

THE HIGH COURT**2009 1477 P****BETWEEN****AIDEN KELLY AND MICHAEL O'SULLIVAN****PLAINTIFFS****AND****JAMES LENNON****DEFENDANT****JUDGMENT of Mr. Justice Clarke delivered the 2nd July, 2009****1. Introduction**

1.1 On the 25th May, 2007, the parties to these proceedings entered into a contract ("the Contract") for the sale of lands in County Westmeath for an agreed sum of €46,693,300. The defendant ("Mr. Lennon") was the vendor. The plaintiffs ("Mr. Kelly and Mr. O'Sullivan") were the purchasers. In circumstances which it will be necessary to explore in a little more detail, Mr. Kelly and Mr. O'Sullivan now contend that that contract is at an end. They have brought these proceedings for the purposes of seeking a declaration to that effect. More specifically, Mr. Kelly and Mr. O'Sullivan seek a declaration that the contract to which I have referred "has been validly rescinded" by them. Mr. Kelly and Mr. O'Sullivan also seek the return of a deposit in the amount of €9,093,000 together with interest on that sum under the terms of the contract. Mr. Lennon disputes the entitlement of Mr. Kelly and Mr. O'Sullivan to either order and, indeed, maintains that the contract continues in effect and remains capable of enforcement.

1.2 However, in addition Mr. Lennon maintains that what he says is the true dispute which arises in these proceedings is governed by the standard form arbitration clause contained in the Law Society General Conditions of Sale (2001 edition), which was incorporated into the contract by the parties. On that basis, Mr. Lennon seeks to have these proceedings stayed until such time as certain issues between the parties have been resolved by arbitration.

1.3 This judgment is directed to the question of whether it is appropriate to stay these proceedings in those circumstances. Some of the factual background to the dispute between the parties is relevant to a full understanding of the issues which have arisen under this application, and I, therefore, turn to the facts insofar as they are material to the issue which I now have to decide.

2. The Material Facts

2.1 The contract provided for a closing date six months from the date of its signing. As the contract was dated the 25th May, 2007, the closing date was in November, 2007. The lands to be sold were described by reference to six different freehold folios. However, it would appear that, in the course of investigating title, differences arose between the parties as to the consistency of the physical boundaries of the lands with the boundaries of the land registry folios to which I have referred. It would appear that it was, at least at one stage, contemplated that an application might be made to the land registry for the purposes of rectifying those boundaries. Be that as it may, the question of closing the sale did not really come to a head until the latter part of 2008. Two completion notices were served, followed by correspondence between the respective parties' solicitors as to the basis upon which the respective parties might be willing to close the sale. On the evidence currently available it would appear that all of the closing requirements of Mr. Kelly and Mr. O'Sullivan (through their solicitors), were agreed save for two matters. The parties remained in dispute concerning the consequences of what was said to be an error, to which I have already referred, in the description of the lands, the subject matter of the contract, arising out of the difference between the boundaries on the ground and those contained in the relevant folios. In addition, there appears to have been some dispute between the parties concerning the issue of tenancies.

2.2 Special condition 5 of the contract provided that the property was to be sold "subject to and with the benefit of the Tenancies, particulars of which are set out in the First Schedule hereto and the Vendor shall not be required to hand over vacant possession of the said property on closing and General Condition No. 21 is amended accordingly".

2.3 The same clause went on to provide that the purchaser should be entitled to communicate and negotiate with the relevant tenants, while the vendor agreed not to communicate with those tenants "save on the direction of the Purchasers". It would appear that, prior to the events which I am describing, at least some of the relevant tenants had terminated their tenancies. Issues concerning the contractual entitlements of the parties in those circumstances appear to have arisen in the context of the closing requirements made by the respective solicitors acting for the parties.

