THE HIGH COURT

[2001 No.1434P]

BETWEEN

PATRICK REDAHAN

PLAINTIFF

AND

MINISTER FOR EDUCATION AND SCIENCE AND JOHN DOHERTY, MICHAEL DENNING, JAMES BLAND, EAMON CORKERY, KATHLEEN CONEFREY, PETER CASSIDY, MICHAEL O'ROURKE, SEAN LYNCH, LOUIS MCENTYRE, GERRY BRADY, LIAM FAUGHNAN AND BY ORDER MICHAEL MACNAMEE

DEFENDANTS

Judgment of Gilligan J.delivered the 29th day of July, 2005.

1. This matter comes before the court by way of a notice of motion in which the thirteenth named defendant, Michael MacNamee, seeks the following reliefs.

> 1. An order discharging the thirteenth named defendant from these proceedings.
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> 2. Further or in the alternative an order pursuant to O.19, r.28, striking out the plaintiff's claim against the thirteenth named defendant herein for damages in negligence on the ground that the plaintiff has no such cause of action against the said defendant and the said claim is frivolous and vexatious.
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> 3. Further or in the alternative an order pursuant to O.34, r.2 directing that there is a question of law arising in the plaintiff's proceedings against the thirteenth named defendant herein which should be tried as a preliminary issue or raised for the opinion of this Honourable Court by way of special case or as otherwise directed and that the within proceedings against the thirteenth named defendant be stayed pending the outcome.
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> 4. Further or other relief.
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> 5. An Order providing for the costs of and incidental to the proceedings and the application herein.

1. Factual Background

The thirteenth named defendant who is a Barrister-at-Law was appointed arbitrator in relation to a matter involving the appointment of a school vice principal pursuant to an agreement as reflected in a circular letter, generated by the first named defendant, known as CL15/97 which said circular letter regulates the appointment of teachers to posts of responsibility in community and comprehensive schools, prescribes the means by which appointment are to be made, and sets out strict criteria as the basis of assessment of candidates.CL15/97 also provides for an appeal procedure whereby an unsuccessful candidate is permitted to challenge the decision of the selection committee to appoint a successful candidate.Such appeals are referred to an arbitrator who is jointly appointed by the teachers and management unions and whose terms of reference are set out in CL15/97.

The plaintiff in these proceedings was the successful applicant for the position of Assistant Principal at Moyne Community School.The appointment was made on the 21st October, 1999, subject to the approval and sanction of the first named defendant and there being no successful appeals against the decision of the selection committee.There were appeals by the unsuccessful candidates and the thirteenth named defendant was appointed as arbitrator pursuant to CL15/97 to decide on those appeals and the appeals were allowed.

In accordance with CL15/97, the first named defendant instructed the Board of Management to terminate the provisional appointment of the plaintiff who then instituted the within proceedings in February, 2001.The plaintiff obtained an order that the thirteenth named defendant be joined to the proceedings on 15th February, 2002, but the proceedings were not served on the thirteenth named defendant until some time after the 15th January, 2003.The motion grounding these proceedings was instituted on 22nd October, 2003.

2. Preliminary Issue – Delay

The thirteenth named defendant contends that notwithstanding that the plaintiff obtained an Order that he be joined to the proceedings on 15th February, 2002, the amended proceedings were not served upon him nor was he notified of their existence by the plaintiff or his legal advisers, until the 15th January, 2003.While the progress of these proceedings has not been entirely satisfactory, I do not consider that the general background circumstances would merit an order being made on this ground to the effect that the proceedings be struck out as against the thirteenth named defendant.The thirteenth named defendant has accepted in his affidavit that he was aware of the proceedings as he had been informally advised that the matter was in for hearing and had arranged for counsel to maintain a watching brief in respect of the matter.

3. Principal Issues

The plaintiff's claim, as sought as against the thirteenth named defendant, is for a declaration that he exceeded his jurisdiction as arbitrator, a declaration that his decision was without jurisdiction and/or ultra vires, an order remitting the said appeal to arbitration pursuant to CL15/97, and damages against the thirteenth named defendant for negligence and/or breach of duty.The plaintiff's principal complaint is the thirteenth named defendant accepted appeals outside what it is claimed is a mandatory time limit provided by CL15/97 and that such appeals were considered at an oral hearing at which the plaintiff was not allowed participate.The plaintiff thus claims that the decision to exclude him from the oral hearing was in breach of his contract of employment, natural justice and his constitutional rights.

