

THE HIGH COURT

2007 No. 129 MCA

BETWEEN/

DECLAN HOGAN

PLAINTIFF

AND

THOMAS BYRNE AND HENRY J. CURTIN

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 3rd June, 2008**The proceedings**

1. In these proceedings the plaintiff seeks either an order under s. 38 of the Arbitration Act, 1954 (the Act of 1954) setting aside or, alternatively, an order under s. 36 of the Act of 1954 remitting for reconsideration, an arbitration award made by Timothy Bouchier-Hayes (the Arbitrator) which is described as having been made on 30th August, 2007. The arbitration arose out of the sale of an accountancy practice by the defendants to the plaintiff and another person who was not a party to the arbitration and is not a party to these proceedings. The defendants were claimants in the arbitration and the plaintiff was the respondent.

The agreement for sale

2. The agreement for the sale of the accountancy practice which gave rise to the arbitration was dated 29th July, 1994. The dispute which arose between the defendants, as sellers, and the plaintiff, as one of the purchasers, related to the consideration payable by the plaintiff to the defendants. The provisions of the agreement which bear on the dispute are as follows:

Clause 3.1, which provided that the consideration was IR£251,546, of which IR£176,080 (representing 70% of the consideration) was to be contributed by the plaintiff. Clause 3.1 set out the consideration "as stated in Schedule V". Schedule V disclosed that the consideration was 112% of the total fees payable by clients of the practice listed in Schedule I, which amounted to IR£224,595.

Clause 3.3, which set out the time frame for payment of the sum of IR£176,080 by the plaintiff, which was payable in three tranches as follows:

- (1) IR£70,432 was to be paid on 30th September, 1994, which, in effect, was the closing date provided for in the agreement;
- (2) IR£52,824 was to be paid on 30th September, 1995; and
- (3) the balance of IR£52,824 was to be paid on 30th September, 1996 (Clause 3.3.3).

Clause 3.4, which deals with the eventuality of Recurring Fees, as defined, not being maintained for the two-year period from 30th September, 1994. The term "Recurring Fees" was defined in the agreement as follows:

"Fees of the aggregate value from Clients [as listed in Schedule I] who are expected to remain Clients of the business for the foreseeable future in respect of services which are expected to recur annually."

3. Clause 3.4, the interpretation and application of which has given rise to the arbitration, provided as follows in the first paragraph thereof:

"The consideration is based on the assumption that income from Recurring Fees from the Business for 12 months is maintained for year 1 (i.e. year ended 30th September, 1995) and year 2 (i.e. year ended 30th September, 1996). If the said Recurring Fee income is not maintained for the said period of 24 months because of delays in performing work for Clients the period shall be extended by 9 months to allow the income from Recurring Fees to arise and the payment due under Clause 3.3.3. above shall be abated pro rata: a final payment shall then be due on 30th June, 1997 based on the fees raised in the said 9 month period for (sic) clients for whom 2 years income from Recurring Fees was not received in the period to 30th September, 1996."

4. The second paragraph of Clause 3.4 was in the following terms

"If the said Recurring Fee income is not maintained for the said period of 24 months due to the non-retention of a Client or Clients of the Business then ... the amount or amounts of the consideration attributable to such Client or Clients shall not be payable. Any such amount or amounts already paid shall be refunded to the Purchaser or credited against further payment due by the Purchaser at the discretion of the Purchaser but the Purchaser shall pay over to the Seller 50% of the fee actually paid by the Client or Clients for services rendered by the Purchaser."

Clause 4.5, which provided as follows:

"Any amounts owing under this agreement shall bear interest from the due dates to the date of payment at the rate of 8% per annum paid separately."

5. The agreement contained a clause, Clause 22, which was headed "Arbitration" and which provided that any dispute, difference or question which might arise at any time thereafter between the parties concerning the interpretation of any of its provisions or any other matter or thing arising out of the agreement should be "referred to the decision of an expert". Clause 22 went on to provide:

"In arriving at his decision, the decision of the Expert shall (save in the case of manifest error) be final and binding upon the parties hereto. The provisions of the [Act of 1954] shall not apply."

