Neutral Citation Number: [2012] IEHC 223

THE HIGH COURT

[No 2012/50MCA]

IN THE MATTER OF THE ARBITRATION ACT, 2010

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

Ruairi O'Cathain

APPLICANT

V.

Diarmuid O'Cathain

RESPONDENT

Judgment of Mr. Justice Hedigan delivered the 24th day of May 2012

1. The applicant resides at 30 South Terrace, Cork. The respondent resides at "Sanzio", Beaumount Cresent, Ballintemple, Cork.

2. The applicant seeks the following relief:-

> (a) An Order pursuant to section 6 of the Arbitration Act, 2010, Article 34 of the UNCITRAL Model Law, the common law and Order 56, rule 3(1) (i) of the Rules of the Superior Court (as amended) setting aside the Interim Award of Frank Nyhan, Arbitrator dated 13th January, 2012.
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> (b) An Order pursuant to section 6 of the Arbitration Act, 2010, Article 34(4) of the UNCITRAL Model Law, the common law and Order 56, rule 3(1) (i) remitting the said Award of Frank Nyhan, Arbitrator for his reconsideration of the dispute between the Applicant and the Respondent.

Background Facts

3.1 The applicant worked for a firm of solicitors in Cork until January, 2006, when he entered a partnership agreement with his uncle, the respondent. The partnership was formalized by a deed dated 20th April, 2007. In December, 2008 a dispute arose under the partnership agreement. Legal proceedings were commenced by the respondent which resulted in Mr. Justice Murphy referring the matter, with the consent of the parties, to arbitration by order dated 13th July, 2010. Mr Frank Nyhan was appointed arbitrator on 8th September, 2010.

3.2 A large amount of correspondence passed between the parties and the arbitrator. On 8th June, 2011 the applicant's solicitor wrote to the arbitrator and stated that the accounts being provided by the respondent were insufficient to complete his points of defence and counterclaim. An inspection of the accounts took place in the office of the respondent on 2nd August, 2011. The applicant's accountants were not satisfied that they had full access to the accounts on the computers in the office. A second preliminary meeting was convened on 22nd September, 2011. The arbitrator tried to get to the bottom of what the applicant actually wanted. The applicant's solicitor stated that he wanted three things (i) the journals, (ii) the accounts for the building on South Terrace and (iii) a box of miscellaneous items. All of these documents were provided. However the applicant continued to argue that he could not submit his defence and counterclaim as he did not have access to all the information which he required. On the 14th October, 2011 the arbitrator wrote to the applicants solicitor informing him he was not accepting further correspondence from either party unless it related to the pleadings or a date for hearing.

3.3 The applicant applied twice before the date of the hearing for an adjournment. On 21st November, 2011 and 23rd November, 2011. The application was not responded to. At the hearing on 25th November, 2011 at the arbitrator's offices the applicant was present with his solicitor and at the outset of the hearing the solicitor for the applicant again made an application to have the matter adjourned which was also refused. The applicant left during the course of the hearing complaining that he did not have sufficient information to submit his defence. The hearing proceeded in his absence.

3.4 An award was issued by the arbitrator on 13th January, 2012. In his award the arbitrator held as follows at paragraph 19:-

> "19. Having carefully considered the written submissions, reviewed the documentation and heard the evidence I now make the following findings of law and of fact:-
>
> (a) I find as a matter of law and of fact that D.6 C and R. 6 Centered into a partnership in January 2006, the terms of the partnership agreement are set out in an agreement dated the 20th April 2007 and further that the points of interpretation set out in the Irish Language form part of that agreement.
>
> (b) I find that as a matter of law and of fact that the partnership was dissolved on the 18th December 2008.
>
> (c) I find as a matter of law and of fact that D O'C and R O'C are bound by terms of the Interim High Court Settlement dated the 21st December 2009.
>
> (d) I find that the accounts for the partnership for the years 2006, 2007 and 2008 prepared by Horgan & Barrett accountants are true and accurate.

