation were not successful, the plaintiffs and the Company would have clarity as to the forum in which the issues between them would be determined. On that basis, I agreed to hear and determine the Article 8(1) application.

5. The plaintiffs opposed the application and contended that there was no arbitration agreement between the plaintiffs and the Company and that, therefore, there was no basis for the court to stay the proceedings and to refer the plaintiffs and the Company to arbitration in respect of the issues between them.

6. The fourth named defendant, Michael Browne, trading as BBA Architecture (the "Architect"), was served with the motion papers by the applicants' solicitors. The Architect put in a written submission essentially taking a neutral position on the application but indicating that he would be prepared to participate in any arbitration in the event that the court took the view that a valid arbitration agreement existed between the plaintiffs and the Company. Counsel for the Architect appeared at the hearing and reiterated that position. It should be noted that the Architect did not bring his own Article 8(1) application and did not swear any affidavit in support of the applicants' application. Any arbitration between the plaintiffs and the Architect could, of course, only take place with the plaintiffs' agreement.

Factual Background

7. The plaintiffs wished to carry out certain construction works to their home in Cabinteely, Dublin 18 (the "property"). They obtained planning permission to subdivide the property into two semi-detached dwellings in October, 2015. They initially engaged with an architect in late 2015/early 2016 and, on the recommendation of that architect, met with Mr. Doyle in January, 2016. There is a dispute between the parties as to the precise contractual relationship which developed between the parties thereafter. The plaintiffs contended that Mr. Doyle and the Company were retained by them to carry out the construction works on the basis of a design and build project in which Mr. Doyle and the Company would engage the Architect. The plaintiffs maintained that the terms of the agreement between them and Mr. Doyle and the Company were set out by Mr. Doyle and the Company on 6th May, 2016 and that the works proceeded thereafter on that basis. There was no signed contract. The plaintiffs

claim that there were defects in the works and allege that those defects were caused as a result of a breach of contract, breach of a duty of care and misrepresentation on the part of Mr. Doyle and the Company. They also allege that the Architect was in breach of contract, negligent and guilty of misrepresentation in a number of respects. Among other things, the plaintiffs claim that the Architect failed to ensure that a written contract existed between the parties and, in particular, between the plaintiffs and Mr. Doyle and the Company. The plaintiffs also seek to hold the New Company liable in respect of the alleged defects in circumstances where they allege that assets were transferred from the Company to the New Company (which was incorporated in June, 2018, long after the services of the Company were dispensed with by the plaintiff in August, 2017). The plaintiffs have sought to do so on the basis that they contend that the businesses of the Company and the New Company should be treated as a single entity.

8. Mr. Doyle and the Company, who are two of the three applicants in the Article 8(1) application along with the New Company, asserted that the Company (and not Mr Doyle and the Company, as the plaintiffs have alleged) contracted with the plaintiffs on the basis of the RIAI "Blue Form" contract terms. They contended that it was the custom and practice of the Company, and generally in the construction industry, that works of the type to be carried out for the plaintiffs would be carried out on the basis of those contractual terms and that that was not for negotiation between the parties. The applicants relied on clause 38(b) of the RIAI "Blue Form" as constituting an arbitration agreement between the plaintiffs and the Company and brought the Article 8(1) application on the basis of that agreement.

9. The plaintiffs maintained that, while Mr. Doyle did mention the RIAI "Blue Form" in a telephone conversation on 8th April, 2016, they made clear in subsequent written communications that they did not agree to contract on those terms and that those terms were

not appropriate having regard to the design and build nature of the project and the inclusion of a bill of quantities as part of the documentation provided by Mr. Doyle/the Company.

10. That is a very brief description of the dispute between the parties but it should suffice for the purposes of my task on this application. I should stress that I am not making any finding in this judgment on the issue as to whether the plaintiffs contracted with Mr. Doyle and the Company, as the plaintiffs have claimed, or with the Company only, as the applicants have claimed. That is an issue which might have to be determined in the appropriate forum, in the event that the disputes between the parties are not resolved at mediation.

The Article 8(1) Application: Existence of Arbitration Agreement

11. The applicants seek an order under Article 8(1) of the Model Law referring the plaintiffs and the Company to arbitration in respect of the disputes between them in the proceedings and staying the proceedings. The Model Law has force of law in the State by virtue of s. 6 of the 2010 Act.