Events post-agreement

6. The plaintiff made the following payments to the defendants on foot of the agreement:

- (1) the sum of IR£70,432 on 30th September, 1994; and
- (2) the sum of IR£27,394 on 30th September, 1995.

7. The plaintiff paid less than the sum due under the agreement on 30th September, 1995 and made no further payment on 30th September, 1996, contending that he was entitled to an abatement or adjustment of the consideration payable by him under Clause 3.4, by reason of the Recurring Fees income not having been maintained for 24 months by reason on non-retention of clients.

8. In February, 1997 the defendants, obviously recognising that the plaintiff was entitled to some abatement of the consideration, claimed that a balance of IR£56,539.70 was due to them by the plaintiff.

9. Dispute resolution mechanisms were subsequently invoked by the parties and involved three stages.

10. The first stage was the appointment of the Arbitrator as Expert within the meaning of Clause 22 for the purpose of determining a dispute which had arisen between the parties as to the interpretation of the definition of "Recurring Fees" and the interpretation of Clause 3.4. The Arbitrator gave his opinion qua Expert under Clause 22 on 11th May, 1999, finding as follows:

"A. The reference to '*fees of the aggregate value*', as referred to in the definition of Recurring Fees, is of significance. In my opinion the definition of Recurring Fees requires a determination of the total value of the fees received from Clients (as defined), subject only to the qualification that such fees are '*in respect of services which are expected to recur annually*'. Accordingly, no reduction from such sum ought to be made of the amount of the original consideration attributable to Clients [who] were not retained by the Business.

B. Pursuant to the definition of Recurring Fees, charges to Clients for services '*not expected to recur annually*' should not be taken into account for the purpose of determining the aggregate value of fees received from clients.

C. If the Recurring Fees, as determined above, are maintained for the period of 24 months (i.e. to 30 September, 1996) then the consideration as provided for under Clause 3.3 ... is payable by the Purchaser to the Sellers.

D. If the Recurring Fees, as determined above, are not maintained for the period of 24 months (i.e. up to 30 September, 1996) due to the non-retention of a Client or Clients then the adjustment as required second paragraph Clause 3.4 ... is required to be made."

11. Subsequently, as is recited in the Interim Award hereafter referred to, further disputes arose between the parties "regarding the interpretation and the application of the Expert's Opinion and Decision" and, as is recited in the Interim Award, the parties agreed to refer such disputes to arbitration and appoint the Arbitrator as arbitrator. My understanding is that the submission to arbitration was outside the four corners of the agreement and was a submission to arbitration in accordance with the Act of 1954. That understanding is based on the only evidence before the court of the history of the dispute, other than such as is afforded by the recital in the Interim Award to which I have referred, the affidavit sworn by the plaintiff in these proceedings in November, 2007. In paragraph 14 the plaintiff averred as follows:

"Notwithstanding the Arbitrator's expert opinion the parties were unable to resolve their dispute as to the correct interpretation of the Agreement and its application. The parties therefore agreed to refer the disputed matters back to the Arbitrator, sitting as an arbitrator and the Arbitrator agreed to so act."

Arbitral process

12. There were two stages in the arbitration process.

13. The first stage was that the Arbitrator made an interim award on 24th September, 2003 (the Interim Award). His determination embodied the following elements. First he determined that Recurring Fees (as defined) for the period of 24 months ending on 30th September, 1996 had not been maintained at the level set out in Schedule I to the agreement, that is to say, IR£224,595 (paras. 5 and 7) and on this point the parties were in agreement (para. 7). Secondly, having quoted the first sentence of the second paragraph of Clause 3.4, which I have quoted earlier, he stated as follows:

"The definition of Recurring Fees refers to '*fees of the aggregate value*' and I have previously determined, acting as expert, that the definition of recurring fees requires the determination of the total value of the fees received from Clients (as defined) subject only to the qualification that such fees are '*in respect of services which are expected to recur annually*'. Accordingly, for the purposes of determining Recurring Fees no reduction is required to be made from the aggregate value of fees received from Clients of the Business (that is to say, from Clients as listed in Schedule I of the agreement) in respect of the period to 30th September, 1996."

