Neutral Citation Number: [2008] IEHC 383

THE HIGH COURT

2008 No. 152 M.C.A.

IN THE MATTER OF THE ARBITRATION ACTS 1954 – 1998, AND
IN THE MATTER OF AN ARBITRATION

BETWEEN

S & R MOTORS (DONEGAL) LIMITED

CLAIMANTS

AND
KATHLEEN MOOHAN AND JOHN BRADLEY, TRADING AS BRADLEY CONSTRUCTION

RESPONDENTS

AND
KEVIN BRADY

NOTICE PARTY

Judgment of Mr. Justice Clarke delivered on the 12th of December, 2008

1. Introduction
1.1 In this application the claimant ("S & R Motors") seeks an order setting aside an award of the notice party ("the arbitrator") arising from a dispute between S & R Motors and the respondents ("Bradley Construction") relating to the construction of a car showrooms at Drumlonagher in Donegal Town.

1.2 That dispute has already been the subject of a judgment ("the earlier judgment") given by me in *Moohan and Bradley, trading as Bradley Construction v. S & R Motors (Donegal) Limited* [2007] IEHC 435. The general circumstances giving rise to the dispute between those parties are set out in the earlier judgment and it is unnecessary to repeat them here. As appears from that judgment, Bradley Construction sought summary judgment for sums allegedly owing on architects certificates arising out of the construction contract which was at the heart of the dispute between the parties. For the reasons set out in that judgment I gave liberty to Bradley Construction to enter final judgment for the sum claimed, but placed a stay on the execution of any sum in excess of €100,000 "until the determination of an arbitration in respect of the claims made by S & R Motors relating to defective construction or further order", (see para. 7.2).

1.3 The arbitration contemplated by that part of the order ultimately proceeded before the arbitrator, and it is as to aspects of the resultant award of the arbitrator that this application is directed. In that context it is appropriate to turn, firstly, to the process before the arbitrator.

2. The Process before the Arbitrator
2.1 On the 24th January of this year, solicitors for S & R Motors wrote to solicitors for Bradley Construction. Having referred to the earlier judgment the solicitors for S & R Motors stated the following:-

> "We hereby contend that the matters in dispute between the parties relate principally to the construction of a defective floor at our clients premises, a Volkswagen car showroom at Drumlongaher, Donegal town, the inordinate delay in the construction of same and outstanding construction "snags" to be rectified and also the failure to furnish all remaining documents pertaining to the premises to our client."

2.2 Notice was also given that the matter was being referred to arbitration pursuant to the provisions of the Arbitration Acts 1954 – 1998.

2.3 On the 12th February, 2008, the arbitrator agreed to act and suggested a preliminary meeting which did not proceed due to the inability of the legal representatives of Bradley Construction to attend. However, the arbitrator gave appropriate directions including a requirement that pleadings be exchanged, together with witness statements and expert reports.

2.4 In its statement of claim, S & R Motors contended for a breach of contract in the manner in which the relevant building works were allegedly carried out, including a repetition of the allegation concerning the manner in which the floor to the premises had been constructed. The statement of claim also made complaint in respect of alleged delay in the completion of the relevant works. In its defence Bradley Construction denied any breach of contract, but went on to make complaint about the fact that, it was said, S & R Motors had failed to make payments on foot of both interim certificates and the order which I had already made giving Bradley Construction liberty to enter final judgment with a partial stay. In its reply and defence to counterclaim, S & R Motors said, in relation to the latter matter, the following:-

> "The High Court has adjudicated upon the respondents claim and granted judgment in final satisfaction of same. It stayed execution on all amounts over €112,000 to allow the claimant to bring its claim to arbitration. The claimant promptly paid €112,000 to the respondents on foot of the said judgment. Save where admitted, para. 11 is denied in full."

2.5 Thereafter, a hearing was convened by the arbitrator on the 24th June, 2008, and lasted one day. It will be necessary to refer in somewhat more detail to what transpired at that hearing in due course. However, for the purposes of describing the process it is only necessary to note that, on the 30th July, 2008, the arbitrator issued his award which, having recited the process, was, in its operative part, in the following terms:-

> "1. The claimant shall pay to the respondent the sum of €107,573.18 (one hundred and seven thousand five hundred and seventy three euro and eighteen cent) inclusive of VAT at a rate of 13.5% within two weeks of the date of this my award.
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> 2. The claimant shall pay to the respondent the sum of €9,639.88 (nine thousand six hundred and thirty nine euro and eighty eight cent) inclusive of VAT at a rate of 13.5% for interest from 20th December, 2007, to the date of this my award. This sum to be paid within two weeks of the date of this my award.
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> 3. The costs of the reference shall be paid by the claimant and such costs if not agreed between the parties shall be taxed by me.
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> 4. The costs of this my interim award (inclusive of expenses) I hereby tax and settle in the sum of €16,879.50 (sixteen

thousand eight hundred and seventy nine euro and fifty cent) inclusive of Value Added Tax."

