2010 59 MCA

THE HIGH COURT

IN THE MATTER OF THE ARBITRATION ACTS 1954/1998

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

PATRICK CORRIGAN

APPLICANT

AND

MICHAEL THOMAS DURKAN

AND

PATRICK DURKAN

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered the 16th day of December, 2010.

1. This matter comes before the court by way of three notices of motion, two of which have been brought by Mr. Patrick Corrigan and one by Mr. Michael Thomas Durkan and Mr. Patrick Durkan. In the course of this judgment I will refer to Mr. Corrigan as the applicant and to Mr. Michael Thomas Durkan and Mr. Patrick Durkan as the respondents.

2. In relation to the notices of motion the first in time is a motion brought by the applicant dated the 26th February 2010 with a return date of the 20th December 2010 seeking an order pursuant to s. 36 of the Arbitration Act 1954 remitting the award dated 17th December 2009 and recited as having been received by the applicant on the 22nd January 2010 to the reconsideration of the arbitrator and, in particular, the issue of the proper construction of Clause 4.1 of a licence agreement dated 21st December 2006 made between the parties. Also sought is further or other relief and an order for costs. The second notice of motion in time was brought by the respondents and is dated the 14th April 2010. It seeks an order pursuant to O. 56, r. 4(g) and (h) of the Superior Court Rules and s. 41 of the Arbitration Act 1954 and ss. 7 and 16 of the Arbitration Act 1980 giving liberty to enforce the award of the arbitrator dated the 17th December 2009. Orders are also sought in relation to interest, for other or other relief and for costs.

3. The third motion in time is dated the 28th June 2010 and was brought on behalf of the applicant. It seeks an order pursuant to O. 56, r. 4 of the Rules of the Superior Courts extending the time within which an application can be made to remit or set-aside the award of the arbitrator. The award is stated to be dated the 17th December 2009 and to have been received by the applicant on 22nd January 2010. Further or other orders and an order providing for costs are also sought.

4. It will be noted that while the motion dated 28th June 2010, the motion seeking an extension of time, refers to an application to remit or set-aside the award of the arbitrator, the substantive notice of motion of 26th February 2010 makes no reference to setting aside the award of the arbitrator and the specific relief sought is an order remitting the matter to the arbitrator.

5. The background to these motions coming before the court is that an arbitration was conducted by Mr. Patrick O'Connor, solicitor, he having been appointed to that role by the President of the Law Society. The disputes and differences that were submitted to arbitration arose out of a licence agreement dated 21st December 2006. Pursuant to the licence agreement the applicant, Mr. Corrigan had agreed to pay to the respondents the sum of €3m in respect of lands situated in the town of Louisburgh, County Mayo. The arbitrator in his award recites that the agreement was one whereby the respondents, Messrs. Durkan agreed to sell approximately 8 acres of land in Louisburgh. In the body of the award he refers to the agreement between the parties as a sale/purchase agreement drafted in the manner that it was so as to be tax efficient for both parties. In an award dated 17th December 2009 the arbitrator directed the applicant in the present proceedings Mr. Corrigan to pay to the respondents the sum of €3m.

6. By letter dated the 17th December 2009 to the solicitors for both parties, the arbitrator informed them that he had prepared and published his award and stated that he would be happy to release his award on payment of his fees. By letter dated the 20th January 2010 the arbitrator furnished both parties to the arbitration with a copy of his award.

7. On the 5th February 2010 the solicitors for the respondents in the present proceedings sought proposals for the payment of the €3m and threatened action if meaningful proposals were not forthcoming by the 9th February 2010. The solicitors for the applicant responded by letter dated the 16th February 2010 stating that their client was "considering his avenues of appeal and otherwise open to him under the Arbitration Acts within the timeframe permitted thereunder". On 26th February 2010 the notice of motion with the return date of 20th December 2010 to which I have referred was issued.

8. It seems convenient at the outset to set out the provisions of the Arbitration Acts and Rules of the Superior Courts which are most directly in issue.

"Arbitration Act 1954

Section 36(1) In all cases of reference to arbitration, the court may from time to time remit the matters referred or any of them to the reconsideration of the arbitrator or umpire.

(2) Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.

Section 37(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the court may remove him.

Section 38(1) Where –

(a) an arbitrator or umpire has misconducted himself or the proceedings, or

(b) an arbitration or award has been improperly procure, the Court may set the award aside.