12. Article 8(1) of the Model Law 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."*

13. The approach which the court is required to take in dealing with an application under Article 8(1) is well established and there was no dispute between the parties on what that approach involves. I summarised the approach in a number of cases, including most recently, in *Narooma Ltd v. Health Service Executive* [2020] IEHC 315 ("*Narooma*"). The approach was previously outlined by me in *Ocean Point Development Company Ltd (In Receivership)*

v. Patterson Bannon Architects Ltd & ors [2019] IEHC 311 ("*Ocean Point*"). At para. 26 of the judgment in that case, I summarised the approach as follows:-

> *"In order for the provisions of Article 8(1) of the Model Law to be engaged, various requirements must be satisfied. First, an action must have been brought before the court in respect of a dispute between the parties. Second, the action must concern a 'matter which is the subject of an arbitration agreement'. Third, one of the parties must request the reference to arbitration 'not later than when submitting his first statement on the substance of the dispute'. If those requirements are satisfied, the court must refer the parties to arbitration (the word 'shall' is used). The only circumstances in which the court's obligation to refer the parties to arbitration does not arise is where the court finds that the arbitration agreement is (i) 'null and void' or (ii) 'inoperative' or (iii) 'incapable of being performed'. The onus of establishing the existence of one or more of these disapplying factors rests on the party who seeks to rely on them…"*

14. I repeated that summary in several judgments since then, including *XPL Engineering Ltd v. K&J Townmore Construction Ltd* [2019] IEHC 665 ("*XPL*") (at para. 34), *K&J Townmore Construction Ltd v. Kildare and Wicklow Education and training Board (No. 2)* [2019] IEHC 666 ("*Townmore (No. 2)*") (at para. 43) and *Narooma* (at para. 60).

15. It is well established that where the requirements of Article 8(1) are satisfied, the court is under a mandatory obligation to make the reference to arbitration and does not have a discretion as to whether to refer to arbitration or not.

16. It is also settled law that the burden of establishing the existence of an arbitration agreement between the relevant parties for the purposes of an application for a reference under Article 8(1) lies on the party seeking the reference. At para. 82 of my judgment in *Narooma*, I quoted from para. 46 of my judgment in *Townmore (No. 2)*, where I stated:-

> *"As the party seeking to invoke the court's jurisdiction under Article 8(1) of the Model Law, the defendant bears the initial burden of establishing that the various requirements for the application of Article 8(1) are satisfied. In particular, it bears the burden of establishing that the proceedings concern a matter or matters which is or are the subject of an arbitration agreement. If the defendant discharges that initial burden, the burden then shifts to the plaintiff to establish that the arbitration agreement is 'inoperative' under Article 8(1)."*
>
> (*Townmore (No. 2)*, at para. 46; *Narooma*, at para. 82).

17. It is clear, therefore, that, as the moving parties on this application, the applicants have the burden of establishing that the various requirements under Article 8(1) are satisfied, including that there is an arbitration agreement between the plaintiffs and the Company.

18. In considering whether the applicants have discharged the burden of establishing that an arbitration agreement exists between the relevant parties for the purposes of the Article 8(1) application, the court must apply the *"full judicial consideration"* standard and not approach the consideration of that issue on a *prima facie* basis: *Lisheen Mines v. Mullock & Sons (Shipbrokers) Ltd* [2015] IEHC 50; *Sterimed Technologies International Ltd v. Schivo Precision* [2017] IEHC 35; *Kelly's of Fantane Ltd v. Bowen Construction Ltd & anor* [2017] IEHC 357; *Townmore (No. 2)*; and *Bowen Construction Ltd (In Receivership) & anor v. Kelly's of Fantane (Concrete) Ltd (In Receivership)* [2019] IEHC 861.

19. In the present case, the court will have to consider the issue as to whether an arbitration agreement exists between the relevant parties by applying the *full judicial consideration"* standard on the basis of the affidavit evidence and submissions advanced by the parties. There was no oral evidence on the application. The deponents were not cross-examined.

20. Before considering the evidence and addressing the issue as to whether the applicants have discharged the burden of establishing that there was an arbitration agreement between the plaintiffs and the Company, it is necessary to consider the requirements which must be met before an agreement can amount to an arbitration agreement for the purposes of an Article 8(1) application.