14. Thirdly, having recorded in para. 7 that there was continuing disagreement between the parties regarding the value of income which could be described as "Recurring Fees", the Arbitrator went on to set out in para. 8 his determination that the appropriate methodology for the calculation of the consideration payable under the agreement by the plaintiff was as follows:

"Calculate 50% of the total fee income received from Clients (as listed in Schedule I ...) in respect of services which are expected to occur annually, for the period of two years ending 30th September, 1996 extended, as appropriate, by 9 months to allow income from Recurring Fees to arise because of delays in performing work for Clients. Fees received from such Clients are to be included in the calculation if the services provided are of a type which is expected, in the general sense, to occur annually, whether or not a particular Client remained a Client of the practice after 30th September, 1996.

Multiply the resulting figure by 112% (representing the relationship between the consideration payable under the Agreement and the fee set out in Schedule I); and

Multiply the resulting figure by 70% (to represent the agreed liability of the Respondent/Purchaser under the Agreement)."

15. In the curial part of the Interim Award the Arbitrator determined that the plaintiff should pay to the defendants the amount of the

consideration so determined, less amounts already paid by the plaintiff to the defendants. He also determined that no further adjustment was required to be made to such consideration.

16. In addition to directing the payment of the balance due by the plaintiff to the defendants as aforesaid, the Arbitrator provided that the plaintiff should pay interest at the rate of 8% per annum as follows:

(a) on any payment up to the sum of IR£25,430 from 30th September, 1995, that being the difference between the amount due on that day under Clause 3.3 and the amount actually paid; and

(b) on any payment greater than the sum of IR£25,430 from 30th September, 1996.

17. The second stage of the arbitral process culminated in a final award made by the Arbitrator on 30th August, 2007 (the Final Award). In the Final Award the Arbitrator recited his determination in the Interim Award (by reference to para. 8) as to the appropriate methodology for the calculation of the consideration payable under the Agreement. He further recited that the parties, having been unable to agree the amount to be paid pursuant to the provisions of the Interim Award, had agreed that the remaining issues in dispute between them be referred to him for his final determination and award. In the Final Award, the Arbitrator determined that the balance of the consideration payable by the plaintiff to the defendants in accordance with the methodology set out in para. 8 of the Interim Award was IR£69,030.36 (equivalent to €87,658.36), having taken into account the payments amounting to IR£97,826 already made by the plaintiff to the defendants. The effect of that determination was that the total consideration payable by the plaintiff was IR£166,856, rather than the figure of IR£176,080 stipulated in Clause 3.1, which represented an abatement of IR£9,224

18. In the Final Award the Arbitrator also calculated the interest due on the balance of the consideration in accordance with the provision of the Interim Award up to the date of the Final Award (30th August, 2007) in euro at €79,139.17 and found the plaintiff to be liable for further interest at the rate of 8% on any amount outstanding from 31st August, 2007. As regards costs, in the Final Award the Arbitrator recited that at the arbitration hearing it was agreed by the parties that he should have jurisdiction to determine the issue of costs and that, pursuant to the provisions of s. 33 of the Act of 1954, he would be entitled to proceed to settle and tax the costs. He determined that the plaintiff should pay the defendants' costs of the reference, which he settled and taxed in the amount of €28,000 plus Value Added Tax, and should be liable for the costs of the Interim and Final Awards, which he settled and taxed in the amount of €15,100 plus Value Added Tax.

The "Award"

19. In framing the relief he claims in the originating notice of motion, the plaintiff has referred to the award of the Arbitrator "made on the 30th day of August, 2007 (incorporating the Interim Award of the said Arbitrator made on the 24th day of September, 2003 and the Final Award of the said Arbitrator made on the 30th day of August, 2007)". In effect, the plaintiff has sought to attack both the Interim Award and the Final Award. Before determining whether he is entitled to challenge the Interim Award, I propose outlining the evidence which is before the court and the submissions made by the parties.