(2) Where an application is made to set-aside an award, the Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application."

For ease of reference I have set out the provisions of s. 37 and 38 notwithstanding that the only specific relief sought in these proceedings relates to s. 36. Order 56, rule 4 of the Superior Court Rules provides:-

"An application by any party to a reference under an arbitration agreement

(a) to appoint an arbitrator or umpire, or

(b) to remove an arbitrator or umpire, with or without an application to appoint another person in his place, or

(c) to remit an award to an arbitrator or umpire, or

(d) to direct an arbitrator or umpire to state a special case for the Court, or

(e) to set aside an award, or

(f) to enforce an award in pursuance of s. 41 of the Arbitration Act, 1954,

(g) to enforce an award (within the meaning of Part III of the Arbitration Act, 1980 in pursuant of s. 7 of the Arbitration Act 1980, or

(h) to enforce the pecuniary obligations imposed by an award and (within the meaning of Part IV of the Arbitration Act 1980) in pursuance of s. 16 of the Arbitration Act 1980,

may be made by originating notice of motion, to which the other party or parties, to the reference (and, in the case of an application under paragraph (b) or paragraph (d) the arbitrator or umpire) shall be respondents. 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."

9. The three motions have been heard together and the applicant has presented in full the criticisms that he makes of the award. In these circumstances, I propose to address those criticisms. I do so notwithstanding that a decision on the request for an extension of time has the potential to dispose of all the issues between the parties and notwithstanding that it would ordinarily be sensible and convenient to deal with the extension of time first. However, in so far as the strength of the case sought to be made is a factor that is relevant to the question of whether time should be extended, and where the criticisms of the award have been opened so fully, it would seem to me necessary to address the substance of the criticism if the parties and, in particular, the applicant is not to be left with a sense of grievance.

10. The applicant presents two principal criticisms of the award. First of all, the manner in which the arbitrator dealt with the evidence of one witness, Mr. Adrian Kearney of Kearney Consulting Limited – "experts in construction", is criticised and it is said that the approach of the arbitrator was so flawed as to amount to misconduct in the sense that that term is used in the arbitration code. Secondly, it is said that there has been a failure on the part of the arbitrator to deal with all of the issues that were in dispute in the course of his award. In particular, the arbitrator is criticised for failing to construe or interpret Clause 4.1 of the licence agreement. That clause is in these terms:

"In consideration of the Licensee paying to the Licensor the Advance Payment and providing the Security Payment to the Licensor and once the Licensee has paid the Advance Payment and provided the Security Payment to the Licensor the Licensor GRANTS to the Licensee the exclusive licence and authority during the Licence Period to enter upon the entire of the Licensed Area for the purpose of erecting building and executing the Works on the Licensed Area in accordance with the terms and conditions of the Planning Permissions."

11. To provide some context for these criticisms, it is necessary to explain that the intention of the applicant, Mr. Corrigan, in entering into the agreement and acquiring the lands was to undertake a housing development. It appears that in the past the respondents, the Durkans, had made an application for planning permission in respect of the lands. However, as recited by the arbitrator, the applicant, Mr. Corrigan, did not wish to use the plans, specifications or advisers of the respondents in respect of an application that he submitted to Mayo County Council. Instead, Mr. Corrigan retained his own professional team in relation to the planning application. That fresh application was considered by Mayo County Council and a decision to grant permission was made. An appeal against the granting of permission was submitted by the Western Regional Fisheries Board to An Bord Pleanála which, despite the recommendation of its Inspector that permission should be granted, refused the application for planning permission. At the heart of the dispute between the parties was the question as to whether in the absence of planning permission the sum of €3m was still

payable by the applicant to the respondents.