21. Section 2(1) of the 2010 Act provides that the term *"arbitration agreement"* must be considered in accordance with option 1 of Article 7 of the Model Law. The relevant provisions of that version of Article 7, for present purposes, are as follows:-

"Article 7. Definition and form of arbitration agreement

(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.*

(4) *...*

(5) *...*

(6) …"

22. In *Barnmore Demolition and Civil Engineering Ltd v. Alandale Logistics Ltd & ors* [2010] IEHC 544 ("*Barnmore*"), the High Court (Feeney J.) drew attention to the fact that, although Article 7(2) of the Model Law requires that the arbitration agreement be in writing:-

> *"…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."* (para. 4)

23. Article 7 contains a number of requirements which are relevant for present purposes. However, the most fundamental requirement is that there must be an agreement between the parties to submit their disputes to arbitration. Without an agreement, there can be no arbitration agreement. The second point to note is that, as Feeney J. made clear in *Barnmore*, while the arbitration agreement must be recorded in writing, it does not have to be signed or executed by the parties in order to satisfy the requirements of Article 7. It can be made orally or arise by conduct, provided that it is recorded in writing.

24. It is accepted by all parties that there is no signed agreement in existence between the plaintiffs and the Company. More fundamentally, however, it is not accepted by the plaintiffs

that there was any agreement between them and Mr. Doyle/the Company to submit any disputes between them to arbitration. The first hurdle, therefore, that the applicants must overcome and the first burden which the applicants must discharge on this application is to establish, on the basis of *"full judicial consideration"*, that there is an arbitration agreement between the plaintiffs and Mr. Doyle/the Company under which they have agreed to submit their disputes to arbitration. As I explain below, I am not satisfied on the evidence that the applicants have discharged that burden, having considered the affidavit evidence between the parties, the documents exhibited and the submissions advanced by the parties.

Assessment of the Relevant Evidence: Findings of Fact

25. The applicants' Article 8(1) application was grounded on three affidavits. Mr. Doyle swore two of those affidavits. He swore one affidavit on his own behalf and another on behalf of the Company. The principal grounding affidavit in respect of the applicants' Article 8(1) application was the affidavit which Mr. Doyle swore on behalf of the Company on 9th November, 2020. At para. 4 of that affidavit, Mr. Doyle asserted that the contract was between the plaintiffs, the Company and the Architect. He asserted that the contract arose from a *"design and build"* project in respect of the plaintiffs' residence and that the *"contact and engagement"* between the plaintiffs and the Company was *"in early 2016"*.

26. At para. 5 of that affidavit, Mr. Doyle stated:-

> *"At all material times the* [Company] *herein advised the plaintiffs that the work of the* [Company] *was being carried out under the terms of the RIAI 'Blue Book' suite of contracts."*

27. Mr. Doyle exhibited a copy of clause 38 of the RIAI "Blue Form" which is the disputes resolution clause in that standard form contract. Those paragraphs of Mr. Doyle's affidavit are striking for their generality and for the obvious failure by Mr. Doyle to say when

the Company advised the plaintiffs that the work being carried out by the Company was being done on the basis of the RIAI "Blue Form".

28. At para. 6 of that affidavit, Mr. Doyle referred to and exhibited an email sent by Mr. Coen, the first named plaintiff, to Mr. Doyle on 9th April, 2016, a further email sent by Mr. Coen to Mr. Doyle on 5th May, 2016 and an email from Mr. Doyle in response later on 5th May, 2016. I will come to the terms of those emails shortly. As will be apparent, in the absence of having received any draft contract or contract terms from the Company, Mr. Coen prepared a draft contract which he sent to Mr. Doyle on 5th May, 2016. Mr. Doyle rejected that contract in his email sent in response later that day. At para. 6 of his affidavit, Mr. Doyle stated that the Company viewed the draft contract sent by the plaintiffs as being *"unworkable"*. It is clear from para. 6 of Mr. Doyle's affidavit and from the terms of his email of 5th May, 2016, that the Company was not agreeing to the terms of the draft contract sent by Mr. Coen on 5th May, 2016.

29. At para. 7 of his affidavit, Mr. Doyle stated that:-

> *"Due to inadvertence, no actual copy of the said RIAI Blue Book contract was signed between the parties. However, the contract continued* [on] *the basis, as far as the* [Company] *was concerned, that the suite of contracts applied. At no stage was any dispute resolution mechanism discussed other than conciliation and/or arbitration. The plaintiffs would have clearly understood that the* [Company] *had never waived their* (sic) *rights, and the custom and practice in the construction industry so as to embrace a potential substantive hearing before the High Court."*

30. It is notable from that paragraph that, notwithstanding that Mr. Doyle asserted that the contract between the parties *"continued"* on the basis of the RIAI "Blue Form" terms, there was no indication as to when those terms were actually discussed and agreed between the parties. Nor is there any indication as to the basis of Mr. Doyle's assertion that the plaintiffs

"would have clearly understood" that the Company had *"never waived"* its rights or as to the plaintiffs' knowledge of the *"custom and practice in the construction industry"*. The plaintiffs are not involved in the construction industry. Mr. Coen is described in the statement of claim and in his affidavits as a "*retired accountant*". Mrs. Coen is described in the statement of claim as a "*housewife*".