(e) I find that the O'C practice was paid a VAT inclusive fee of €21,661 for the sale of premises at 9 South Mall and I find that as a matter of law and of fact that R O'C is liable to account to D O'C for that fee.

(f) I cannot from the information before me determine which party is liable for the costs of the High Court Motion referred to in the Order of Mr. Justice Murphy dated the 12 July 201 and I therefore find that D O'C and R O'C should each bear their own costs of that Motion.

(g) I therefore find that R O'C is liable to pay D O'C the following sums

(i) €3,819.11 being the sum due to the ESB.

(ii) €11,016 being a contribution to the fees due to Horgan & Barrett. I consider that the other sums claimed by Horgan & Barrett are more properly attributable to the dispute between the parties.

(iii) €5,453.75 being a contribution due for rates on the premises where the practice carried on business.

(iv) €34,444 being the sum due on foot of the capital account on the dissolution of the partnership.

(v) €84,226 being the sum due in respect of Debtors due on the dissolution of

the partnership.

(vi) €14,080 being 65% of the VAT inclusive fee for the sale of9 South Mall

Cork.

I therefore award D O'C the sum of €153,038.86 together with his costs of the arbitration to include the arbitrators and experts fee."

In the within proceedings the applicant seeks to set aside this arbitral award.

Applicants Submissions
4.1 An arbitral award may be set aside by the Court in certain circumstances. Article 34 of the UNCITRAL Model Law deals with applications for setting aside an arbitral award. It provides as follows:-

"34 (2) An arbitral award may be set aside by the court ...only if: (a) the party making the application furnishes proof that:-

(i) a party to the arbitration agreement ... was under some incapacity; ...

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case."

Counsel for the applicant submits that the applicant was unable to present his case as he was not given access to the full and complete accounts and financial records by his partner, D Ó C which he required in order to prepare his defence The applicant's solicitor had written to the arbitrator on 3rd March, 2011 informing him that the arbitration could not proceed until such time as full accounts had been provided. By further letter dated 6th March, 2011 from the applicant's solicitor to the arbitrator this request was repeated. The applicant's solicitor wrote to the arbitrator on 19th April, 2011, 27th April, 2011 and 10th May, 2011 explaining that the required documentation had not been provided by D Ó C. The applicant's solicitor again wrote to the arbitrator by letter dated 8th June, 2011 setting out three specific categories of documents which were required for the applicant to present his case:

(i) All bank statements from 06.01.2006 to 31.12.2008;

(ii) All trial balances for each of the 6 month periods from 06.01.2006 to 31.12.2008;

(iii) All printouts for all nominal codes from 06.01.2006 to 31.12.2008

4.2 Access to the partnership accounts was agreed to by the respondent by letter dated 29th July, 2011 and the applicant's accountant visited the respondent's office on 2nd August, 2011. Insufficient documentation was provided or documentation which was unintelligible to the accountant. By letter dated 19th September, 2011 the applicant's solicitor expressed the continuing difficulties being experienced by the applicant and his accountants. By letter dated 20th September, 2011 the arbitrator set a date for a second preliminary meeting to take place on 22nd September, 2011. Both parties attended before the arbitrator on 22nd September, 2011 and at the meeting the applicant's solicitor expressed the difficulties with regard to documentation provided by the respondent and his accountants, who had been the accountants to the partnership. The applicant's solicitor stated that the applicant could not present his case with the documents provided and feared that if he attempted to present his case with the documents provided he would prejudice his case by being unable to counter claims being made by the respondent with documentary evidence.