12. The approach that should be taken by the courts to challenges of this nature was recently the subject of consideration by the Supreme Court in the case of *Galway City Council v. Samuel Kingston Construction Ltd. and Geoffrey Hawker* [2010] IESC 18. O'Donnell J., in the course of his judgment, referred to a statement by McCarthy J. in the case of *Keenan v. Shield Insurance Company Ltd.* [1988] I.R. 89, where he had commented at p. 96 of his judgment:

> *"Arbitration is a significant feature of modern commercial life; there is an International Institute of Arbitration and the field of international arbitration is an ever expanding one. It ill becomes the courts to show any readiness to interfere in such a process; if policy considerations are appropriate as I believe they are in a matter of this kind, then every such consideration points to the desirability of making an arbitration final in every sense of the term.*
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> *Church and General Insurance Co. v. Connolly & McLoughlin (Unreported, High Court, Costello J., 7th May, 1981) itself is an example of the type of fine-combing exercise which courts should not perform when it is sought to review an arbitration award.*
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> *There may be instances in which an award which shows on its face an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged."*

13. In a situation where there was apparently little if any dispute before the Supreme Court as to the circumstances in which a court may interfere with an arbitration award, whether by setting the award aside or remitting the matter to the arbitrator, O'Donnell J. stated that he was, subject to certain comments, accepting as correct the passage in the High Court judgment (McMahon J.), [2008] IEHC 429, under the heading "Legal Principles on which Arbitral Awards can be Challenged". The passage was in these terms:

> *"Both parties accept that an arbitral award can only be challenged in limited circumstances and there is broad agreement as to the principles governing such a challenge, which may be based on sections 38 and 36 of the Arbitration Act 1954 ('Act of 1954') for the court's common law jurisdiction.*
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> *First, section 38 of the Act of 1954 provides for the setting aside of an award where 'an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured …'. The term 'misconduct' has a special meaning in this context. As explained by Jenkins L.J. in London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd. [1958] 1 W.L.R. 661 at p. 665, misconduct is 'used in the technical sense in which it is familiar in the law relating to arbitrations as denoting irregularity, and not any moral turpitude or anything of that sort'. Similarly, Atkin J. in Williams v. Wallis and Cox [1914] 2 KB 478 stated, at p. 485, that the expression 'does not necessarily involve personal turpitude on the part of the arbitrator' and that it 'does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice'. This passage was recently cited by Fennelly J. in McCarthy v. Keane [2004] 3 I.R. 617, who went on to say, at p. 627, that 'the standard or test of misconduct … would be something substantial, something that smacks of injustice or unfairness'. Examples of misconduct from the case law include refusing to hear evidence on a material issue, adopting procedures placing a party or parties at a clear disadvantage, acting with clear favouritism towards one party, deciding a case on a point not put to the parties or failure to resolve an issue in the proceedings. However, in order to provide the basis for a successful challenge to the arbitral award, the misconduct must reach the high threshold set out above.*
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> *Secondly, section 36 of the Act of 1954 provides that, in all cases of reference to arbitration, the Court 'may from time to time remit the matters referred or any of them to the reconsideration of the arbitrator or umpire'. According to McCarthy J. in Keenan v. Shield Insurance Company Ltd. [1988] I.R. 89 at p. 95 '[s]ection 36 would appear to be the procedure appropriate, for example, to a case of a patent mistake, in monetary calculation, in the giving or not giving of a particular credit, in an award that is on its face ambiguous or uncertain'.*
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> *In Portsmouth Arms Hotel Ltd. v. Enniscorthy U.D.C. (Unreported, High Court, 14th October, 1994) O'Hanlon J. in a passage later approved by the Supreme Court in Tobin & Twomey Services Ltd. v. Kerry Foods Ltd. & Kerry Group Plc [1996] 2 ILRM 1 listed four grounds upon which the court was generally considered to be entitled to intervene under this provision: the existence of some defect or error patent on the face of the award, the existence of a mistake admitted by the Arbitrator which he desires to have remitted for correction, the availability of material evidence which could not with reasonable diligence have been discovered before the award was made, and finally misconduct on the part of the Arbitrator, understood to include a situation where there are errors of law on the face of the award. Courts have also remitted awards where there is a 'procedural mishap' resulting in unfairness to the parties: thus, for example, in McCarrick v. The Gaiety (Sligo) Ltd. [2002] 1 ILRM 55, Herbert J. remitted an award because the subject of the reference had been ruled upon without the benefit of submissions from both sides and it would have been inequitable to allow the award to stand.*
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> *Thirdly, the court has a common law jurisdiction to set aside or remit an award for an error of law on the face of the record. In Church and General Insurance Co. v. Connolly & McLoughlin (Unreported, High Court, 7th May, 1981), Costello J. stated that 'there is no doubt that at common law the Court can either remit or set aside an award if there is an error of law on its face'. This jurisdiction, according to McCarthy J. in Keenan at p. 96 is limited to 'an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged'. In McStay v. Assicurazioni Generali SPA & Anor. [1991] 2 I.L.R.M. 237 Finlay C.J. stated at p. 234 that, where an Arbitrator decides a question of law in respect of which the general issue in dispute, but not the precise question of law, is submitted to him, the court 'may in its discretion and in particular cases where the decision so expressed is clearly wrong on its face, intervene by way of remitting the matter or otherwise in the interests of justice'. Thus, as noted by Clarke J. in Limerick City Council v. Uniform Construction Ltd. [2007] 1 I.R. 30 at p. 43, the jurisdiction is 'limited and arises only where the error is 'so fundamental' that it cannot be allowed to stand (Keenan v. Shield Insurance Co. Ltd.) or 'clearly wrong' (McStay v. Assicurazioni Generali SPA & Anor.)."*