31. As I have observed earlier, Mr. Doyle's first affidavit was extremely vague and general in terms of the information which he put forward on behalf of the Company in support of the Article 8(1) application.

32. Mr. Coen swore an affidavit in response on 15th December, 2020. In that affidavit, Mr. Coen referred to the circumstances in which the plaintiffs were introduced to Mr. Doyle and his Company, through another architect. Mr. Coen stated that after a bill of quantities was furnished in or around 28th January, 2016, the plaintiffs agreed to engage Mr. Doyle and the Company as their builders *"around"* 16th February, 2016 on the building project. Mr. Coen asserted that Mr. Doyle and the Company were engaged on the basis of a *"design and build project"*. He stated that in the period between 16th February, 2016 and 25th February, 2016, Mr. Doyle indicated that the Architect would be retained *"in respect of compiling the necessary construction drawings, acting as architect and assigned certifier, inspecting and certifying all works to be carried out"* by Mr. Doyle and the Company *"and acting as part of the design team"* (para. 7). Mr. Coen then stated:-

> *"Consequently, the discussions revolved around the bill of quantities being attached to a building contract with* [Mr. Doyle] *suggesting the RIAI Blue Form contract copies, albeit as I understand it, the Blue Form is for use without quantities. Additionally, I now understand that such a form of contract would not be appropriate in a design and build scenario."* (para. 7)

33. Mr. Coen exhibited a body of emails which he had exchanged with Mr. Doyle (considerably more emails than Mr. Doyle exhibited to his first affidavit). I intend to turn to those emails shortly. The position of the plaintiffs as set out in Mr. Coen's affidavit was that the parties never agreed the RIAI "Blue Form" terms and that there was no written contract agreed, still less signed, between the parties containing an arbitration agreement. Mr. Coen asserted that in the absence of any contract being provided by Mr. Doyle/the Company, he furnished a draft contract on 5th May, 2016 which was rejected by Mr. Doyle. Therefore, according to the plaintiffs, there was no arbitration agreement between the parties.

34. Both Mr. Doyle and Mr. Coen swore further affidavits in respect of the applicants' Article 8(1) application. In his further affidavit sworn on 13th January, 2021, Mr. Doyle stated (at para. 4):-

> *"In the vast majority of cases a residential client does not dictate the contractual basis on which said work is performed. The client would be told as happened here by* [the Company and the Architect] *that the work would proceed on a particular basis. The pressure to perform work in an agreed timespan militate* (sic) *against creating uncertainty and confusion where no such uncertainty and confusion is needed. A client is generally advised that work is being performed so as to be governed by a standard form contract."*

35. At para. 5 of that affidavit, Mr. Doyle stated that there was *"no reality"* to the idea that he/the Company would *"engage with a residential client"* such as the plaintiffs, *"and discuss the merits of various types of possible contracts before mutually agreeing which contract would be relied on"*. Mr. Doyle referred to the *"custom and practice"* among building contractors working on residential projects (such as the plaintiffs' project) which he stated involves the use of an *"applicable standard form contract"*. Mr. Doyle continued (also at para. 5):-

> *"A residential client engaging an architect and building contractor is presented with the contractual position, they do not present a contract to be used. If a residential client does not like this approach, they can attempt to find an architect and building contractor who would work contrary to what I understand the custom and practice in the construction industry is."*

36. At para. 6 of that affidavit, Mr. Doyle asserted that it was the *"clear and unequivocal position"* that the Company and the Architect advised the plaintiffs that the work was governed by *"a standard form contract which in this instance, due to the nature of the work performed, I say and believe is the RIAI Blue Book"*.

37. At para. 7 of his affidavit, Mr. Doyle described what happens *"in the vast majority of instances"* where the Company carries out building work of this kind and where, he stated, *"the client is advised as the applicable contract"* and that *"there is usually no particular engagement or negotiation between the parties on this issue"*. He further asserted that the Company *"is entitled to perform its work in the manner set out and it is open to a client not to engage the Company if there is an issue"*. Later (at para. 9), Mr. Doyle expressed his belief that the plaintiffs *"had clearly been advised as to the contractual position"*. He then stated (at para. 10) that the Company *"has never, and would never, engage in construction work on the basis of a contract proffered and prepared by a client"*. He concluded that the fact that a contract was not actually signed (which he put down to *"inadvertence"*) *"does not set at nought the clear basis on which the plaintiffs had contracted with the* [Company and the Architect]*"*.