4.3 The arbitrator confirmed orally that a full set of financial accounts for the partnership be supplied by Mr. Rodger Barrett accountant to the applicant within 21 days of the date of the Order for Directions. This was confirmed in the Order for Directions dated 23rd September. The applicant's solicitor wrote to Mr Barrett on 19th October, 2011, 24th October, 2011 and 3rd November, 2011 setting out the documents that were required by the applicant. Mr Barrett responded by letter dated 25th October, 2011 stating that certain of the documents would require the permission of the respondent to be released. On 14th October, 2011 the arbitrator wrote to the applicant's solicitor informing him that he was "not accepting any correspondence from either of the parties in this matter unless it related to the pleadings or date for hearing". The applicants accountants Hickey Associates wrote to the applicant on 21st November, 2011 explaining in detail which documents were necessary to finalize his submissions and present his case to the arbitrator but which were still missing, and the reasons why they were required. The applicant's solicitor wrote to the arbitrator on 21st November, 2011 enclosing the letter from Hickey Associates and requesting an adjournment of the hearing. No response to this letter was ever received from the Arbitrator. On 23rd November, 2011 the applicant's solicitor again wrote to the arbitrator enquiring as to whether an accountant was required on the hearing date to explain why the submissions could not be completed. No response

to this letter either was ever received from the arbitrator. Counsel for the applicant submits that it was a breach of fair procedures and natural justice for an arbitrator, to fail to respond to either of these important letters and to have issued a direction that he would not respond to any further correspondence from the parties. The applications for an adjournment were reasonable and necessary and merited a considered decision and response.

4.4 At the hearing on 25th November, 2011 at the arbitrator's offices the applicant was present with his solicitor and at the outset of the hearing the applicant's solicitor again made an application to have the matter adjourned. The arbitrator refused the adjournment. The applicant's solicitor then took instructions. After speaking to his client he informed the arbitrator that his client could take no further part in the hearing. The arbitration proceeded in their absence. The award issued on 13th January, 2012. It relied on the report of Connor Pyne an outside accountant unilaterally employed by the arbitrator. The applicant takes issue with the use of by the arbitrator of an outside accountant. The applicant submits that it was a breach of arbitration law and practice and ultra vires his powers for the arbitrator to unilaterally employ the services of an outsider. This accountant was not mentioned or present at the hearing or offered to be challenged or cross-examined. The arbitrator did not even inform the applicant that he was intending to employ or rely on this outside accountant. It is unclear what instructions this accountant was provided with or what material, private and confidential to the applicant a solicitor, was made available to him prior to the report being made. It is submitted that this was an unfair method of arriving at a decision and was done without jurisdiction, authority or permission.

4.5 The applicant complains that the hearing took place in his absence. He refers the court to the case of *Grangeford Structures Ltd v S.H Ltd* [1990] 2 IR 351 where the Supreme Court upheld the decision of Costello J. in the High Court in finding that an Arbitrator does have jurisdiction to proceed with an arbitration hearing in the absence of one of the parties if reasonable notice of the time limits for the presentation of the case has been given to the parties. The applicant however submits that although this case may be factually similar to *Grangeford,* it differs significantly in that the applicant informed the arbitrator of his reason for not being able to finalize and submit his defence and counterclaim. The reason offered was reasonable and not a spurious one. In the *Grangeford* case both the High Court and the Supreme Court were critical of the unresponsive defendant, the applicant was not unresponsive he continuously wrote to the arbitrator to keep him abreast of developments and the impedimentary behaviour of the respondent.

4.6 The applicant submits that in this case the arbitrator was duty-bound to ensure that he had an opportunity to present evidence and arguments in support of his case. Article 18 of the UNCITRAL Model Law provides that "each party shall be given a full opportunity of presenting his case". It is submitted that this gives effect to the normal tenets of fair procedures and Constitutional justice. Furthermore the arbitrator purported to award the fees of an outside accountant engaged without authority against the applicant. The applicant submits that this was an *ultra vires* act. The arbitrator is not empowered to unilaterally appoint an expert without the consent of the parties. There is no mention of any such authority in the arbitrator's letter of appointment or terms of reference. In this case the arbitrator did not even inform the applicant that it was his intention to employ the services of an expert and at their cost. In addition, the parties have no assurance that the expert was in fact independent or impartial. It is entirely unclear as to how the firm of accountants were appointed or what terms of reference, if any, were provided or what instructions they received or what documents they had in their possession prior to making their report. For all the above reasons the applicant submits that the arbitral award cannot stand and must be set aside, or in the alternative, such further or other order as is just and necessary after the relevant documents have been provided to the applicant and his accountants.