This application by the thirteenth named defendant arises from the plaintiff's claim for declaratory relief and injunctive relief and for damages in negligence as against the thirteenth named defendant.The thirteenth named defendant seeks an order discharging him from these proceedings and an order striking out the plaintiff's claim for damages in negligence as against him on the ground that the plaintiff has no such cause of action.Further and in the alternative, if unsuccessful in seeking these reliefs, the defendant seeks an order that there is a question of law arising in the plaintiff's proceedings which should be tried as a preliminary issue.

Order 56, r.4 or the Rules of the Superior Courts, 1986, provides:- "An application by any party to a reference under an arbitration

agreement –

> (a) to appoint an arbitrator or umpire, or
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> (b) to remove an arbitrator or umpire, with or without an application to appoint another person in his place, or
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> (c) to remit an award to an arbitrator or umpire, or
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> (d) to direct an arbitrator or umpire to state a special case for the Court, or
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> (e) to set aside an award, or
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> (f) to enforce an award in pursuance of section 41 of the Arbitration Act, 1954, may be made by special summons, to which the other party to the reference, and (in the case of an application under paragraph (b) or paragraph (d)) the arbitrator or umpire, shall be defendants.An application to remit or set aside an award shall be made within six weeks after the award has been made and published to the parties, or within such further time as may be allowed by the Court."

Having regard to the language of O.56, r.4, it seems clear that the Rules of the Superior Courts envisage that an arbitrator should only be joined as a defendant to proceedings where the plaintiff is making an application for the arbitrator to be removed under para. (b) or for the arbitrator to state a special case for the Court under para.(d).The plaintiff in the present proceedings is not seeking either of these reliefs and thus joining him to the proceedings would appear to be inconsistent with the Rules of the Superior Courts.

While O.124, r.1 empowers the High Court to deal with proceedings in non-compliance of the rules as it sees fit and there may be room for the argument that as procedural tools, the rules must be flexible, O.56, r.4 specifically names who "shall" be the defendant in the six situations listed and any other interpretation of this rule would certainly seem to be the more radical one.

Support for the more conservative interpretation of O.56, r.4 can be found in the common law doctrine of functus officio.An explanation of this doctrine can be found in *McClatchy Newspapers v.Central Valley Typographical Union* No.46, 686 F.2d 731, 733-34 (9th Cir.), 459 U.S.1071 (1982):

> "It is [a] fundamental common law principle that once an arbitrator has made and published a final award his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration.The policy which lies behind this is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion."

It has also been held in this jurisdiction that the doctrine of functus officio applies to an arbitrator once he has made his award.In *Hogan v.St.Kevin's Co*.[1986] I.R.80 Murphy J.stated:

> There is authority for the proposition that the court will not direct an arbitrator to state a case after he has made his final award.This follows from the fact that on the making of such an award the arbitrator is functus officio."

This was also held in *McStay v.Assicurazioni Generali S.P.A.*[1980] I.R.248 where Carroll J.stated:

> "The power of the Court to direct a special case for the decision of the Court must be exercised before the award is pronounced.After that the arbitrator is *functus officio.*

In *Arbitration Law and Procedure*, (Dublin, 1994), Forde states "[o]nce a final award is made then, generally, the arbitrator becomes functus officio and no longer has any authority to deal with the matter".

Consequently I take the view that if proceedings are to be brought pursuant to s.36 or s.38 of the Arbitration Act, 1954, as amended (remit, set aside, an award) the arbitrator should not be joined as a party to the proceedings.Not only would it appear to be inconsistent with the procedure that is envisaged by O.56, r.4, but it is also in conflict with the doctrine of functus officio.

I am satisfied, having regard to the relevant provisions of O.56, r.4, that it is not necessary for the thirteenth named defendant to be a party to these proceedings for the purposes of the relief as claimed in paragraphs (a) (b) and (f) of the general endorsement of claim as set out in the plenary summons herein being the reliefs for (a) a declaration that the thirteenth named defendant exceeded his jurisdiction as arbitrator, (b) that his decision was without jurisdiction and/or ultra vires, and (f) the order remitting the said appeals to arbitration pursuant to circular 15/97.These reliefs in my view can be obtained against the remaining defendants without the necessity of the thirteenth named defendant in his capacity as arbitrator being a party to these proceedings.