Evidence

20. The plaintiff's case is grounded on an affidavit sworn by his solicitor, in which the agreement, the Expert's opinion, the Interim Award and the Final Award were exhibited, and also on the affidavit sworn by the plaintiff to which reference has already been made. In that affidavit, apart from outlining the history of the dispute, which I have already recorded, the plaintiff set out (paras. 19 to 39) the bases on which it is alleged the Arbitrator misconducted the arbitration and he has extrapolated from evidence which was before the Arbitrator with a view to illustrating that the Arbitrator misinterpreted and misapplied the provisions of the agreement. Those averments have been characterised as "averments of fact" by counsel for the plaintiff. In my view, they are not averments of fact in any real sense and, even allowing for the fact that no replying affidavit has been filed on behalf of the defendants, they are not properly characterised as "uncontroverted averments" of fact. What those paragraphs contain are arguments as to the conclusions which the plaintiff contends should be reached on the interpretation of the relevant documents and the inferences to be drawn from primary facts.

The plaintiff's submissions

21. The court has had the benefit of written and oral submissions on behalf of the plaintiff and oral submissions on behalf of the defendants.

22. In broad terms, there are two strands to the plaintiff's case for setting aside or remitting the Arbitrator's award. The first is that the award contains on its face three patent errors, which it was contended, taken individually and together, are so fundamental that the award cannot stand. The second is that the Arbitrator adopted a methodology for the calculation of consideration outside the scope of the reference, for which neither party had contended, without advising the parties that he was considering such approach or affording them an opportunity to address the same.

23. When one analyses the first strand, two of the asserted patent errors relate to the Interim Award.

24. The first is that the Arbitrator used a methodology for calculation of consideration that was at variance with the agreement in that, by its use, the Arbitrator could have arrived at a result which would have exceeded the agreed maximum consideration, which I understand to mean IR£251,546. The reality of the situation, however, is that, as I have pointed out earlier, the effect of the Arbitrator's award was to abate the amount of the consideration for which the plaintiff was liable by IR£9,224. So, as regards the outcome of the arbitration, that assertion is more hypothetical than real.

25. The second asserted patent error which relates to the Interim Award is the plaintiff's contention that the Arbitrator used a methodology which, as set out in the award, meaning the Interim Award, was internally inconsistent. Three examples are given to illustrate this point:

(a) It is pointed out that at para. 6 of the Interim Award, the Arbitrator quoted the first sentence of the second paragraph of Clause 3.4 but, when arriving at his determination of how the consideration should be calculated, he allowed no adjustment to the consideration in respect of non-retained clients, basing this contention on the second sentence in the first bullet point in para. 8, which has been quoted earlier. This seems to me to be a "cut and paste" approach to the interpretation of the Interim Award without having regard to the entire context thereof. Apart from any other consideration, I do not think this is a legitimate approach to ascertaining what the Arbitrator did.

(b) The plaintiff then sets out to illustrate that there is an inherent contradiction in para. 6 itself. The assertion is that there is a contradiction between the statement that the definition of Recurring Fees requires the determination of the

total value of the fees received from clients listed in Schedule 1, subject only to the qualification that such fees are "in respect of services which are expected to recur annually", on the one hand, and the subsequent statement that, for the purposes of determining Recurring Fees, no reduction is required to be made from the aggregate value of fees received from clients listed in Schedule 1 in respect of the period to 30th September, 1996, on the other hand. The contradiction, it is suggested, raises the question whether the Arbitrator excluded from his calculation fees in respect of services not expected to recur annually, although it was acknowledged that para. 8 would tend to suggest that he may have excluded such fees. Once again, this allegation ignores the overall context of the Interim Award and, in particular, the incorporation of the Expert opinion into para. 6. In my view, it is the type of "fine-combing exercise" which McCarthy J. deprecated in *Keenan v. Shield Insurance Company Limited* [1988] I.R. 89.