O'Donnell J. went on to add some comments of his own. In relation to "procedural mishap" he had this to say at pages 14 to 15:

> *"First, it might be noted that the concept of 'procedural mishap' falls short of misconduct. This ground which was relied upon by Herbert, J. in McCarrick v The Gaiety (Sligo) Ltd [2002] 1 ILRM 55, was considered in the judgment of Fennelly, J. (with whom Murray, C.J. and Geoghegan, J. agreed) in McCarthy v Keane [2004] 3 IR 617 where he observed that:*
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> > *'It would be inimical to the autonomy and certainty of the arbitral process if the notion of procedural mishap were*

to become an additional ground of complaint'."

He then added:

> *"In the event it was not necessary to decide the issue in McCarthy, but at a minimum, it cannot be taken that procedural mishap is an established independent ground of review of an arbitral award."*

14. Dealing with the provisions of s. 36 of the Act of 1954, he observed:

> *"It is also noteworthy that s.36 of the Act 1954 does not itself specify any ground for the remittal of an award: it simply provides a statutory mechanism for a remittal. The identification of grounds for such remittal is not an exercise in statutory interpretation: the words of the section give no clue as to the grounds upon which the machinery may be exercised. Those matters were dealt with by common law which was in existence prior to the enactment of the 1954 Act, and s.36 might be seen therefore as simply permitting a mechanism for the exercise of the existing jurisdiction.*
>
> *If the grounds for remittal are matters of common law, then a number of consequences follow. First, the grounds may at least in theory be capable of expansion, as indeed was recognised by Fennelly, J. in McCarthy. By the same token however, the existing grounds can also be developed and if considered appropriate, made more rigorous. Indeed, this in my view is how recent Irish case law should be understood."*

15. At page 18 of his judgment O'Donnell J. commented:

> *"The position has thus been reached where this approach can and should be taken to each of the grounds for remittal (and in indeed any new or extended ground), namely that it is not enough that there should be an error or misconduct, or new evidence etc, but that the factor must reach the level of being so serious and so substantial, or so fundamental, that it smacks of injustice and the court cannot permit it to remain unchallenged." (*Emphasis in original*).*

At page 20 he dealt with the modern approach of the Irish Courts to the review of arbitral awards:

> *"While it may only be a matter of semantics, I do not think that it is particularly helpful to describe the modern approach of the Irish Courts to the review of arbitral awards as 'deference' or at least 'curial deference' a phrase which has become popular in the public law field in the last 15 years. If there is deference, it is not to the arbitrator, but to the parties' choice of a process which values certainty and speed above technical correctness, and which recognises that correctness is itself the matter upon which courts and judges might reasonably differ. The scheme thus created (and chosen by the parties) has a relatively high tolerance for matters which upon close inspection might be revealed to be errors of procedure, fact, evidence or law."*

At page 21 O'Donnell J. commented:

> *"Accordingly I would suggest that it is important that the Courts in considering challenges to arbitral awards should firstly remind themselves of the high tolerance that the system of arbitral review has for arbitral error and furthermore should seek to articulate as fully as possible the consideration of law and policy, and the analysis of the individual proceedings, which lead the Court to conclude that in any given case a substantial error has or has not been established which is so fundamental that the proceedings cannot be allowed to stand."*

16. I take from the authorities to which I have referred at some length that in considering the criticisms that have been formulated, I should resist any temptation to engage in fine-combing, that I should be very conscious of the fact that the forum was one that was chosen by the parties, that even if errors or misconduct in the technical sense are identified, that I should intervene only if that error or misconduct is so serious and so substantial or so fundamental that it smacks of injustice and that if errors are identified in the course of examination, that I must recognise that the law has a relatively high tolerance of arbitral error.