The plaintiff further sues the thirteenth named defendant for damages for negligence and/or breach of duty.The two issues that arise in this regard are as to whether or not the arbitration agreement is such that it is governed by the provisions of the Arbitration Act, 1954 as amended and as to whether the arbitrator being the thirteenth named defendant is immune from suit at common law.

4.Is the arbitration agreement an 'arbitration' within the Arbitration Act, 1954, as amended?
The plaintiff contends that this agreement is an industrial relations type agreement and not an arbitration agreement governed by the provisions of the Arbitration Act, 1954 as amended.

Section 2 of the Arbitration Act, 1980 states that "arbitration agreement" is "an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration."

An agreement in relation to the appointment of teachers to posts of responsibility in community and comprehensive schools was made between the teachers unions and the management union representing the community and comprehensive sector which is reflected in CL15/97.This circular letter regulates the procedure for appointments and provides for an appeal procedure whereby the appeal of an unsuccessful candidate is referred to an arbitrator appointed jointly by the teachers and management unions.The factual situation is that CL15/97 incorporated an arbitration agreement and by applying for the position which was to be regulated by CL15/97, the plaintiff agreed to submit future differences to arbitration.

In *Sweeney v.Mulcahy* [1993] I.L.R.M.289 O'Hanlon J.expressly recognised the concept of arbitration clauses being binding by way of

incorporation.The facts were that the defendant wrote to the plaintiff confirming that he would act as architect subject to the conditions laid down by the Royal Institute of Architects of Ireland.The plaintiff subsequently contested an application for an order staying proceedings on the grounds that there was no written agreement as required by s.2 of the Arbitration Act, 1980 and further contended that if the arbitration agreement contained in the RIAI had been incorporated into the contract, it must be signed by both parties to be brought within s.2 of the Act of 1980.O'Hanlon J.held that although both parties had not signed an express arbitration agreement, an express reference in a valid and binding contract to a written arbitration clause is sufficient to incorporate the arbitration agreement into the contract.

On the facts of this matter the plaintiff agreed to submit any difference to arbitration pursuant to CL15/97 and the arbitration clause contained in CL15/97 does satisfy s.2 of the Arbitration Act, 1980 and thus is governed by the provisions of the Arbitration Act, 1954 as amended.

5.Is an arbitrator immune from suit?
It appears there is a degree of uncertainty as to whether s.12(1) of the Arbitration (International Commercial) Act, 1998 applies only to arbitrators in international commercial arbitrations.The section states:

> "An arbitrator shall not be liable for anything done or omitted in the discharge or purported discharge of his or her functions as arbitrator unless the act or omission is shown to have been in bad faith."

An argument can be advanced that s.3 of the Act, providing for interpretation, only defines 'arbitration agreement' as an 'arbitration agreement concerning international commercial arbitration' and is silent with regard to a similar definition for arbitrators.However, the approach favoured by Stewart in *Arbitration Commentary and Sources* (Dublin, 2003), that s.12(1) applies only to international commercial arbitrations, appears to me to be the correct approach.In support of this approach is the fact that the provision is contained in an Act dealing with international commercial arbitration and is not included in part III which deals with amendments to the domestic Arbitration Acts, 1954 and 1980.

In these circumstances it is necessary to consider whether arbitrators are immune from suit at common law.There appears to be no Irish authority dealing with this issue but in this regard, almost without exception, arbitral immunity from suit has been found to exist in other common law jurisdictions.Counsel for the plaintiff concedes that there is no allegation of bad faith on the part of the thirteenth named defendant in his capacity as arbitrator.

Many of the decisions from other common law jurisdictions have stated that the arbitrator performs duties of a judicial character and, as a result, enjoys quasi-judicial status.Thus many of the policy arguments underlying the immunity conferred upon judges can be, and have been, applied to arbitrators.For example, in *Sirros v.Moore* [1975] Q.B.118, Lord Denning stated at p.136 that "each [judge] should be able to do his work in complete independence and free from fear.He should not have to turn the pages of his books with trembling fingers, asking himself: 'if I do this, shall I be liable in damages?'" This rationale for judicial immunity is equally applicable to arbitrators.Further, parties usually enter into arbitration agreements with the objective of obtaining a private, efficient and final decision on their dispute.Exposing arbitrators to liability at common law would risk damaging these primary objectives of arbitration as a method of the effective resolution of disputes.