(c) It is asserted that another inconsistency arose in para. 8, wherein the Arbitrator proposed using, as the basis for calculation of consideration, the fee income received in the two years after 30th September, 1994 and then to apply the factor of 112%, which was derived from the relationship between the consideration payable under the agreement and the fees listed in Schedule 1, which were fees arising before 30th September, 1994. It was suggested that this involved an "apples and oranges" approach to the calculation of the consideration which, on its own, renders the methodology internally inconsistent and incapable of achieving the result envisaged in the agreement. That is one argument on the construction of the second paragraph of Clause 3.4. There is another argument open. Under the agreement the plaintiff was liable for 70% of the consideration of IR£251,546, which involved the uplift to 112% on the Schedule 1 fees. In calculating "the amount or amounts of the consideration attributable to" non-retained clients on a like-for-like basis it is arguable that the uplift should also apply.

26. The third patent error which the plaintiff contends appears on the face of the award is what he asserted was a patent mistake in monetary calculation in the Final Award. This is based on his extrapolation from the evidence before the Arbitrator. In particular, it was contended that, even using the Arbitrator's stated methodology and using assumptions as to amounts not disputed by the defendants, it is arithmetically impossible to arrive at the Arbitrator's final figure of IR£69,030.36; rather, the maximum amount that can be derived therefrom is less than IR£31,000.

27. In relation to the second strand of the Arbitrator's case, it seems to me that it is based on the same argument as was made in support of the first alleged patent error in the Interim Award. Having referred to the decision of the Court of Appeal in *Société Franco-Tunisienne d'Armement-Tunis v. Government of Ceylon* [1959] 1 W.L.R. 787/[1959] 3 All E.R. 25, it was contended that the Arbitrator arrived at a methodology that was not contended for by the parties, in that he allowed for the maximum consideration payable by the plaintiff to exceed the maximum figure agreed between the parties. It was submitted that the plaintiff had no opportunity to address that point before the award was made. This alleged error on the part of the Arbitrator, if it be such, was discernible when the Interim Award was made, which was almost four years before the Final Award was made. Aside from any other consideration, the plaintiff had ample opportunity to address it before the Final Award was made.

The defendants' submissions

28. In answering the plaintiff's case, counsel for the defendants submitted that there were two awards in the arbitration proceedings, not one, as contended by the plaintiff. He submitted that the approach which had been adopted in the arbitration proceedings was analogous to a situation which arises in civil litigation where the issue of liability is dealt with first, while leaving over the issue of the quantum of damages until liability is determined. In the arbitration proceedings, in the Interim Award, the Arbitrator made his finding on the methodology for determining the consideration on foot of the agreement. Thereafter, the parties engaged in the process leading to the determination of the question of what was due by the plaintiff to the defendants in accordance with that methodology.

29. The response of counsel for the defendants to the plaintiff's attack on the Interim Award was that it was not open to the plaintiff to mount that attack at this juncture, on the basis that the Interim Award constituted a partial final award as regards the methodology for quantifying what was owed by the plaintiff to the defendants. The plaintiff became aware of the content of the Interim Award in 2003. If he was aggrieved by it, in that he was of the view that the Arbitrator erred in adopting the formula he adopted in the Interim Order, it was open to the plaintiff to challenge the Interim Award in court at that juncture. He did not do so, but rather he conducted himself in a manner which suggested that he had no issue with the Interim Award. Therefore, it was contended, the plaintiff is estopped from challenging the Interim Award now. Further, because of his inactivity in relation to the Interim Award for approximately four years, it is not open to the plaintiff to launch a collateral attack through the Final Award at the Interim Award at this juncture and the court should exercise its discretion against allowing the plaintiff to do so.