17. With these principles very much in mind, I now turn to consider the issues raised by way of challenge. I will deal first with the issues that are said to arise from the evidence of Adrian Kearney which, by way of shorthand, I will refer to as the hearsay point. The issue arises in these circumstances. On the 22nd December, 2008 the arbitrator issued directions and orders as to the conduct of the arbitration. Paragraph 12 thereof so far as material provided:

> *"12. The arbitration will proceed by way of oral hearing. At the hearing the following will apply:-*
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> *(a) oral evidence will be given on oath;*
>
> *(b) strict adherence to the rules of evidence with particular reference to the "hearsay rule" shall not apply;"*

18. Mr. Kearney was called as a witness on behalf of Mr. Corrigan. It appears that he was called to give evidence to support the proposition that it was unlikely that planning permission would be obtained for the lands in question in the foreseeable future.

19. The award contains the following reference to this witness:

> *"The evidence of Adrian Kearney of Kearney Consulting Ltd., 'experts in construction' and whose offices are in Belfast, Northern Ireland, has been carefully considered by me. Mr. Kearney gave evidence as an expert. However, some of his evidence was hearsay and some of it based on conclusions that had been apparently formulated following discussions with third parties."*

In support of his criticism the applicant refers to an extract from Dowling-Hussey and Dunne on Arbitration Law who at paragraph 8.20 comment as follows:

> *"For the purposes of s. 38(a) of the Arbitration Acts 1954 – 1998, misconduct by the arbitrator or misconduct by the arbitrator of the proceedings can take many forms. The categories of behaviour that are capable of constituting misconduct are not closed and it is not possible to provide an exhaustive list of the types or categories of behaviour that will constitute misconduct for the purposes of s. 38(a). However, it is possible to identify the types of behaviour or conduct on the part of arbitrators that are most common in practice that may be classified as misconduct for the purposes of s. 38(a). These are:*

> • *Failure by the arbitrator to adhere to the procedures to be employed in conducting the arbitration as agreed by the parties.*
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> •
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> •
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> • *Failure of the arbitrator to deal with all of the issues in dispute in his award (which renders the award incomplete).”*

20. The applicant refers also to Russell on Arbitration which at paragraph 5.090 (23rd Ed.) comments:

> *“A material departure by the tribunal from such agreed procedure may constitute a serious irregularity under s. 68(2)(c) of the Arbitration Act 1996 and may result in the award being remitted, set aside or declared to be of no effect.”*

The applicant refers to a decision of Diplock J., as he then was, in the case of *London Export Corp. Ltd. v. Jubilee Coffee Roasting Co. Ltd.* [1958] 1 All E.R. 494 at 497 where he commented:

> *“Where the award has been made by the arbitrator in breach of the agreed procedure, the applicant is entitled to have it set aside, not because there has been necessarily any breach of the rules of natural justice, but simply because the parties have not agreed to be bound by an award made by the procedure in fact adopted.”*

21. Most significantly, the applicant contends that the situation in relation to Mr. Kearney closely mirrored the situation that the Supreme Court was considering in *Galway City Council v. Samuel Kingston Construction Ltd. and Geoffrey Hawker* where the alleged misconduct involved the exclusion from consideration or failure to consider a report from an expert that had been obtained by the County Council. In essence the complaint made is that the arbitrator departed from the procedures that he had laid down, and which had been accepted by the parties.

22. The first matter that may be noted is that any criticism in relation to the treatment of Mr. Kearney’s evidence arose very late in the day. No mention of this issue had been made by the solicitor for the applicant in his initial response to the demand for payment where instead he had referred to options of appeal or otherwise. The notice of motion of the 26th February, 2010 makes no reference to this issue, nor does the grounding affidavit which accompanied it, but rather the first reference to this issue is to be found in the affidavit sworn by the solicitor for the applicant on the 28th June, 2010. If there had been a fundamental and flagrant departure from the agreed rules of procedure one might have expected that the issue would have been raised long before then. There is some analogy here to the scepticism with which the Court of Criminal Appeal treats grounds of appeal in relation to the adequacy of the trial judges’ charge that were not the subject of requisition.