With regard to principles of public policy, *Russell On Arbitration*, 22nd Ed, (London, 2003) states the following at p.154:

> "There are several irreconcilable principles of public policy as regards to immunity of arbitrators.First, arbitrators should be answerable for the consequences of their actions and omissions, and, in particular, arbitrators should be answerable to the parties for their professional negligence like most other professionals.When considering the issue in the 1970s, the House of Lords stated, *obiter*, that arbitrators were immune, but only as a secondary rule of public policy, the primary rule being the duty of care to others.The second public policy principle is that arbitrators should be immune from suit, like judges, and they should not be discouraged from accepting appointments by the threat of personal liability.The third principle is that disputes should be settled conclusively the first time and not be reheard as part of secondary actions against arbitrators.The DAC were firmly of the view that arbitrators should have a degree of immunity, on the grounds of both the second and the third public policy considerations.Immunity is necessary, in their view, to enable the arbitrator to perform to perform an impartial decision making function.They were concerned that, unless a degree of immunity were afforded, the finality of the arbitration process could be undermined.They viewed "with dismay" the prospect of a losing party attempting to re-arbitrate the issues on the basis that a competent arbitrator would have decided them in favour of that party.They believed that what became the Arbitration Act 1996 provides adequate safeguards to deal with cases where the arbitral process has gone wrong.Apart from the bad faith exception to an arbitrator's immunity, those safeguards include a definition of the duties of a tribunal and the court's right to order repayment of fees and expenses by the arbitrator on the his removal or resignation."

In support of following the well-established common law approach is the fact that the Supreme Court have described arbitrators, albeit in the context of property arbitrators under the Acquisition of Land (Assessment of Compensation) Act, 1919, as exercising functions 'quasi-judicial in nature'.In *Manning v.Shackleton* [1996] 3 I.R.88 Keane J.considered an arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919 and stated at p.94 of his judgment that:

> "It is not in dispute that the respondent, in conducting an arbitration under the provisions of the Act of 1919, was bound to act in accordance with well established principles of natural justice and fair procedures.One can indeed go further and describe his functions under the relevant legislation as quasi-judicial in nature."

The situation in the United Kingdom is that, having regard to the statutory immunity provided by s.29(1) of the Arbitration Act, 1996, it is clear that "an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the Act or omission is shown to have been in bad faith."

However, immunity had previously been found to exist at common law.In *Sutcliffe v.Thackrah* [1974] A.C.727 the House of Lords *obiter* stated that arbitrators were immune and emphasised that the root of such immunity lay in the fact that an arbitrator's functions are of a judicial nature.Lord Reid at p.735 states:-

> "The argument for the respondents starts from the undoubted rule, based on public policy, that a judge is not liable in damages for negligence in performing his judicial duties.The next step is that those employed to perform duties of a judicial character are not liable to their employers for negligence.This rule has been applied to arbitrators for a very long time.It is firmly established and could not now be questioned by your Lordships.It must be founded on public policy but I am not aware of any authoritative statement of the reason for it.I think it is right but it is hardly self-evident.There is a

> general rule that a person employed to perform duties of a professional character is liable in damages if he causes loss to his employer by failure to take due care or to exercise reasonable professional skill in carrying out his duties.So why should he not be liable if the duties which he is employed to perform are of a judicial character?
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> The reason must, I think, be derived at least in part from the peculiar nature of duties of a judicial character.In this country judicial duties do not involve investigation.They do not arise until there is a dispute.The parties to a dispute agree to submit the dispute for decision.Each party to it submits his evidence and contention in one form or another.It is then the function of the arbitrator to form a judgment and reach a decision.
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> In other forms of professional activity the professional man is generally left to make his own investigation.In the end he must make a decision but it is a different kind of decision.He is not determining a dispute: he is deciding what to do in all the circumstances.He may go wrong because he has at some stage failed to take due care and that may not be difficult to prove.But coming to a wrong but honest decision on material submitted for adjudication is rarely due to negligence or lack of care, and it is seldom due to such gross failure to exercise professional skill as would amount to negligence.It is in the vast majority of cases due to error of judgment and there is so much room for differences of opinion in reaching a decision of a judicial character that even the most skilled and experienced arbitrator or other person acting in a judicial capacity may not infrequently reach a decision which others think is plainly wrong.
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> But a party against whom a decision has been given that is generally thought to be wrong may often think that it has been given negligently, and I think that the immunity of arbitrators from liability for negligence must be based on the belief -- probably well-founded -- that without such immunity arbitrators would be harassed by actions which would have very little chance of success.And it may also have been thought that an arbitrator might be influenced by the thought that he was more likely to be sued if his decision went one way than if it went the other way, or that in some way the immunity put him in a more independent position to reach the decision which he thought right.
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> But whatever be the grounds of public policy which have given rise to this immunity of persons acting in a judicial capacity, I do not think that they have anything like the same force when applied to professional men when they are not fulfilling a judicial function."