38. I observe that nowhere in either of his affidavits did Mr. Doyle state when he advised the plaintiffs that the Company was only prepared to carry out the work on the basis that the contract was governed by the RIAI "Blue Form" terms. Nowhere did he state when the plaintiffs had been clearly advised of that position or when they agreed to contract on that

basis. That is in contrast to the position adopted by the applicants in their written submissions in which they asserted that the plaintiffs were informed of this by telephone on 8th April, 2016. That was not stated anywhere on affidavit on behalf of the applicants on this application. It seems to me that what Mr. Doyle was attempting to do was to set out in his affidavit what he/the Company would normally do in the case of construction work carried out by them rather than providing evidence as to what they actually did in this case.

39. The final affidavit in respect of the Article 8(1) application was a supplemental affidavit sworn by Mr. Coen on 25th January, 2021. In that affidavit, Mr. Coen asserted that it was Mr. Doyle who engaged the Architect as part of the design and build contractual arrangement and not the plaintiffs. He further contended that the RIAI "Blue Form" was inapplicable where quantities formed part of the contract and that the form is also not applicable in the case of a design and build contract. Mr. Coen asserted that Mr. Doyle/the Company never provided a copy of the proposed RIAI "Blue Form" contract for the plaintiffs' consideration and disputed the contention that the plaintiffs had been clearly advised as to the contractual position. He reiterated the plaintiffs' position that they never agreed a contract on the terms asserted by Mr. Doyle and that, therefore, no arbitration agreement exists between the parties.

40. I turn now briefly to consider the terms of the emails exhibited by Mr. Coen (some of which were exhibited by Mr. Doyle). In my view, the emails are fatal to the applicants' case as to the existence of an arbitration agreement between the plaintiffs and the second named defendant (or, indeed, any of the defendants).

41. In the first email exhibited by Mr. Coen, sent on 2nd February, 2016, Mr. Coen returned an amended version of Mr. Doyle's bill of quantities. He requested Mr. Doyle to furnish *"a copy of a draft agreement that you would like* [the plaintiffs] *to sign"*. In a subsequent email sent to Mr. Doyle on 16th February, 2016, Mr. Coen stated that the plaintiffs

were *"happy to confirm* [their] *wish to engage* [Mr. Doyle] *and* [the Company] *on the design and build project"* for their home. Mr. Coen stated that his contribution to the project would be to deal with *"contractual matters"* and *"certified build payments as they arise"*. He stated that he would write to Mr. Doyle separately *"on the standard design and build contract which we can address over the coming weeks"*. He concluded by stating that the plaintiffs were continuing to source and consider materials which were the subject of PC sums in the bill of quantities and that they would keep Mr. Doyle advised on this so as to facilitate the finalisation of the bill of quantities *"once the draft construction drawings are agreed and we are in a position to execute contract"*.

42. On 9th April, 2016, Mr. Coen sent an email to Mr. Doyle referring to a telephone conversation of the previous day (8th April, 2016). Mr. Coen referred to the need to prepare a revised bill of quantities. As regards the terms of contract, Mr. Coen stated:-

> *"I understand that it is proposed that the RIAI Blue version contract will be used for execution and as such I have obtained a specimen from the RIAI which Ellen and I need to familiarise ourselves with. I understand there may be certain sections of this document which may not apply and so will need to be deleted. Equally, I understand that there may be a need to expand on certain sections relevant to our engagement."*

43. Later in the email, when referring to the plaintiffs' need to enter into a lease agreement for a house to live in while the works were going on, Mr. Coen stated:-

> *"As I am sure you will understand neither Ellen or* (sic) I *would wish to enter into such a lease without first signing the D&B contract with you."*

44. I conclude that the reference in the applicants' written submissions to the plaintiffs being informed by telephone on 8th April, 2016 that the RIAI "Blue Form" terms applied (which, as already noted, was never stated on affidavit by Mr. Doyle) was derived from the fact that reference was made in Mr. Coen's email of 9th April, 2016 to a telephone

conversation with Mr. Doyle the previous day, the contents of which were recorded by Mr. Coen in his email. At no point did Mr. Doyle respond by stating that Mr. Coen's email of 9th April, 2016 did not accurately reflect the terms of the conversation on 8th April, 2016 and I conclude that it did.