Respondent's Submissions
5.1 The applicant claims that he was unable to complete his point of defence and counter claim as the appropriate books of account were not furnished to him. The respondent submits that he made every conceivable attempt to assist the applicant in obtaining all documentation, as demonstrated by the correspondence between the parties. The correspondence also demonstrates the level of delay and procrastination caused by the applicant with excuses and spurious demands in relation to documentation.

5.2 On the 18th May 2011 the respondent wrote to the arbitrator copying this letter to the applicant. This letter referred to the fact that submissions and documentation had been delivered from the 15th April 2011 but that the respondent had failed to supply any submissions which were due according to the direction of the arbitrator by 6th May, 2011. The letter also referred to a letter from the applicant's solicitor seeking ledger cards and pointing out that because the applicant did not want to delay matters the cards were printed off and handed personally to the plaintiffs solicitor. The letter goes on to consent to a further reasonable period of and adjournment to allow the applicant to put in submissions. The letter goes on to state:-

> "Please advise if there is anything which the Claimant can do to assist the arbitrator in obtaining submissions in exchange for documentation from the Respondent so that the hearing of this matter may be expedited and the matter resolved once and for all"

On the 21st June 2011 the respondent wrote to the arbitrator referring to the fact that the applicant's submissions had still not been obtained. On the 12th July 2011 the respondent wrote to the arbitrator and copied this letter to the applicant's solicitor. The letter expressed disappointment with the continuing delay and frustration of the arbitration process by the applicant. The letter stated that if the applicant needed any documentation "all they need to do is ask for the documentation in order to receive it." At this stage the applicant had the respondent's submissions for over two months. The applicant had failed to provide submissions. On the 5th August 2011 the respondent wrote to the arbitrator and copied this letter to the applicant's solicitor. The letter noted that the applicant was provided with a further extension until the 19th August 2011 to provide points of defence. The letter states "Our client the Claimant in this has no difficulty with a further extension if it will in any way incentivise or motivate the respondent to actually prepare and provide submissions so that this matter can be brought to a conclusion." The letter points out that "The Respondent has been repeatedly advised since January 2008 that a complete back up of all the Ó.C accounts has been available on disc for him to collect and the offer was repeated to him in a letter of the 1st July 2011 but to date he has not chosen to take up that invitation or collect the disc". On the 12th September 2011 the respondent wrote to the arbitrator and copied this letter to the applicant's solicitor. This letter again points out that despite the further extension of time to the 19th of August 2011 for the applicant to file his submissions no submissions had been provided. On the 22nd September 2011 a further preliminary meeting with the arbitrator took place. The arbitrator tried to get to the bottom of what the applicant actually wanted. The solicitor for the applicant stated that he wanted three things:-

> (a) all journals. These would deal with fixtures, fitting and depreciation
>
> (b) the accounts for the building on South Terrace
>
> (c) a box of miscellaneous items in the general office used by both parties.

All of these documents were provided. On the 23rd September 2011 the arbitrator directed that the applicant make written submissions before the 20th October 2011 and he stated that time shall be of the essence. On the 18th November 2011 the solicitor

respondent wrote to the arbitrator and the applicant's solicitor pointing out that despite the direction to provide written submissions by 20th October, 2011 none were provided. The respondent submits that at that stage it was abundantly clear that the applicant was not willing to engage with the process of arbitration and was attempting to frustrate it at every point.