2.6 There followed a five page document which is headed "General Reasoning". It is to three specific aspects of that award that the challenge with which I am concerned is directed. I now turn to that challenge.

3. The Challenge

3.1 As can be seen from the operative part of the award referred to at para. 2.5 above, the approach of the arbitrator was to make an award in favour of Bradley Construction. The basis of that award, as is clear from the reasoning, is that the arbitrator took the view that certain sums should be allowed for defective workmanship. On that basis those sums were deducted from the amounts due by S & R Motors to Bradley Construction with the balance forming the award at para. 1. Paragraph 2 represents interest on the award contained at para. 1. It is, therefore, clear that, in substance, the arbitrator formed the view that S & R Motors had succeeded in part (and it would appear in relatively small part) on its claim for defective workmanship. In passing it should also be noted that it would appear from the general reasoning document that the arbitrator rejected in full the claim made by S & R Motors relating to delay.

3.2 On the basis of the above analysis of the award of the arbitrator (with which both parties agree), S & R Motors maintain that the award of the arbitrator should either be set aside or remitted to the arbitrator in three respects:-

> A. Firstly it is said, echoing the point adopted in the pleadings to which I have already referred, that the only issue which was properly before the arbitrator concerned the question of the extent to which S & R Motors might succeed in their claim for defective workmanship and delay. It is said that it was clear that the amounts due by S & R Motors to Bradley Construction on foot of the relevant architect's certificates had already been determined by me to be due and were no longer, therefore, in issue. It is said that, on that basis alone, the award of the arbitrator is manifestly incorrect in awarding any sum to Bradley Construction (being the balance remaining due on foot of my earlier order less the amount allowed by the arbitrator in respect of defective workmanship). Rather, it is said, the arbitrator should simply have determined the amount which he considered was due to S & R Motors on foot of the defective workmanship claim and made an award for that sum in favour of S & R Motors.
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> B. While the issue at (A) might seem purely technical, it is asserted that same acquires real substance having regard to the knock-on effect which, in turn, it is said, that the form of the arbitrator's award had on costs. As is clear from para. 3 of the award to which I have referred, Bradley Construction obtained the costs of the hearing. Such a result would be understandable on the basis that an award was made in favour of Bradley Construction for the balance remaining due. However, it is said, that the proper award should not have been one in favour of Bradley Construction for the balance due less the amount allowed for defective workmanship. Rather it is said, that the proper award should have been one in favour of S & R Motors for the value assessed by the arbitrator as being attributable to that defective workmanship. On that basis, it is said, that S & R Motors should be seen as having succeeded in the arbitration and that the costs should have been awarded to them.
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> C. Finally, and perhaps of greatest substance, it is said that the award of the arbitrator in relation to the amounts assessed as representing the damages attributable to defective workmanship, is in error, having regard to the evidence heard by the arbitrator, to such an extent that same should be set aside or remitted, having regard to the jurisprudence of the courts in this area. It should be noted that counsel for S & R Motors, while indicating that his client did not agree with the conclusions of the arbitrator concerning delay, nonetheless, quite properly in my view, accepted that there was no proper basis for seeking to have that aspect of the arbitrator's determination set aside or remitted having regard to the high threshold that needs to be established, in accordance with the jurisprudence, before a court can properly go behind the findings of an arbitrator. This aspect of the challenge is, therefore, confined to the assessment of the amounts due for the alleged defective workmanship.

3.3 I propose to deal firstly with the more technical question concerning the approach which the arbitrator took to the sums already found to be due by S & R Motors to Bradley Construction in the earlier judgment.