45. In a subsequent email sent by Mr. Coen to Mr. Doyle on 24th April, 2016, Mr. Coen asked Mr. Doyle to ask the Architect (Mr. Browne) to provide a *"draft of contract with relevant sections to be retained identified for review before signing"* to Mrs. Coen at a forthcoming meeting they were to have. Later in that email, Mr. Coen queried whether it was achievable that they would be in a position to sign the contract by 29th April, 2016. Mr. Doyle did not respond to that email and Mr. Coen sent a follow up email on 2nd May, 2016 seeking Mr. Doyle's response. In the absence of a response, Mr. Coen sent a further email on 5th May, 2016 stating that he had heard nothing from Mr. Doyle or from the Architect's representative *"on the form or content of a contractual document or memorandum of understanding"* since a meeting with the Architect on 3rd May, 2016 (of which no details have been provided in evidence by either side). Mr. Coen continued:-

> *"I have reviewed similar documentation available to me and drafted the attached which Ellen and I believe covers the main issues in a straightforward and simple manner. We are both happy to sign this document."*

Mr. Coen sought Mr. Doyle's comments by that evening and requested Mr. Doyle to confirm his agreement to sign a contract in the terms of the draft. Mr. Coen attached a draft contract which he had prepared and which contained a binding conciliation clause but not an arbitration agreement.

46. Mr. Doyle responded late that night querying the status of the draft contract provided by Mr. Coen and how it was expected that he/the Company would sign such a contract. He stated that they would not. He then stated that the Architect's representative *"will be back to*

us tomorrow with his advice on appropriate contract, which will be based on drawings and spec as I have informed you". He then stated that he/the Company would draft a construction programme which would determine the length of the contract with the full understanding that the plaintiffs wanted to be back in their house for Christmas (2016).

47. What is clear from Mr. Doyle's email is that he/the Company was not prepared to agree to the terms of the draft contract furnished by Mr. Coen. He said that the Architect would provide his advice on the appropriate contract. However, there is no evidence that that was ever done. I am compelled to conclude on the evidence, for the purpose of this application, at least, that the Architect did not subsequently provide advice on the appropriate form of contract and that Mr. Doyle/the Company did not go back to the plaintiffs on the form of contract applicable for the job. What happened was that the work commenced later in May, 2016 and there was no further discussion as to the appropriate form of contract.

48. I accept that Mr. Doyle may have suggested that the RIAI "Blue Form" terms should apply and that is likely to have happened in the telephone conversation with Mr. Coen on 8th April, 2016. However, it is clear from the subsequent communications between the parties that the plaintiffs were not agreeable to those terms applying as they felt that they were inapplicable to the type of contract involved and that, therefore, amendments or alterations would be necessary. Having asked for a copy of the terms of contract to be applied to the job and not having received it, Mr. Coen prepared his own draft which he furnished to Mr. Doyle. That draft was not acceptable and Mr. Doyle indicated that the Architect would provide advice on the appropriate contract. There is no evidence that that was done. The work then commenced and nothing further was said about the applicable contract terms until the disputes arose between the parties.

49. I am compelled to conclude on the evidence that the plaintiffs did not accept the RIAI "Blue Form", at least without significant amendments and alterations. Mr. Doyle/the

Company did not accept the terms of contract proffered by the plaintiffs. No other written terms of contract were proposed or discussed between the parties. It appears from para. 29 of the statement of claim that Mr. Doyle did set out certain terms including price, commencement date, PC sums and the engagement of the Architect on 6th May, 2016. However, no document of that date was provided in evidence by Mr. Doyle or by the plaintiffs. I am entitled to conclude that if a document of that date did contain a reference to the RIAI "Blue Form" terms, Mr. Doyle would have referred to and exhibited it in evidence. I proceed on the basis, therefore, that there was no reference to those terms in any document of that date.

Application of Legal Test to Facts

50. As noted earlier, the applicants bear the burden on this application of establishing the existence of an arbitration agreement. The applicants contended that there was an arbitration agreement between the parties because the RIAI "Blue Form" terms applied to the contract between the parties. The plaintiffs strenuously disputed that claim and I have set out my assessment of the evidence above by reference to the affidavits sworn for the purposes of the Article 8(1) application and the contemporaneous emails exchanged between the parties.