2.4 Against that background it is next appropriate to turn to the issues which are likely to arise in these proceedings.

3. The Issues in these Proceedings

3.1 The net issue between the parties is, of course, as to whether the contract between them is validly at an end in circumstances where Mr. Kelly and Mr. O'Sullivan would be entitled to a repayment of their deposit, together with interest. However, in addressing that issue it seems clear that a number of further sub-issues will necessarily arise. It does not appear to be disputed but that a valid completion notice was served. Equally it is clear that completion did not take place. The position of the parties will, therefore, depend on the view which the court ultimately takes as to the circumstances surrounding that failure to complete. If Mr. Lennon can ultimately persuade the court that he was ready, willing and able to complete, but that he was prevented from so doing because Mr. Kelly and Mr. O'Sullivan imposed conditions in relation to closing, which they were not legally entitled to impose, then it follows that the contract will still subsist and that Mr. Lennon would, in those circumstances, be entitled to pursue whatever remedies (whether specific

performance, damages or the like) as he may be advised. Equally, if the court is persuaded that the position adopted on behalf of Mr. Lennon by his solicitors as to closing was not in accordance with Mr. Lennon's legal obligations, then it seems clear that Mr. Kelly and Mr. O'Sullivan will be entitled to succeed in their claim to the effect that the contract is now at an end by virtue of the failure (on the assumption which I have made the failure would be for no good or sufficient reason) of Mr. Lennon to complete in accordance with his obligations under the completion notice.

3.2 On that basis it seems clear that the real issues in the case will be as to the circumstance surrounding the attempts to close the sale, with a particular focus on the position adopted by the respective parties at that stage. In those circumstances, it seems highly likely that the case will turn on the view which the court takes as to the position adopted at all relevant times by the parties concerning the question of the boundaries, and also concerning the tenancies to which I have referred. In addition it may well be that issues will arise as to the entitlement of Mr. Lennon to insist on arbitration where it is said that the first attempt to refer the issue to arbitration occurred after the service of the relevant completion notices. It is in the context of those issues arising that the question of arbitration needs to be addressed. The issue concerning the boundaries is one, on Mr. Lennon's argument, which can only properly be determined by an arbitrator.

3.3 The first point for consideration is, therefore, as to whether Mr. Lennon is correct in that assertion. In that context it is appropriate to refer to the relevant provisions of the 2001 edition of the Law Society General Condition of Sale. I turn to those conditions.

4. The General Conditions

4.1 The relevant provisions of the Law Society General Conditions of Sale are Conditions 33 and 51. I set out the text of those provisions hereunder:-

"Condition 33

(a) In this Condition "error" includes any omission, non-disclosure, discrepancy, difference, inaccuracy, mis-statement or mis-representation made in the Memorandum, the Particulars or in the Conditions or the Non-Title Information Sheet or in the course of any representation, response or negotiations leading to the Sale, and whether in respect of measurements, quantities, descriptions or otherwise

(b) The Purchaser shall be entitled to be compensated by the Vendor for any loss suffered by the Purchaser in his bargain relative to the Sale as a result of an error made by or on behalf of the Vendor provided however that no compensation shall be payable for loss of trifling materiality unless attributable to recklessness or fraud on the part of the Vendor nor in respect of any matter of which the Purchaser shall be deemed to have had notice under condition 16 (a) nor in relation to any error in a location or similar plan furnished for identification only

(c) Nothing in the Memorandum, the Particulars or the Conditions shall:

(i) entitle the Vendor to require the Purchaser to accept property which differs substantially from the property agreed to be sold whether in quantity, quality, tenure or otherwise, if the Purchaser would be prejudiced materially by reason of any such difference

or

(ii) affect the right of the Purchaser to rescind or repudiate the Sale where compensation for a claim attributable to a material error made by or on behalf of the Vendor cannot be reasonably assessed

(d) Save as aforesaid, no error shall annul the Sale or entitle the Vendor or the Purchaser (as the case may be) to be discharged therefrom.

Condition 51

All differences and disputes between the Vendor and the Purchaser as to:

(a) whether a rent is or is not a rack rent for the purpose of Condition 10(c), or

(b) the identification of the Apportionment Date, or the treatment or quantification of any item pursuant to the provisions for the apportionment in the Conditions, or

(c) any issues on foot of Condition 33, including the applicability of said Condition, and the amount of compensation payable thereunder, or

(d) the materiality of any matter for the purpose of Condition 36 (a), or

(e) the materiality of damage or any other question involving any of the provision in Condition 43, 44 and 45, including the amount of compensation (if any) payable, or

(f) whether any particular item or thing is or is not included in the Sale, or otherwise as to the nature or condition thereof shall be submitted to arbitration by a sole Arbitrator to be appointed (in the absence of agreement between the Vendor and the Purchase upon such appointment and on the application of either of them) by the President (or other Officer endowed with the functions of such President) for the time being of the Law Society of Ireland or (in the event of the President or other Officer as aforesaid being unable or unwilling to make the appointment) by the next senior Officer of that Society who is so able and willing to make the appointment and such arbitration shall be governed by the Arbitration Acts, 1954 to 1998 provided however that if the Arbitrator shall relinquish his appointment or die, or if it shall become apparent that for any reason he shall be unable or shall have become unfit or unsuited (whether because of bias or otherwise) to compete his duties, or if he shall be removed from office by Court Order, a substitute may be appointed in his place and in relation to any such appointment the procedures hereinbefore set forth shall be deemed to apply as though the substitution were an appointment de novo which said procedures may be repeated as many times as may be necessary."