4. The Sums already Due

4.1 Firstly it is clear that there is already in existence a decision of this Court determining the amount due by S & R Motors to Bradley Construction on foot of the construction contract and the architect's certificates issued in accordance with it. Final judgment has been entered for that sum and, as I understand it, the portion of that sum which was not the subject of the stay to which I have referred has already been paid. The position is, therefore, that Bradley Construction have a judgment from this Court which entitles them to be paid the relevant balance, but that judgment is stayed pending the arbitration which is the subject of this application. It was also implicit that S & R Motors will be entitled to a set off in respect of whatever sum is awarded to them by the arbitrator.

4.2 On that basis it seems to me that counsel for S & R Motors was correct when he contended, both before the arbitrator and at the hearing before me, that the question of the entitlement of Bradley Construction to payment per se was res judicata. That issue had already been decided by this Court, was not a matter that could have properly been reopened before the arbitrator, nor was it either necessary or appropriate for the arbitrator to deal with those sums in his award. I have already quoted from para. 7.2 of the earlier judgment which makes it clear that the matter that was being remitted to arbitration was the claim by S & R Motors relating to defective construction. It was also clear from the earlier judgment that S & R Motors would be entitled, in principle, to a set off for whatever sum they might recover in the arbitration. However, it was clear that that set off would be made by court order rather than by the arbitrator in that it was implicit (as I have pointed out) that the balance due on the judgment would be reduced, by set off, to the tune of the sum (if any) that might be allowed in the arbitration.

4.3 As is clear from the award which I have cited earlier, the arbitrator also purported to deal with the question of interest due to Bradley Construction (by awarding at para. 2 a sum of interest from the 20th December, 2007, to the date of his award) and also the time within which the sums which he found to be due to Bradley Construction were to be paid. In both respects (i.e. principal and interest) the award contains a direction that those sums were to be paid within two weeks from the date of the award. It seems to me that both of those interventions on the part of the arbitrator were in excess of his jurisdiction for similar reasons to those which I have identified as pertaining to the principal claim. The principal sum (subject to any set off) is already the subject of a court order, albeit one stayed in part. The question of any interest payable on that sum is, therefore, a matter for the court and not for the arbitrator. Likewise the sum found to be due was payable (subject to the stay) immediately by S & R Motors. The question of the timing of the removal of the stay and any further terms as to payment (whether in the event of an appeal or on the basis of an *ad misericordiam* plea for time) is clearly a matter for the court rather than the arbitrator. That analysis simply goes to reinforce the conclusion which I have reached, which is to the effect that the arbitrator has trespassed on the jurisdiction of the court by purporting to deal with the monies due to Bradley Construction, the interest on those monies, and the time within which any such

monies should be paid. I would emphasise that those matters are ones which, in an ordinary case, would be within the jurisdiction of an arbitrator. The reason why those matters are not within the jurisdiction of the arbitrator in this case is that the court has made final orders in respect of the entitlement of Bradley Construction, subject only to the set off. This was not, therefore, a case where court proceedings were commenced but did not proceed to any significant extent before being stayed pending arbitration. Rather this was a case where the entire claim of Bradley Construction was the subject of a final determination by the court, subject only to what was in effect a set off claim by S & R Motors, which set off claim was the only matter referred to arbitration.

4.4 It seems to me clear, therefore, that the arbitrator exceeded his jurisdiction in purporting to deal with the sums due by S & R Motors to Bradley Construction and the consequential matters referred to in the next preceding paragraph. Rather the arbitrator should have confined himself to assessing the amounts which he considered to be appropriate to allow for defective construction and, (if he had come to the view that any relevant amounts were so allowable) delay. That the arbitrator has exceeded his jurisdiction is apparent on the face of the record.

4.5 It seems to me that it follows that the award of the arbitrator should be remitted to him for the purposes of the arbitrator correcting that error on the face of the award so that the arbitrator should confine himself to making whatever award he considers appropriate on foot of the claim for defective construction. It will then be a matter for this Court to allow a set off in respect of the appropriate amount against the principal claim which has already been determined in favour of Bradley Construction in the earlier judgment.