23. The ordinary rules of evidence as applied in the courts renders, subject to numerous exceptions, hearsay evidence inadmissible. The effect of the directions issued by the arbitrator on the 22nd December, 2008 was to render admissible in the course of the arbitration what would otherwise be inadmissible.

24. In this case the arbitrator has not excluded the evidence of Mr. Kearney from consideration. On the contrary, he has stated expressly that he gave that evidence careful consideration. However, in considering what weight to give that evidence and whether to be persuaded by that evidence to a particular conclusion, the arbitrator was, in my view, entitled to factor in as part of that assessment exercise, the fact that the witness was dealing with matters about which he did not have first hand knowledge. I do not believe that the arbitrator fell into error or engaged in misconduct. It was his function to assess the evidence of all the witnesses who testified before him and to give to each of their evidence such weight as he deemed appropriate. In that regard, he did no more and no less than was required of him.

25. My conclusions in that regard are reinforced by reading the extract from the transcript of Mr. Kearney’s evidence that was made available to me by the applicant. The issue of whether Mr. Kearney was offering impermissible hearsay seems to have arisen when he sought to refer to departmental guidelines. It appears that the guideline that was of interest to Mr. Kearney was a document headed “Consultation Draft Guidelines for Planning Authorities”. An issue arose as to whether the guidelines were in force. Mr. Kearney said that he rang a named official of the OPW Water and Drainage Division in Ballina to speak to her about it. He said that it was her view that she felt that they were in force, but she was not one hundred per cent sure. This led to a protest by counsel for the respondents in the present proceedings that this was clear hearsay evidence. The arbitrator was of the view that there was an easier way of checking the status of the guidelines, which was by going to the government website to see if the regulations were in fact in place.

26. The witness went on to state that it was his understanding that An Bord Pleanála gives extreme weight to guidelines. When he came to deal with this issue, counsel for the applicant who was bringing him through his evidence in chief, introduced his question as follows:

> *“And from your experience and your expertise ….”*

Perhaps, not surprisingly, the transcript indicates that at this stage there was an interjection. Counsel for the respondents then inquired:

> *“Can [you] please explain where he gets that information from?”*

To which the witness responded:

> *“From the officers I spoke to in the OPW”.*

Counsel for the respondents then commented:

> *“Then you are not entitled to give that evidence, at all.”*

This caused the arbitrator to say:

> *"But the OPW is not [the] Bord Pleanála … so what their view in the OPW may or may not have been is not evidence, to me. Okay."*

27. It does seem to me that the arbitrator was entitled to take the view that this was not a satisfactory way to put before him what influence the guidelines would have, always assuming that they were in force, on An Bord Pleanála. The arbitrator clearly signalled his unhappiness with the approach that was being taken. There was no objection on the part of the applicant either by arguing that regard should have been had to the evidence tendered, having regard to the provisions of the directions that had been issued, nor was there any attempt to put more direct information before the arbitrator about the likely effect of the guidelines.

28. I turn now to the alleged failure to interpret Clause 4.1 of the agreement. For convenience I will refer to this as the "failure to interpret" point. I draw attention to the treatment of this topic of a failure to deal with all of the issues in dispute in his award by Dowling Hussey and Dunne where the authors comment:-

> "In deciding whether the arbitrator has decided all essential issues in his award, the court will not exhaustively parse and analyse the award in an attempt to find fault with the arbitrators reasoning. The court will consider from an overall point of view whether it may be said that the arbitrator has dealt properly with each of the matters referred to him and the court will not set aside the award, merely because the arbitrator has not made a separate finding upon each individual issue referred to him (unless the arbitrator is required to do so under the arbitration agreement). The arbitrator is not under a duty to deal with every single point or issue raised in the proceedings. The arbitrator's duty is limited to dealing with every claim or defence that is essential to the determination of the dispute between the parties.