4.2 As will be noted from the above an error for the purposes of Condition 33 includes any discrepancy in the

memorandum or particulars of the contract. I did not understand the parties to dispute but that the alleged discrepancy between the physical boundaries and the folios concerned would, if established, amount to an error within that definition.

4.3 It is clear from Condition 33(b) that a purchaser is entitled to compensation for any loss suffered as a result of an error unless either:-

- (a) The loss is of trifling materiality save when same is attributable to recklessness or fraud; or
- (b) under Clause 33(c) where the error creates a situation where the purchaser would be required to accept property "which differs substantially from the property agreed to be sold" so that the purchaser would be prejudiced materially by reason of such difference or where (under sub-clause (ii)) any relevant compensation could not reasonably be assessed.

4.4 It is clear that Condition 33(d) provides that an error shall not annul the sale or entitle either party to be discharged therefrom "save as aforesaid".

4.5 In those circumstances it seems clear to me that the effect of General Condition 33 as a whole is such as to preclude either party from being able to escape from an otherwise contractually valid arrangement on the basis of an error in the particulars, unless that error is:-

- (a) As a result of fraud or recklessness;
- (b) Sufficiently substantial as would cause material prejudice; or
- (c) Incapable of giving rise to a reasonable computation of relevant compensation.

In all other cases the parties are required to complete the contract with an appropriate adjustment being made to the purchase price to reflect the error (unless the error is so immaterial as to be trifling and not, therefore, to warrant compensation at all).

4.6 To the extent, therefore, that there would appear to have been an error in the contract so far as boundaries are concerned, the issue which arises between the parties is as to whether that error is sufficiently material so as to cause prejudice and thus to lead to the entitlement on the part of the purchasers to treat the contract as at an end. In addition, and in the event that it be determined that any error is not sufficient to warrant permitting the purchasers to walk away from the contract, then the question of the appropriate amount of compensation to be assessed also arises.

4.7 It is also clear that the relevant provisions of General Condition 51 provide that all differences and disputes between the vendor and the purchaser as to "any issue on foot of Condition 33, including the applicability of the said Condition, and the amount of compensation payable thereunder" is to be submitted to arbitration. Contrary to the submission of Mr. Kelly and Mr. O'Sullivan it seems to me that General Condition No. 51 requires that any question as to whether a relevant error is such as might bring the contract to an end under the provisions of Condition No. 33 is to be determined by arbitration.

4.8 Having analysed the relevant contractual provisions it is next appropriate to turn to the basis on which Mr. Kelly and Mr. O'Sullivan oppose the application for a stay.

5. The Issues on the Stay Application

5.1 Two points are raised in opposition to the stay on behalf of Mr. Kelly and Mr. O'Sullivan.

5.2 Firstly, it is argued that, as the contract has been validly rescinded, there is no longer an arbitration clause capable of enforcement. In that context it is also said that no arbitrator could determine the ultimate issue in these proceedings which is as to whether the contract is validly at an end.

5.3 A second point is made arising out of the fact that Mr. Lennon has, undoubtedly, entered an unconditional appearance to these proceedings. In those circumstances it is said that Mr. Lennon has taken a step in the proceedings and is not, therefore, entitled to a stay pending arbitration.