Lord Morris of *Borth-y-Gest* at p.744 states:-

> "I think that it must now be accepted that an action will not lie against an arbitrator for want of skill or for negligence in making his award.The reason for this may be that the public interest does not make it necessary for the courts to exercise greater powers over arbitrators than those which they possess, such as the power of removing for misconduct or of correcting errors of law which appear on the face of an award.Furthermore, as a matter of public policy it has been thought to be undesirable to allow an action against an arbitrator (for lack of care or skill) for the reason that his functions are of a judicial nature."

In *Arenson v.Casson Beckman Rutley & Co.*[1977] A.C.405 the House of Lords confirmed that the immunity of judges and arbitrators was exceptional to the general rule of liability for negligence.Lord Fraser of Tullybelton stated:

> "It has long been established in both England and Scotland that judges are immune from actions for negligence in the performance of their duty.The reason no doubt is that public policy requires that they should not be liable to harassment for actions by disappointed litigants; "...otherwise no man but a beggar, or a fool, would be a judge" (Stair, *Institutions of the Law of Scotland*, IV.1.5.).Immunity against actions for negligence is enjoyed by arbitrators for much the same reason; in *Lingood v.Croucher* (1742) 2 Atk.395 Lord Hardwicke L.C.quoted, at p.396, a dictum by Lord King L.C.that if arbitrators were liable to be sued that "...would effectually discourage persons of worth from accepting of being arbitrators;..." But the immunity of judges and arbitrators forms an exception to the general rule that a person who professes special skill or knowledge is liable for negligence if he fails to show such knowledge and skill and to take such care and precautions as are reasonably expected of a normally skilled and competent member of the profession or trade in question."

In the United States of America the authorities also confirm that an arbitrator enjoys immunity from suit at common law.In *Cahn v.International Ladies' Garment Union*, 311 F.2d 113, 114-15 (3rd Cir.1962) the Third Circuit held that an arbitrator is immune from suit for all acts which he performs in his capacity as an arbitrator.The court stated that an arbitrator has an immunity analogous to judicial immunity because he performs a quasi-judicial function.In Corey v.New York Stock Exchange 691 F.2d 1205; (6th Cir.1982) Kennedy J.stated: –

> "It is clear that immunity does not depend upon the source of the decision-making power but rather upon the nature of that power.Accordingly, the limits of immunity should be fixed in part by federal policy.The functional comparability of the arbitrators' decision-making process and judgments to those of judges and agency hearing examiners generates the same need for independent judgment, free from the threat of lawsuits.Immunity furthers this need.As with judicial and quasi-judicial immunity, arbitral immunity is essential to protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants."

In the recent Australian case of *Mond & Anor v.Berger & Ors* [2004] VSC 150 the Supreme Court of Victoria cited *Lendon v.Keen* [1919] KB 994 where it was recognised that, given the quasi-judicial position of an arbitrator, an award of costs against an arbitrator in proceedings to set aside the award for misconduct will ordinarily be inappropriate, unless the arbitrator becomes a participant in the litigation or is guilty of collusion or dishonesty.

I take the view that the thirteenth named defendant was acting as an arbitrator in an arbitration governed by the Arbitration Act, 1954 as amended and that he was acting in a *quasi* judicial capacity sufficient to attract immunity from suit at common law in the absence of having acted in bad faith, which is conceded not to have been the case.

In these circumstances the plaintiff does not satisfy the court that he has a valid cause of action against the thirteenth named defendant in his capacity as arbitrator in respect of the reliefs as sought by him and it follows accordingly that the thirteenth named defendant is entitled to an order discharging him from these proceedings.