5.3 At the hearing on 25th November, 2011 the arbitrator asked whether there was any reason why he should not commence at that stage, no submissions having been provided. The applicant's solicitor alleged that the accountant refused to provide documentation and he was unable to "submit or formally deny allegations". At that stage the accountant Rodger Barrett gave evidence that he provided the information requested by the applicant and that he had provided it at least twice. This evidence was entirely unchallenged by the applicant or his solicitor who were still present at this stage. In the absence of any evidence or challenge to the evidence of Rodger Barrett and in the total absence of any written submissions the arbitrator determined that the applicant was responsible for gross and inexcusable delay with no effort made to progress matters. The arbitrator indicated that he would rise to give the applicant and his solicitor the opportunity to challenge his decision. The applicant walked out of the meeting. Shortly after, his solicitor returned and stated to the arbitrator "my client is withdrawing from the arbitration and my client has left the building." The arbitrator continued with the hearing in the applicant's absence. On the 13th January, 2012 the arbitrator awarded the applicant the sum of €153,038.86 together with his costs of the arbitration to include the arbitrators and experts fee.

5.4 The applicant complains that the arbitrator erred in proceeding with the hearing in his absence. This issue was addressed in the case of *Grangeford Structures Ltd v S.H Ltd* [1990] 2 IR 351, the plaintiff and defendant were main contractor and sub-contractor respectively to a shopping centre development. The agreement between the parties contained an arbitration clause. A dispute was referred to arbitration and a preliminary hearing was held. Points of claim and defence were filed. On the 6th November, 1985, the defendant's solicitor wrote to the arbitrator to say that he was "formulating a substantial counterclaim." The arbitrator replied on the 7th January, 1986, that he was agreeable to allowing the defendant amend its defence to make a counterclaim and allowed it a further 21 days and a further period of 14 days "for filing the list of documents" and wrote "no extension to these periods will be allowed except for grave reasons and if no amended defence and counterclaim is received within the period stated then I will proceed." On the 4th February, 1986, the arbitrator wrote to the parties stating that as he had not received any amended claim or other communication from the defendant's solicitor, he proposed to proceed to a hearing on the 7th March, 1986, at 10.30 a.m. On the 5th March, 1986, the defendant's solicitor wrote to the arbitrator stating that he was not yet in a position to file the counterclaim and would be seeking an adjournment of the arbitration hearing. At the commencement of the hearing he applied for the adjournment which was objected to by the solicitor for the plaintiff and the arbitrator peremptorily adjourned the hearing to 2.15 p.m. on the same day to allow the defendant's solicitor consult his client. At the resumed bearing at 2.15 p.m. the defendant's solicitor walked out in protest when his application for an adjournment was refused. The hearing then continued and by his award of the 4th April, 1986, the arbitrator directed payment to the plaintiff of £18,330.53.The plaintiff sought leave of the High Court to enforce the award and the defendant claimed that the arbitrator had mis-conducted himself and that the award should be set aside. Costello J. held that the arbitrator had acted reasonably and without misconduct in refusing to adjourn the arbitration hearing and that he had jurisdiction to proceed with the arbitration having given reasonable notice to the parties as to time limits for the presentation of claims and counterclaims and notwithstanding that the defendant had walked out. The defendant appealed to the Supreme Court from the judgment and order of the High Court and argued that the arbitrator's refusal to adjourn the proceedings was unreasonable and arbitrary and constituted an unfair procedure, and that the arbitrator had no power to proceed with the hearing *ex parte* in the absence of the defendant. It was held by the Supreme Court (Finlay C.J., Griffin and McCarthy JJ.), in dismissing the appeal and affirming the order of the High Court, that the arbitrator had not misconducted himself and had jurisdiction to continue the hearing in the absence of the defendant and make an award on the evidence presented to him. The respondent submits that there are no grounds for distinguishing *Grangeford* from the instant case and that the arbitrator in this case was equally entitled to continue when the applicant absented himself.