5.4 I propose to turn to the continuing effectiveness of the arbitration clause first.

6. The Validity of the Arbitration Clause and its Application

6.1 It does not seem to me that there is any merit in the principal argument put forward on behalf of Mr. Kelly and Mr. O'Sullivan under this heading. There is no basis for suggesting that there was not a valid contract entered into between the parties. The only issue between the parties is as to whether, in accordance with the terms of that contract, the contract still subsists (as Mr. Lennon argues) or may have come to an end, whether by rescission or otherwise, as Mr. Kelly and Mr. O'Sullivan argue. This is not one of those cases where there may be an argument as to whether there was ever a valid and subsisting contract in the first place, such as to give rise to a valid arbitration agreement between the parties. Rather this case is one where there was undoubtedly a valid agreement with an arbitration clause in the form of General Condition 51. It is clear from the review of the authorities conducted by Kelly J. in *Doyle v. Irish National Insurance Company* [1998] 1 I.L.R.M. 502 that, in such circumstances an arbitration clause survives any contended termination of the contract. Indeed in *Doyle* the argument was that the insurance contract concerned was void with retrospective effect. The high water mark of the case made in these proceedings is that contractual relations between the parties have come to an end. This case is, therefore, if anything, an even clearer case for the survival of the arbitration clause concerned. In principle, therefore, I can see no basis for the suggestion put forward on behalf of Mr. Kelly and Mr. O'Sullivan to the effect that the arbitration clause is no longer in being, or capable of being given effect to.

6.2 However, it is important also to address the question of the undoubted limitation on the scope of the arbitration

clause in this case. In most cases involving an arbitration clause, the scope of any potential arbitration is wide. Phrases such as "any disputes arising out of" and the like make it clear that all relevant disputes between the parties are likely to be properly the subject of arbitration. However, that is clearly not the case here. The only dispute between the parties which comes within the scope of General Condition 51 is the boundary dispute. As pointed out earlier I did not accept the argument put forward on behalf of Mr. Kelly and Mr. O'Sullivan to the effect that the dispute between the parties was not properly within the scope of General Condition 51 or that there was, at least, a doubt about this fact. The dispute between the parties arising out of the alleged error in the boundaries is one which seems to me to be governed by General Condition 33.

6.3 Leaving aside for the moment the question of the dispute concerning the tenancies (to which it will, of course, be necessary to return), and the issues concerning the sequencing of the completion notices and the first attempt to refer to arbitration, it is important to analyse what the legal position of the respective parties would be in the event that the only issue between them as to closing centred on that boundary dispute.

6.4 If, on a proper application of the terms of General Condition 33 to the facts of this case, it is appropriate to decide that any error as to the boundary of the properties was such as did not entitle Mr. Kelly and Mr. O'Sullivan to treat the contract as at an end, then the only issue (other than that relating to the tenancies to which I have referred) which might arise between the parties is as to the consequences of that finding for the continuance of the contract in the light of the sequence of events which, in fact, occurred in this case. What in fact happened was that a completion notice was served at a time prior to any attempt being made to suggest that issues arising out of the boundary question should be referred to arbitration. Prior to the expiry of the second completion notice in this case, an attempt was made on behalf of Mr. Lennon to have the issues which arose under General Condition 33 referred to arbitration under the provisions of General Condition 51. As I understand it, the parties adopt a different view as to the consequences of that sequence of events. It is argued on behalf of Mr. Kelly and Mr. O'Sullivan that it had, in practice, become too late for Mr. Lennon to seek to refer the matter to arbitration at that stage, given that he had already served a completion notice. Mr. Lennon argues for a contrary position relying, at least in part, on what is said to have been the position previously adopted on behalf of Mr. Kelly and Mr. O'Sullivan which was to the effect that an application could be made to the Land Registry to seek to remedy the apparent boundary discrepancies. In those circumstances it is said that there was a belated change of position on the part of Mr. Kelly and Mr. O'Sullivan such that Mr. Lennon cannot be blamed for the lateness of seeking to refer the boundary question to arbitration.

6.5 As indicated earlier, it is also necessary to touch on the fact that there is clearly a potential dispute between the parties as to the legal consequences for the continuance of the contract on the fact (which seems to be so), that some of the tenancies referred to in the contract had terminated before the proposed closing.

6.6 In all those circumstances it seems to me that, on the basis of the evidence and arguments currently put forward, there would be likely to be three questions which any court or other competent adjudicator would need to determine in order to decide whether the contract still subsists, or whether it should be treated as at an end with the deposit being repaid. Those issues would seem to be:-

- (a) Whether the change in the status of the tenancies to which I have referred means, as a matter of law and as a matter of fact, that the contract can no longer be preformed;
- (b) Whether, in the light of the fact that the first attempt to refer the matter to arbitration on the part of Mr. Lennon took place after the service of a completion notice, the contract was not completed due to a failure on the part of Mr. Lennon regardless of the proper application of Clause 33 to the boundary issue; and
- (c) In the event that the argument under (b) above does not avail Mr. Kelly and Mr. O'Sullivan whether, on a proper application of the provisions of General Condition 33 to the facts of this case, any error in the boundaries concerned is such as entitles Mr. Kelly and Mr. O'Sullivan to treat the contract as at an end.