4.6 If follows from that finding that the award of costs by the arbitrator must also be remitted for further consideration. It is clear that an arbitrator has a discretion in relation to costs. It is, however, also clear that in exercising that discretion an arbitrator must apply the same principles as are applied by the courts. See for example *Lloyd Del Pacifico v. Board of Trade* [1930] 46 T.L.R. 476; *Stotesbury v. Turner* [1943] K.B. 370 and *Matteson & Company Limited v. A. Tabah & Sons* [1963] 2 Lloyds Rep. 270. It is also clear that an award of costs can be remitted to the arbitrator for reconsideration in circumstances where appropriate principles have not been followed. See for example L.E. *Cattan v. A. Michaelides & Co.* [1958] 2 All E.R. 125. In those circumstances it is clear that the award of costs should be remitted to the arbitrator for reconsideration. However, on this point I do not go as far as counsel for S & R Motors urged I should. It does not seem to me to be appropriate to determine that the arbitrator was bound to award full costs to S & R Motors. True it is that, for the reasons I have already sought to analyse, S & R Motors must now have an award in their favour for defective workmanship. However, it is clear from cases such as *Veolia Water UK plc and Ors v. Fingal County Council* [2006] IEHC 240, that, in claims which are partly successful and partly unsuccessful, a court should attempt to do justice between the parties by crafting an order which reflects the extent, if any, to which unnecessary costs may have been incurred in litigating issues upon which the party who was generally successful, nonetheless failed. It is clear that S & R Motors maintained a significant claim in respect of delay which wholly failed. It seems to me that it is for the arbitrator to determine, in accordance with the principles identified in the relevant jurisprudence, what, in those circumstances, the appropriate order for costs should be. The arbitrator must, of course, start from the basis that S & R Motors have succeeded in establishing some entitlement on their claim for defective workmanship and, *prima facie*, therefore, the event which costs must be said to follow was, at least to that extent, resolved in favour of S & R Motors. Whether and to what extent there are other factors properly taken into account which should lead the arbitrator to depart from a full order for costs in favour of S & R Motors is, in my view, a matter for the arbitrator.

4.7 Subject, therefore, to the question of whether the arbitrator's decision in relation to defective workmanship is sustainable I should, in any event, remit the award to the arbitrator for the purposes of:-

> A. Ensuring that the award reflects only those issues which were properly within the jurisdiction of the arbitrator, that is to say the determination of the amount to which S & R Motors were entitled on foot of their claim for defective workmanship; and
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> B. A reconsideration of the question of costs in the light of the findings made in the next preceding paragraphs.

4.8 It remains, therefore, to consider whether the substantive decision of the arbitrator concerning the amounts due to S & R Motors for the defective floor can itself be the subject of a successful challenge. Before approaching that question it is necessary to address briefly the relevant principles.

5. Legal Principles

5.1 There was little dispute between counsel as to the applicable legal principles. The basis upon which a court can and should interfere with an arbitration award on the grounds of an error on the face of the award has been the subject of much judicial determination in recent times. I had occasion to analyse this Court's jurisdiction, both at common law and under the Arbitration Act 1954, to set aside an award in *Limerick County Council v. Uniform Construction Limited* [2005] IEHC 347. Likewise Laffoy J. in *Uniform Construction Limited v. Cappawhite Contractors Limited* [2007] IEHC 295, conducted a similar analysis and came to the same conclusions.

5.2 It is clear, therefore, that an award can only be set aside where there is an error of law on the face of the award which is so fundamental that the court cannot stand aside and allow it to remain unchallenged. That is the test which I propose to apply in this case.

6. The Allegations

6.1 On that basis I turn to the case made on behalf of S & R Motors for the proposition that the arbitrators determination of the amount to be allowed in respect of defects should not be allowed to stand. The starting point has to be a consideration of the reasoning of the arbitrator which, on this point, is to be found at p. 4 of the "General Reasoning" document. So far as the defect to the floor is concerned, the conclusions of the arbitrator are in the following terms:-

> "I accept that the floor is not correct. However, I am also of the belief that if remedial action was required to the floor it should have been made clear to the contractor in 2005 and opportunity given to him to rectify same. No evidence was adduced to state that the contractor refused to carry out remedial works. Indeed all other major snags are noted to have been corrected as per PDA letter of 3rd October, 2007. The costs of rectification should not be based on present day costs but on costs at the time of the completion of the building. Furthermore if rectification was deemed necessary it should have been carried out before S & R Motors entered the premise when the costs of the delay could have been directly borne by the contractor. This would further lead me to the conclusion that a monetary settlement was discussed at that time.
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> Taking all the above into consideration and the fact that as stated in evidence the defect in the floor had no effect on

the business of S & R Motors I find that a figure of €20,000 should be allowed against the floor defect."