5.5 The applicant also complains about the arbitrator's use of accountant Connor Pyne who was hired to prepare an independent expert report into the accounts of the partnership. The applicant submits that the arbitrator was not entitled to appoint an expert without the consent of the parties. The respondent submits that the consent of the parties was not required in relation to the arbitrator's decision to appoint Mr Pyne. Article 26 of the UNCITRAL Model Law deals with the appointment of an expert by an arbitral tribunal. It provides:-

> (1) Unless otherwise agreed by the parties, the arbitral tribunal
>
> (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
>
> (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
>
> (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

It is clear therefore that unless otherwise agreed by the parties, the arbitrator may appoint one or more experts; there was no agreement to the contrary in this case. It was open to the applicant to participate in the hearing and put questions to the expert he chose not to do so.

Decision of the Court

6.1 In the within proceedings the applicant seeks to set aside an arbitral award made on the 13th January, 2012 by Mr. Frank Nyhan, arbitrator. The applicant is a solicitor who entered a partnership agreement with the respondent (his uncle) on the 20th of April 2007. In December, 2008 a dispute arose under the partnership agreement. Legal proceedings were commenced by the respondent, the matter was referred to arbitration with the consent of the parties. A large amount of correspondence passed between the parties and the arbitrator. On the 15th April 2011 the respondent provided the applicant with its submissions and other documentation. Despite repeated requests the applicant failed to provide the respondent with its submissions. In June, 2011 the applicant's solicitor wrote to the arbitrator and stated that the accounts being provided by the respondent were insufficient to complete his defence and counterclaim. An inspection of the accounts took place in the office of the respondent on 2nd August, 2011. The applicant continued to be unsatisfied that he had full access to the accounts. A second preliminary meeting was convened on 22nd September, 2011. The arbitrator tried to get to the bottom of what the applicant actually wanted. The applicant's solicitor stated that he wanted three things (i) the journals, (ii) the accounts for the building on South Terrace and (iii) a box of miscellaneous items. All of these documents were provided. However the applicant continued to argue that he could not submit his defence and counterclaim as he did not have access to all the information which he required. On the 14th October, 2011 the arbitrator wrote to the applicants solicitor informing him he was not accepting further correspondence from either party unless it related to the pleadings which had still not

been filed or a date for hearing. The applicant wrote to the arbitrator on the 21st and 23rd November, seeking an adjournment. No response was received. At the hearing on 25th November, 2011 the applicant's solicitor again made an application to have the matter adjourned. He complained that the accountant had refused to provide him with information he had requested. At this stage the accountant Mr Barrett gave evidence. He stated that he had given the applicant all that he had asked for. He said he had done this twice. The applicant did not challenge this evidence. The arbitrator then refused the adjournment and indicated he intended to continue the hearing. The applicant then left complaining that he did not have sufficient information to submit his defence. The hearing proceeded in his absence. On the 13th January, 2012 the arbitrator awarded the respondent the sum of €153,038.86 together with his costs of the arbitration to include the arbitrators and experts fee.

6.2 The applicant submits that he was unable to present his case as he did not have access to all the information which he required. However the applicant's argument that he was frustrated in his attempts to access information is not borne out by the correspondence between the parties. The correspondence in fact indicates that the respondent went to great lengths to provide the applicant with all the documentation he could possibly require. The letter of the 18th May 2011 refers to the respondent providing the applicant with the ledger cards for the practice. The letter of the 12th July 2011 stated that if the applicant needed any documentation all he had to do was ask. The letter of the 5th August 2011 contained the respondent's agreement to an extension of time for the applicant to make submissions. The letter points out that the applicant had been offered a disc containing a backup of all the accounts but had never taken up this offer. The letter of the 12th September 2011 and the 16th September note that despite having the respondents submissions for 5 months the applicant had failed to provide his submissions. On the 22nd September, 2011 a meeting with the arbitrator took place, the arbitrator tried to get to the bottom of what the applicant actually wanted. The applicant's solicitor stated that he wanted three things (i) the journals, (ii) the accounts for the building on South Terrace and (iii) a box of miscellaneous items. All of these documents were provided. After the meeting of the 22nd September 2011 it was clear that the applicant had everything he could possibly require. Nevertheless on the 21st and 23rd November the applicant's solicitor wrote to the arbitrator seeking an adjournment on the basis that they did not have all the necessary documentation to prepare his case. The arbitrator did not respond to this request. When the matter finally came on for hearing the applicant again sought an adjournment. It is very difficult to believe that the applicant had not had, at this stage every reasonable opportunity to acquaint himself with the accounts. In my view, the correspondence illustrates a clear pattern of obstructive behaviour on the applicant's behalf. In the light of all the above it seems to me that the applicant was offered all the information he could reasonably require and I reject his complaint that he was not in a position to make his case fully. If there was any gap in his knowledge it seems to me that this was caused by himself.