6.7 It is also clear that items (a) and (b) are matters purely for the court. However, for the reasons which I have sought to analyse, I am satisfied that there is a valid arbitration clause in being and enforceable as a result of which the parties have agreed to abide the decision of an arbitrator in respect of issue (c).

6.8 On a proper analysis of the issues which arise between the parties it is clear, therefore, that some but not all of the issues which arise in these proceedings are the subject of a valid and binding arbitration clause. In those circumstances it seems to me that the issue which I have to decide is as to the proper course which a court should adopt where, as here, some but not all of the issues which arise in a set of proceedings are the subject of a valid and binding arbitration clause and, in particular, where, as here, those issues relate not to stand alone causes of action in themselves, but rather are components of the matters that need to be determined by the court in order to come to a proper decision on a single cause of action, which, in this case, is as to the continued validity of the contract. I, therefore, turn to that question.

7. Partial Arbitration

7.1 It seems to me that the starting point must be to give full recognition to the fact that the parties have agreed between themselves in the contract to refer any questions under General Condition 33 to arbitration. A court should not seek to go behind that decision of the parties. In those circumstances it does not seem to me that there could be any legitimate basis for the court taking on the role, which the parties had agreed to refer to an arbitrator, of determining any issues which arise under General Condition 33.

7.2 However, the court also has to take into account the fact that there are other issues which will, in any event, arise in these proceedings, being the tenancy issue identified at 6.6(a) above and the question of the consequence of the sequence of the service of the completion notices, and the attempted referral to arbitration referred to at 6.6(b) above. There could be no suggestion that either of those issues come within the scope of the arbitration clause.

7.3 The net position is, therefore, that in order that there be a final determination as to the continuing existence of the contract, it is necessary that some issues are decided by the court and some issues are decided by an arbitrator. That fact is unusual but stems from the terms of the contract which provide for arbitration in only limited circumstances. The question which I must now address is as to what the court should do when faced with a situation where there is a single

cause of action, the proper resolution of which requires a determination (possibly) of some issues over which the court has jurisdiction, and some issues which the parties have agreed to refer to arbitration. I use the terms "possibly" in parenthesis because it is, of course, possible that a determination by the court in favour of Mr. Kelly and Mr. O'Sullivan on issue (a) or issue (b) could render any decision as to the effect of General Condition 33 redundant. For example, if the court were to find that the tenancy issue was such that the contract was no longer capable of being performed then it would, in all likelihood, become irrelevant to determine the proper application of General Condition 33.

7.4 In my view, in cases such as this, where some but not all of the issues necessary to determine a cause of action arising in proceedings are the subject of a valid and subsisting arbitration clause, the court has a discretion as to the proper course of action to adopt which should be exercised in the light of all the circumstances of the case with a view to ensuring, insofar as possible, a speedy resolution of all of the issues which arise, and a final determination of the cause of action concerned, while at the same time ensuring that the court does not trespass on determining any issue which has been properly made the subject of an arbitration agreement between the parties.

7.5 I should emphasise that the discretion of which I speak does not, it seems to me, extend to the court taking over a jurisdiction to determine any issue properly referred to arbitration. Rather, the discretion is as to how the various elements of the case (being those properly within the jurisdiction of the court and those validly referred to arbitration) should be sequenced so as to maximise the likelihood of a speedy and just resolution of all issues between the parties.

7.6 I should also emphasise that the analysis which I have engaged in has no bearing on a case where there are separate causes of action some, but not all, of which are the subject of a valid arbitration agreement. In those circumstances a court should have no difficulty in staying any aspect of the proceedings before the court in relation to those causes of action which are the subject of a valid arbitration agreement. The position with which I am concerned is different. It stems from the unusual circumstances of this case, where a determination of the single cause of action in the proceedings (if one leaves out the consequential question of interest on the deposit) itself requires a resolution of a number of sub-issues, some but not all of which, are the subject of the arbitration agreement.