51. I am satisfied, on the basis of the affidavit evidence and on the basis of the contemporaneous emails between the parties, that the applicants have not discharged the burden of establishing the existence of an arbitration agreement between the Company or any of the applicants and the plaintiffs.

52. The fact that there is no signed arbitration agreement between the parties is not fatal to the applicants' application. Article 7(2) of the Model Law requires that the arbitration agreement be in writing but does not require that it be signed. In light of Article 7(3), an arbitration agreement can be in writing if its contents are recorded *"in any form"* and whether or not the arbitration agreement or contract has been concluded *"orally, by conduct, or by*

other means". However, the problem here for the applicants is that the evidence does not support the assertion that there was any arbitration agreement at all with the plaintiffs, still less one which was in, or recorded in, writing. To that extent, the position is somewhat similar to *Barnmore* where the High Court (Feeney J.) held on the evidence that the document alleged to constitute the arbitration agreement was never in fact agreed between the parties (see para. 10 of the judgment of Feeney J. in *Barnmore*). Nor, in the present case, could it be said that there was any course of dealing between Mr. Doyle/the Company and the plaintiffs such as might have led to the conclusion that the RIAI "Blue Form" terms applied to the job. The plaintiffs met with Mr. Doyle/the Company for the first time in January, 2016 for the purposes of this particular residential project and there was no prior course of dealing between them. Therefore, just as in *Barnmore*, there was no basis on which the court could conclude that the RIAI "Blue Form" applied by virtue of any course of dealing.

53. Nor, in my view, is there any basis on which the applicants can rely on any alleged custom or practice in the construction industry to support their case that the RIAI "Blue Form" applied to the contract between the plaintiffs and Mr. Doyle/the Company. I accept that there may be cases in which a court will conclude that particular terms of contract (including an arbitration agreement) applied to the dealings between parties on the basis of the custom and practice of a particular industry, such as the construction industry.

54. There was some debate at the hearing as to whether cases such as *Lynch Roofing Systems Ltd v. Bennett & Son Ltd* [1999] 2 IR 450 ("*Lynch Roofing*") and *McCrory Scaffolding Ltd v. McInerney Construction Ltd* [2004] 3 IR 592 ("*McCrory Scaffolding*") still have any relevance, where they concerned applications to stay proceedings under s. 5 of the Arbitration Act, 1980 (the "1980 Act") and, therefore, arose in the context of the pre-2010 Act regime. In both those cases, the High Court held that the proceedings should be stayed on the basis that the dealings between the parties were conducted on the basis of standard terms

which contained an arbitration clause. In both those cases, all of the parties were involved in the construction industry and, in each case, the court concluded that the parties had experience and previous dealings on the basis of the relevant standard conditions.

55. Both cases were referred to by Feeney J. in *Barnmore* (which is a 2010 Act case). At para. 11 of his judgment in *Barnmore*, Feeney J. referred with approval to a passage from the judgment of Peart J. in the High Court in *McCrory Scaffolding*. Feeney J. stated:-

> *"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… (at p. 601):*
>
> > *'I prefer to follow the thinking of Morris P. in Lynch Roofing…, 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.'"* (per Feeney J. at para. 11)

56. I agree with the approach taken by Feeney J. in *Barnmore* that the *dicta* of Peart J. in *McCrory Scaffolding* and of Morris P. in *Lynch Roofing* are relevant to applications under the 2010 Act notwithstanding that they were dealing with applications under s. 5 of the 1980 Act. However, Peart J. in *McCrory Scaffolding* and Morris P. in *Lynch Roofing* were able to reach the conclusions they did as both parties in each case were involved in the construction industry, were familiar with the relevant terms and had previous dealings on the basis of those terms. The court concluded in both those cases that it was clear the basis on which the

plaintiff went on to the site and commenced the work. That was not the case in *Barnmore*. Nor is it the case here. In light of the emails exchanged between the parties, how could it conceivably be said that it was clear that when Mr. Doyle/the Company went on site to commence the works in May, 2016, they were doing so on the basis of the RIAI "Blue Form" terms? That could not be said on the basis of the evidence before the court. It may have been what Mr. Doyle/the Company wanted but it is clear from the evidence that the plaintiffs did not agree and had proposed alternative terms which in turn were not agreed by Mr. Doyle/the Company. The position was never ironed out or clarified before Mr. Doyle/the Company went on site and carried out the works. Nor, of course, are the plaintiffs involved in the construction industry. The facts of the present case are, therefore, quite different to those in *McCrory Scaffolding* and *Lynch Roofing*.