30. In relation to the Final Award, counsel for the defendants acknowledged that one does not know how the Arbitrator arrived at the figure of IR£69,030.36 from reading it, but the strategy counsel adopted was not to speculate on that. His response to the case made by the plaintiff in relation to the Final Award was that, as a matter of law, the Arbitrator was not obliged to give reasons for his award. Counsel for the defendants rejected the contention of counsel for the plaintiff that the Final Award was a "half reasoned" award, in that the Arbitrator set out the methodology he adopted (albeit a flawed methodology on the plaintiff's case), but failed to show how he had applied the methodology. Counsel for the defendants' analysis of the Final Award was different: the Arbitrator had simply recited the methodology he had already decided on and then determined the balance of the consideration due by the plaintiff to the defendants in accordance with that methodology, which was in keeping with the requirements of Irish law. The Arbitrator was not obliged to explain how he arrived at the figure of IR£69,030.36. Not having done so, the plaintiff cannot go behind that figure, it was submitted, and there is no patent error in the Final Award. It is not the function of the court to speculate on or make assumptions as to how the Arbitrator arrived at the figure; to do so would involve the court in speculating on or assuming the reasoning behind the determination which is not to be found in Final Award.

The law

31. Counsel for the defendants did not take issue with the exposition by counsel for the plaintiff of the general principles of law applicable to the proper application of s. 36 and s. 38 of the Act of 1954 and the surviving common law jurisdiction to set aside an arbitration award which shows on its face an error of law. The general principles are to be found in the decisions of the Supreme Court in *Keenan v. Shield Insurance Company*, *Tobin and Twomey Services v. Kerry Foods* [1996] 2 I.L.R.M. 1 and, most recently, *McCarthy v. Keane* [2004] 3 I.R. 617. There is a comprehensive review of the legal principles in the judgment of Clarke J. in *Limerick City Council v. Uniform Construction Limited* [2007] 1 I.R. 30.

Conclusions

32. The first question which it is necessary to address is whether the proposition put forward on behalf of the defendants that the Arbitrator made two separate and distinct awards, not one, is correct. In my view, it is. By virtue of s. 25 of the Act of 1954 it is provided that every arbitration agreement shall be deemed to contain a provision that the arbitrator may, if he thinks fit, make an interim award, unless a contrary intention is expressed therein. On the evidence before the court it would appear that both parties accepted at all times that the Arbitrator had power to make an interim award. He did so. The Interim Award might have disposed of

the dispute in its entirety, but it did not. The Arbitrator subsequently made the Final Award, which was made on the basis that the Interim Award determined the issue with which the Arbitrator was concerned in making the Interim Award, the methodology for determining the consideration. The Final Award was concerned with the application of the methodology to the facts. The Interim Award and the Final Award each dealt with a distinct issue and are separate and distinct awards.

33. The next question is to consider what was the status and effect of the Interim Award once it was made. In my view, as between the plaintiff and the defendants, the Interim Award was final and conclusive on the matter thereby determined, that is to say, the appropriate methodology for the calculation of the consideration payable under the agreement. In effect, on the making of the Interim Award, the Arbitrator was *functus officio* in relation to that matter. It could not have been re-opened on the resumption of the arbitral process. The arbitration was resumed for the purpose of calculating the consideration. The Final Award, on its face, does not contain any indication that any attempt was made at the two-day hearing on 24th and 25th July, 2007 to re-open the methodology issue, nor does the plaintiff aver in his grounding affidavit as to any attempt to re-open it. Having participated in the resumed process without challenging the Interim Award, and allowed the process to proceed to finality on the basis of the application of a methodology which the plaintiff now contends was not correct, the plaintiff is estopped from seeking to remit or set aside the Interim Award. On the question of delay, the time limit for bringing an application to remit or set aside an award provided for in O. 56, r. 4, is six weeks after the award has been made or published to the parties, or within such further time as may be allowed by the court. No application for an extension of time has been made in this case. If such an application had been made, I cannot see how, on the basis of the jurisprudence on the issue, for example, the judgment of Blayney J. in *Bord na Mona v. John Sisk & Son Limited* (the High Court, Unreported, 31st May, 1990), it could be acceded to.