6.2 Under the heading "Other Defects" the arbitrator came to a conclusion concerning other problems with the building, that is to say problems other than the difficulties encountered with the floor. Under that heading the arbitrator concluded as follows:

> "Mr. Francis, Civil Engineer & Construction Project Manager, also noted that other snags had since arisen these included, cracks to walls etc and some paving to exterior. He estimated costs of internal works at €10,000 to €13,000 for external works, giving a total of €26,000. These costs would necessarily include profit. If the relations between the contractor and the client had not broken down due to non-payment of certificates then the contractor in the normal course of events could have rectified same at a cost which would be significantly less. I would therefore allow 50% of the estimate against these items, i.e. an amount of €11,500."

6.3 Essentially the case made on behalf of S & R Motors is that the only evidence that was given to the arbitrator came from their side. This included factual evidence from the principals of S & R Motors and expert testimony. While Ms. Moohan did give evidence in chief on behalf of Bradley Construction, it appears to be accepted that she did not present herself for cross examination in the afternoon of the hearing and that the arbitrator accepted that he would not have regard to her evidence on that basis. The arbitrator was undoubtedly correct in coming to that view. It, therefore, appears to be factually correct that the arbitrator did only have the evidence of S & R Motors on which to base his award. However, it is clear that the arbitrator did at least have regard to that expert evidence in that he recites, in the "General Reasoning" document, the evidence of an auctioneer and valuer, a civil engineer and construction project manager and an accountant. It is said that the award contains an error on its face which is sufficiently fundamental to warrant this Court setting aside or remitting the award. The error is said to amount to the failure of the arbitrator to accept the only expert evidence tendered. It is to that issue that I now turn.

7. Conclusions

7.1 It is important to recall the basis on which the arbitrator came to his view as to the proper sum that should be allowed in respect of the undoubted defects in the floor. It does not seem to me that the arbitrator rejected, *per se*, the evidence of the experts. He does not, for example, find that the valuation, engineering or accountancy evidence was incorrect. Rather, the arbitrator came to the view that the proper course of action which should have been adopted under the contract and in all the circumstances was to have permitted the contractor (i.e. Bradley Construction) to carry out remedial works while still on site. It seems to me that it was well within the arbitrator's entitlement to reach such a conclusion. There is no substantial and manifest error in that conclusion. Viewed in that way, it seems to me that the arbitrator was entitled to take the view that the proper approach to the assessment of damages was not that contended for on behalf of S & R Motors (i.e. that based on the valuation, engineering and accountancy evidence to which I have referred), but rather was on the basis of what the consequences would have been had Bradley Construction been given the opportunity to remedy the defects before S & R Motors took possession. Given that it was within the entitlement of the arbitrator to take that view, it does not seem to me that his assessment of the damages *on that basis* in the sum of €20,000 can be said to involve an error on the face of the record, still less one so fundamental that it would justify setting that part of the award aside or remitting it for further consideration.

7.2 It should also be noted that the arbitrator was clearly influenced in coming to his view as to damages by factors which he identified from the evidence such as the fact that the undoubted defects in the floor had not prevented S & R Motors from carrying on their business in the ordinary way and that there was evidence that complaints in relation to the floor may not have been central to the position adopted, at the time, by S & R Motors. For example, the arbitrator makes specific mention in his "General Reasoning" document of the fact that, at a site meeting on the 15th June, 2005, attended by representatives of S & R Motors, "no mention is made of the floor but only of other defects". The arbitrator also notes that there was no evidence of any refusal on the part of Bradley Construction to correct any defect in the floor. All of these factors are matters which could, in my view, properly have been taken into account by the arbitrator in assessing the basis upon which damages should be approached.

7.3 I am not, therefore, satisfied that S & R Motors has made out any case for the court interfering with the substance of the determination by the arbitrator as to the two amounts to be allowed in respect of defects.

8. Final Conclusions

8.1 It, therefore, follows that the only elements of the award which I propose remitting back to the arbitrator are those elements set out at para. 4.7 above. When the arbitrator has had an opportunity to amend his award in accordance with the findings which led to the conclusions set out in that paragraph, I will arrange to have the substantive proceedings re-listed so as to consider what final order to make in those proceedings in the light of the arbitrator's final award.

8.2 It follows that S & R Motors will be entitled to a set off in respect of that portion of the claim already allowed by virtue of the final amount determined by the arbitrator. It also follows that when that set off is put in place, the existing stay will come to an end