29. There is no doubt that the question of planning permission and in particular how the parties' position was affected by the failure of the applicant in the present proceedings to obtain planning permission was at the heart of the dispute between the parties. It is true that nowhere in his award does the arbitrator say "I interpret Clause 4.1 as follows". The question, however is not whether the arbitrator recited that he was interpreting the contract in a particular way but whether he fully addressed the matters in dispute between the parties which obviously required a determination of what the rights of the parties were under the licence agreement. If one reads the award in full, there can be very little doubt whatever but that the arbitrator was fully aware of the significance of Clause 4.1 to the dispute. He refers specifically to the fact that the applicant in the present proceedings sought to rely on a particular interpretation of Clause 4.1 of the agreement. In a section of the award headed "5. The Issues" he states that he will for convenience summarise the issues before him and then lists as issue No. 1 "what is the proper construction of the agreement?" In the body of the award, in the section headed "6. The Agreement" the arbitrator refers to the fact that the agreement was not subject to either:

> (a) the applicant in the present proceedings obtaining planning permission or
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> (b) the applicant in the present proceedings obtaining planning permission on terms acceptable to him.

In the course of the misrepresentation section of the award the arbitrator comments "the agreement was loosely drafted. There can be no doubt but that the agreement for the sale/purchase of the land between the parties was not subject to planning permission."

30. In the course of the conclusion at paragraph (iii) the arbitrator comments that the agreement is not frustrated by the refusal of An Bord Pleanála to grant planning permission to the respondent. All of these extracts are consistent only with a determination on the part of the arbitrator to interpret the agreement in a particular manner.

31. In these circumstances I do not believe there is any reality to the suggestion that the arbitrator failed to interpret the contract. On the contrary it is abundantly clear that the arbitrator did interpret the contract but did so in a manner that is not to the liking of the applicant in the present proceedings.

32. The initial response to a demand for payment when the award became available was that the applicant in the present proceedings was considering his options in relation to an appeal. That remark was a telling one.

33. The applicant is disappointed with the outcome of the arbitration and he would like to appeal. That option is not open to him, so in the absence of an appeal he has resorted to the device of seeking to remit the matter to the arbitrator, the relief sought in the notice of motion, or to have the award set-aside. However, while the application is presented in the guise of a request to remit this is in reality an attempt to appeal by a party that is disappointed with the outcome. There is no basis for the suggestion that the conduct of the arbitrator and his conduct of the proceedings require that the matter be remitted to him or still less that his award should be set-aside. In these circumstances, in the absence of any point in relation to time limits I would refuse the request to have the matter remitted to the arbitrator and I would make an order enforcing the award.

34. In those circumstances it might be said that it is strictly speaking unnecessary to deal with the time limit point. However, in a situation where it was addressed by both parties and lest the matter go further I believe I should express a view. By letter dated the 17th December 2009 the arbitrator notified the parties that he had prepared and published his award. In those circumstances if the applicant wished to move to remit or set-aside the award he was required to do so by an originating notice of motion within six weeks after the award had been made and published to the parties or within such further time as might be allowed by the Court. The applicant did not bring a notice of motion within six weeks but as we have seen brought a motion dated the 26th February 2010. Neither the originating notice of motion nor the grounding affidavit made any reference to an application for extension of time.

35. No specific explanation has been offered in the context of the application now before the court to extend time as to why the notice of motion was not brought in time. However, I think it can be safely inferred that the reason was that the applicant was operating on the basis that the six weeks ran from when he received the copy of the award. If that is the explanation and if that was his view there is no doubt that he was quite wrong in his belief.

36. In the case of *Kelcar Developments Limited v. M.F. Irish Golf Design Limited* [2007] IEHC 468 the question of when time begins to run was considered by Kelly J. At page 4 of his judgment he referred to an extract from Russell on *Arbitration* which was in these terms:-

> "'Publication to the parties' of an award (as distinct from publication of it simply) entails both completion of the award, so that the arbitrator has finally adjudicated and retains no power of altering it, and also notice to the parties that this has been done. It is immaterial, however, whether or not the parties are then made acquainted with the contents of the award or receive copies of it."

Having referred to this extract and to authorities there cited, dating from 1840 and 1844 Kelly J. commented at page 5 of his judgment:-

> "It is plain that publication of an award to the parties arises when the arbitrator makes his award and notifies the parties of that fact… The authorities on the topic go back well in excess of a century and a half".

On this basis it is clear that the notice of motion was not brought within six weeks of the award being made and published. However that is far from the end of the matter because the obligation is not to bring the notice of motion within an absolute time limit of six weeks but rather to bring it within six weeks or within such further time as may be allowed by the court. The question is whether the court should allow additional time.