34. Counsel for the plaintiff, in replying to the defendants' argument that the plaintiff cannot attack the Interim Award at this juncture, suggested that this Court could not have dealt with an application under s. 36 or s. 38 of the Act of 1954 following the making of the Interim Award, because the court would not have known at that time how much was at stake, and what the parties were fighting about in fact. In my view, that is immaterial. The Interim Award addressed a discrete issue – the methodology to be employed in calculating the consideration. The court could have dealt with that issue in principle, as the Arbitrator did.

35. It may be that the analogy with civil litigation, in which the issue of liability is determined first and quantum is left over, is not an apt analogy. In the interests of the effective management of its case load, an appellate court may well take the view that it would be preferable if all issues on a particular appeal were heard at the same time. However, it seems to me that, having regard to the policy considerations which recent jurisprudence of the Superior Courts in relation to the interference by a court in the arbitral process has identified, the primary consideration is "the desirability of making an arbitration award final in every sense of the term" (per McCarthy J. in *Keenan v. Shield Insurance Company Limited* (at p. 96)). To permit a party to an arbitration process to apply following the final award to have an interim award set aside or remitted after participating in the resumption of the arbitration proceedings following the interim award, during which the application of the determination embodied in the interim award to the facts was to be determined, without taking issue with the interim award, in my view, would be at variance with that objective.

36. While counsel for the defendants did not address the alleged patent errors in the Interim Award for which the plaintiff contends, in my view, the plaintiff's arguments raise obvious counter-arguments. On the basis that my observations in relation to the plaintiff's arguments would be more meaningful if juxtaposed to the outline of the plaintiff's arguments, I have already made some observations. Those observations and the further comments I will make now lead me to the conclusion that, even if it is wrong to conclude that it is not open to the plaintiff to seek to set aside or have remitted the Interim Award at this juncture, the plaintiff has not, in any event, established patent errors on the face of the award.

37. In relation to the meaning of "on the face of the award", I agree with the analysis contained in paras. 65 to 68 inclusive of the judgment of Clarke J. in *Limerick City Council v. Uniform Construction Limited*. In this case, I consider that the Expert opinion of 11 May, 1999 and the provisions of the agreement referred to therein and the provisions of the agreement referred to in the Interim Award are incorporated in the Interim Award. Further, I consider that the provisions which are referred to in either document are incorporated in their entirety, even where extracts only from them are quoted, and that the relevant provisions of the agreement must be read in the context of the agreement as a whole. Adopting that approach, in my view, the examples relied on by the plaintiff do not constitute patent mistakes or errors on the face of the Interim Award. Apart from the observations I have already made, it is para. 8 which forms the basis of the determination. Pointing to a perceived inconsistency between para. 6 and para. 8, or a perceived internal contradiction in para. 6 taken in isolation, does not entitle one to conclude that there is a patent error. Of particular significance is the fact that the plaintiff does not indicate what he says the correct methodology is. Even without argument from counsel for the defendants against the existence of patent errors in the Interim Award, on the basis of the plaintiff's submissions, to adopt the words of Clarke J. in *Limerick City Council v. Uniform Construction Limited* (at para. 70) "... any error, if there be an error, cannot be said to be of the obvious and fundamental variety which is necessary for the court to intervene."

38. I turn now to the case made by the plaintiff for setting aside or remission of the Final Award. The plaintiff's case is that there is an obvious and fundamental error on the face of the Final Award, in that there is a patent mistake in the monetary calculation, being one of the grounds identified by McCarthy J. in *Keenan v. Shield Insurance* (at p. 95), giving rise to an entitlement to invoke the relief available under s. 36 of the Act of 1954. In my view, the submission of counsel for the defendants that there is not a patent error in the calculation of the figure of IR£69,030.36 is correct.

39. Before considering whether there is a patent error in the monetary calculation on the face of the Final Award, it is necessary to consider whether the Arbitrator was obliged to give a reasoned explanation of how he arrived at the figure of IR£69,030.36. In my view, the submission of counsel for the defendants that, as a matter of law, the Arbitrator was not obliged to give reasons is correct. The submission by counsel for the plaintiff that the Final Award be remitted to require the Arbitrator to explain the build up of his calculation of the consideration and the balance due by the plaintiff cannot be acceded to.