7.7 In those circumstances, it seems to me to be necessary to consider the application of the discretion which I have identified to the facts of this case.

8. Application to the Facts of this Case

8.1 It is necessary to take into account the fact that Mr. Lennon needs to be successful on all three of the issues which I have identified in order that he should succeed in these proceedings. He will need to satisfy the court that the tenancy issue is not such as has rendered the contract, properly construed, incapable of completion. He will need to satisfy the court that the sequence of events concerning the service of the completion notices and the attempt to refer the matter to arbitration is not such as leaves him in a position where it can be properly said, in accordance with the terms of the contract, that he was unable to complete. In addition, he will need to satisfy the arbitrator that the proper application of General Condition 33 to the facts of this case leaves either to no compensation (on the grounds of triviality) or measured compensation and does not entitle Mr. Kelly and Mr. O'Sullivan to have the contract treated as at an end.

8.2 It clearly follows that, if the court hearing were to come on first, and Mr. Kelly and Mr. O'Sullivan were to win on either issues (a) or (b), then issue (c) (which would fall for determination by the arbitrator) would almost certainly become irrelevant. Likewise, even if Mr. Lennon were to win before the arbitrator on issue (c), prior to a court hearing, it would still be for the court to determine issues (a) and (b), for those issues would not become redundant by reason of a favourable finding in favour of Mr. Lennon by the arbitrator on issue (c).

8.3 Against that background, it seems to me that it would be inappropriate to fully stay these proceedings pending arbitration, for it is clear that the other issues, which are substantive stand alone issues, will need to be determined in any event. On the other hand, it seems to me that any question of the issues arising under General Condition 33 must be stayed for to do otherwise would be to usurp the function which the parties have, by agreement, referred to arbitration.

8.4 In those circumstances, it seems to me that the proper course of action to adopt in this case is to stay any further consideration in these proceedings of the issues which arise under General Condition 33. It also seems to me that it would be preferable for the court to have the answer to the arbitrator's consideration of the position under General Condition 33 before the court embarks on a trial of any other issues. I, therefore, propose to direct that notice of trial in these proceedings should not be served until such time as the arbitrator should have delivered his award in respect of the General Condition 33 issues. This will allow the court, when embarking on the trial, to have a full picture of all of the legal issues available to it and to reach a single concluded determination. However, I see no reason why those aspects of these proceedings which have not been stayed (that is those issues other than the question of the proper application of General Condition 33), should not proceed in the ordinary way up to the service of a notice of trial, so that the pleadings can be completed and any other interlocutory matters such as discovery can be explored and determined. For the avoidance of doubt, it seems to me that in those circumstances it should be open to Mr. Kelly and Mr. O'Sullivan to make reference in any relevant pleading to the General Condition 33 issues, subject to it being made clear in any such pleading that what is being relied on is the possible determination in their favour on that issue by an arbitrator. No pleading should be filed which might be construed as attempting to invite the court to determine those issues because, for the reasons which I have set out, any consideration by the court of those issues is being stayed pending arbitration.

9. The Appearance

9.1 I should finally deal with the point made on behalf of Mr. Kelly and Mr. O'Sullivan to the effect that the entry of an unconditional appearance by Mr. Lennon amounts to Mr. Lennon having taken a step in the proceedings, such as would debar him from being entitled to rely on the arbitration clause concerned. It seems to me that this point is manifestly ill-founded. Section 12(1) of the Arbitration Act 1954, (which introduces the concept of the taking of a step in the proceedings) provides in express terms that a party to an arbitration agreement can seek a stay "at any time after appearance and before delivering any pleadings or taking any other step in the proceedings". In those circumstances the express terms of the Arbitration Act itself make it clear that an appearance is not to be treated as taking a step in the proceedings and that, indeed, the application for a stay is to take place after appearance. There is, in my view, therefore, no merit in this point whatsoever.

10. Conclusions

10.1 I, therefore, propose to make an order staying that part of these proceedings which refers to any issues arising under General Condition 33 pending an arbitration of those issues. I propose directing that the balance of these

proceedings may proceed in an orderly fashion up to the service of the notice of trial, but that notice of trial cannot be served until such time as there an award of an arbitrator on the General Condition 33 issue has been made. Finally, I will give both parties liberty to apply lest there be any logistical difficulties encountered which have not been anticipated at this stage.