37. The factors to be considered by a court in deciding whether to extend time were set out by Blayney J. in *Bord Na Móna v. John Sisk and Son Limited and Others* (Unreported, 31st May, 1990). He did so by reference to a judgment of Mustill J. in the case of *Citland Limited v. Kanchan Oil Industries PVT Limited* [1980] 2 L.R. Part III and by reference to the Mustill and Boyd textbook *Commercial Arbitration*. He listed the factors as follows:-

> (1) The desirability of adhering to time limits prescribed by rules of court.
>
> (2) The likelihood of prejudice to the party opposing the application if the time is extended.
>
> (3) The length of the delay by the applicant.
>
> (4) Whether the applicant had been guilty of unreasonable or culpable delay.
>
> (5) Whether the applicant has a good arguable case on the merits.

Blayney J. made clear that the list was not exhaustive and did not lay down a rigid test and also made clear that the weight to be given to each of these factors varies greatly from case to case and that the only criteria is whether the interests of justice require that the time should be enlarged, and the weight to be given to each factor will depend on the circumstances of the case (page 4 of his judgment).

38. In the present case where the challenge which the applicant wishes to present has been fully argued, in my view Factor 5 as listed by Blayney J. is the one that carries most weight. In a situation where having heard full argument on the point I have concluded that there is in fact no basis for seeking to remit the matter to the arbitrator or to set-aside the award. It seems to me that it would be illogical to extend time. I will comment briefly on the other factors:-

(1) The desirability of adhering to time limits prescribed by rules of court.

In my view the whole purpose of arbitration will be frustrated if time limits were routinely set-aside. As Mustill J. pointed out in *Citland* the utility of arbitration demands that a final award, once made should be speedily honoured. Again as Kelly J. commented in *Kelcar* the policy considerations identified by McCarthy J. in *Keenan* means that there is an importance to finality in the context of arbitration and that a rather robust approach to times fixed by rules of court is justified.

(2) Prejudice.

On the question of prejudice I cannot ignore the fact that the respondents to the present proceedings have been without the very substantial sum of money, which the arbitrator has found them entitled to for an extended period. It is true that there may not be any prejudice in the litigation as such if there were further hearings because the parties will be able to refresh their memories by reference to the transcript but there is undoubtedly prejudice in a situation where a party found to be entitled at the end of an arbitration process to a large sum of money is prevented from accessing it.

(3) The length of delay.

39. The delay involved here up to the time when a notice of motion was issued was three weeks. There are many areas of litigation where a delay of three weeks over the prescribed time would be regarded as being of little consequence. However, it must be recognised that the initial delay was compounded by the fact that there was no application made initially to extend time. While that might partly be explained by the fact that it may not have been appreciated that the motion was out of time, it is the case that notwithstanding that the respondent in the present proceedings was raising the fact that the application was out of time in the affidavit of the 12th April 2010 it was only on the 28th June 2010 that a motion was issued specifically seeking an extension of time.

(4) Whether the applicant had been guilty of unreasonable or culpable delay.

40. In a situation where it was believed that the originating notice of motion was within time I do not believe that the applicant could be regarded as guilty of unreasonable or culpable delay, so far as the period up to the 12th April 2010, is concerned. There may have been an error of law on the part of the applicant and his advisors but in my view it was an understandable error of law, notwithstanding that the law on this topic was long settled. However, in respect of the period after the 12th April once the issue of time had been fairly and squarely raised by the respondents in the present proceedings, I do believe that there was a degree of culpability.

41. Another consideration that seems to me to be highly relevant is that the matters based on which it is now sought to mount a challenge were matters that if they were of substance must have been immediately apparent on reading the award. In that regard this situation is entirely different to that which was considered by Blayney J. in the *Bord Na Móna* case, where information about previous connections between the arbitrator and one of the parties came to light after the six week period had expired. A reading of the judgment makes clear that this was a very significant factor indeed for Blayney J.

42. In these circumstances, in particular having regard to the very clear judgment of Kelly J. in *Kelcar Developments Limited* I would not be prepared to extend time. Accordingly, on this ground too, the applicant fails.

43. I will grant liberty to enforce the award of the arbitrator as sought in paragraph 1 of the respondents' notice of motion dated the 14th of April 2010.