40. When one analyses what the plaintiff has had to do to illustrate his point, that there is an obvious error on the face of the Final Award in a monetary calculation is not borne out. The plaintiff has had to resort to a so-called "Scott Schedule". In the recitals in the Final Award dealing with procedure, the Arbitrator recorded that the parties' submissions were, as agreed and directed, in the form of a Scott Schedule and a revised Scott Schedule was received from the plaintiff on 23rd July, 2007. In the recital in relation to the hearing it was recorded that a preliminary issue had arisen at the commencement of the hearing as to whether reliance should be placed on the revised Scott Schedule, which was submitted after the date which had been fixed in the Arbitrator's order for directions, and that the Arbitrator ruled that the plaintiff should be able to rely on the updated Scott Schedule. The Scott Schedule was referred to in the Final Award merely for the purpose of recording the ruling of the Arbitrator on the procedural issue. In the circumstances, I am of the view that it cannot be regarded as being incorporated in the Final Award as to its contents, as opposed to its existence. Therefore, I am of the view that its contents cannot be regarded as being incorporated in the Final Award.

41. A Scott Schedule "as at 26th March, 2007" has been exhibited in the plaintiff's affidavit. I am prepared to assume for present

purposes that it is the updated Scott Schedule. It is a document in tabular form which, in relation to 152 clients who obviously are the clients named in Schedule 1, gives details of, *inter alia*, the defendants' claim, how much of it is admitted, the difference between the claim and the amount admitted and the explanation for the difference, the reason why the claim or part of it is disputed by the plaintiff and the defendants' response. It is not clear how the Arbitrator adjudicated on the items contained in the Scott Schedule. There is nothing the plaintiff can do about that because, as a matter of law, the Arbitrator was not required to give reasons.

42. In support of his contention that there was a patent mistake in monetary calculation, the plaintiff has extrapolated from the Scott Schedule and has averred that included in the defendants' maximum claim for recurring fees there are items aggregating at least IR£100,000 which were "clearly not recurring". There is nothing on the face of the Final Award, even if, contrary to the view I have already expressed, one incorporates the Scott Schedule, to indicate what view the Arbitrator took of the alleged "clearly not recurring" items. In addition to suggesting that the Arbitrator may have included in the calculation which resulted in the figure of IR£69,030.36 fees for non-recurring work, it is also asserted that he may have included fees for new services, or for clients not included in Schedule 1 of the agreement, or fees for more than two years' recurring work. It is also suggested that he may have erred by, *inter alia*, failing to apply the factor of 70% specified in the Interim Award.

43. Looking at the totality of the plaintiff's case that the Final Award should be set aside, his basic premise is that the methodology used by the Arbitrator was flawed. I have held that, as the methodology was derived from the Interim Award, the plaintiff cannot challenge its use at this juncture. Given the stance the plaintiff has adopted in relation to the methodology, it is difficult to see how he can properly advance his complaint as to a patent mistake in monetary calculation in the Final Award on a hypothetical basis. Even if he were to accept that the Arbitrator used the correct methodology, a mistake in monetary calculation is not obvious on the face of the Final Award in the absence of a reasoned explanation of how the figure of IR£69,030.36 was arrived at.

44. Finally, as I have already observed in outlining the plaintiff's submissions, the plaintiff had ample opportunity to address the appropriateness or otherwise of the methodology employed by the Arbitrator in calculating the consideration due by the plaintiff to the defendants prior to the making of the Final Award.

42. As there is no basis for either setting aside or remitting the Final Award, insofar as it relates to the determination of the balance of consideration due by the plaintiff to the defendants, in my view, there is no basis on which the court could interfere with the determination in the Final Award of the interest due by the plaintiff or his liability for costs.

Order

43. There will be an order dismissing the plaintiff's application.