57. Nor, in my view, can the applicants derive any support from the judgment of Laffoy J. in the High Court in *Mount Juliet Properties Ltd v. Melcarne Developments Ltd & ors* [2013] IEHC 286 ("*Mount Juliet*"). In that case, the court found that certain standard conditions of engagement published by the Institution of Engineers of Ireland (Agreement SE 9101 and Agreement ME 9101) were incorporated into the terms of engagement by the plaintiffs of the third and fourth named defendants. In considering that issue, Laffoy J. referred to the judgment of the High Court (O'Hanlon J.) in *Sweeney v. Mulcahy* [1993] ILRM 289 ("*Sweeney*"). In that case, the plaintiff had engaged the defendant, an architect, to carry out renovation and restoration works on a dwelling house. After a first meeting, the defendant wrote to the plaintiff setting out the works to be carried out and stating that the conditions of engagement and scale of minimum charges laid down by the RIAI would apply. However, the defendant did not send a copy of the RIAI conditions to the plaintiff but did state that a copy would be available on request. The plaintiff had previously received a copy of the RIAI conditions from another architect whom she had engaged on another project. The parties met

again and continued the project, although the plaintiff did not formally acknowledge the defendant's letter which had referred to the application of the RIAI conditions. O'Hanlon J. held that the RIAI conditions were incorporated into the contract. He stated as follows:-

> *"Having regard to the foregoing facts I am of opinion that the agreement between the Plaintiff and the Defendant must be regarded as incorporating the RIAI Conditions…, as this was expressly put forward by the Defendant at the outset as the basis on which she was prepared to act as Architect in the matter, and the Plaintiff allowed the work to proceed thereafter without expressing any dissent."* (at 291)

58. O'Hanlon J. determined that an arbitration agreement, within the meaning of the 1980 Act, had been brought into existence and granted a stay of the proceedings. Laffoy J. cited *Sweeney* with approval at para. 45 of her judgment in *Mount Juliet*. In the application before her, she concluded that the two relevant defendants, the third and fourth defendants, had made clear that they were prepared to provide engineering services on the basis of Agreement SE 9101 and Agreement ME 9101 respectively and there had been no objection by the plaintiff.

59. The present case is very different to *Sweeney* and *Mount Juliet*. This is not a case where the plaintiffs, having been told that Mr. Doyle/the Company was intending to carry out the works on the basis that the RIAI "Blue Form" terms would apply, allowed the work to proceed on that basis and did not express any disagreement. On the contrary, they did express disagreement on the basis of the appropriateness of those terms to the particular contract and went so far as to propose alternative terms of contract, which in turn were not accepted by Mr. Doyle/the Company. This case is, therefore, very different to *Sweeney* and *Mount Juliet*.

60. In conclusion, in my view, having been informed that the plaintiffs did not believe that the RIAI "Blue Form" terms were appropriate having regard to the type of contract involved and having rejected the plaintiffs' alternative form of contract and informed the

plaintiffs that the Architect would advise on the appropriate contract, it was ultimately a matter for Mr. Doyle/the Company to decide whether to proceed with the works or not to do so until the plaintiffs confirmed their agreement that the works would be governed by the RIAI "Blue Form" terms. That was the point in time at which Mr. Doyle/the Company could have made it clear to the plaintiffs that there was no question of negotiation, that they were only prepared to carry out the works on the basis of the RIAI "Blue Form" terms and that, if the plaintiffs did not agree, Mr. Doyle/the Company would not proceed with the works. However, that is not what Mr. Doyle/the Company did. They proceeded to carry out the works in the full knowledge that the plaintiffs were not agreeable to the RIAI "Blue Form" terms. Mr. Doyle/the Company could easily have made their position clear and their failure to do so has led to the inevitable conclusion that the applicants have failed to discharge the burden of establishing that the RIAI "Blue Form" terms containing the arbitration agreement applied.

Summary of Conclusions: Result of Application

61. In summary, I have concluded that, on the very specific facts of this case, the applicants have failed to discharge the burden of establishing the existence of an arbitration agreement with the plaintiffs, such that the disputes between the plaintiffs and any of the applicants (including the Company) must be referred to arbitration under Article 8(1) of the Model Law. As the burden was on the applicants to establish the existence of an arbitration agreement and as the applicants have failed to discharge that burden, I must refuse the applicants' Article 8(1) application.

62. Having now heard and determined the applicants' Article 8(1) application, I want to wish all the parties well in the mediation in which they have wisely agreed to participate and

to express the hope that the many difficult issues between them will be resolved at that mediation.