6.3 The applicant also complains that the arbitrator was not entitled to appoint Mr. Connor Pyne accountant to examine the accounts of the partnership without the consent of the parties. I am satisfied that the consent of the parties was not required in relation to Mr. Pyne's appointment. Article 26 of the UNCITRAL Model Law deals with the appointment of an expert by an arbitral tribunal. It provides:-

> "(1) Unless otherwise agreed by the parties, the arbitral tribunal
>
> (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
>
> (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
>
> (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue."

It is clear therefore that unless otherwise agreed by the parties, the arbitrator may appoint one or more experts; there was no agreement to the contrary in this case therefore the applicants complaint in this regard is without substance and I reject it.

6.5 Finally, as to the continuance of the hearing in his absence, the applicant argues that the arbitrator was wrong to proceed. The issue of an arbitrator proceeding with a hearing in the absence of one of the parties was considered by the Supreme Court in *Grangeford Structures Ltd v S.H Ltd* [1990] 2 IR 351, Griffin J quoted from the judgment of Costello J in the High Court as follows held at 356:-

> "The question does arise as to whether the arbitrator had jurisdiction to continue the arbitration, one of the parties having walked out and the arbitrator in effect continuing the arbitration on an *ex parte* basis. In my view he had. In my view it would make nonsense of arbitration proceedings if, reasonable notice having been given to the parties as to time limits for the presentation of claims and counterclaims, an arbitrator could not proceed because one party failed to carry out his reasonable requirements. It would mean that one party could frustrate the proceedings by mere in action."

Griffin J. went on to hold at 357:-

> "In my opinion there is no basis for holding that the arbitrator acted unreasonably or arbitrarily in refusing the adjournment or that this resulted in an unfair procedure. Approximately one year had elapsed between the arbitrator's appointment and the date fixed for the hearing. During that time there had been inordinate delay most of which had been the fault of the defendant. More than sufficient time had been afforded to the defendant to prepare any counterclaim which it wished to have included in the arbitration."

McCarthy J held at 359:-

> "There is to be implied into every agreement establishing a forum for the resolution of disputes that there will be fair procedures. Such are not the prerogative of one side or the other. Just as one side is entitled to the opportunity of stating and making his case, the other is entitled to expedition in the determining of the dispute."

The applicant herein had sufficient time and sufficient documentary evidence to prepare his submissions and defence. At the time of the hearing the applicant had the respondent's submissions for approximately eight months. Instead of engaging with the procedure in a meaningful way the applicant sought to delay matters. The arbitrator had given him every possible opportunity to make his case and he had refused to do so. He walked out. The applicant did not enjoy a monopoly over the right to fair procedures. The respondent too was entitled to fair procedures and to have this matter dealt with expeditiously. In my view the arbitrator was correct to insist on the hearing continuing. I therefore reject the applicant's complaint in this regard.

In summary, I am not satisfied that there are any grounds for setting aside the arbitral award made herein. I therefore refuse the relief sought in the within application.