Neutral Citation Number: [2012] IEHC 522

THE HIGH COURT

[2002 No. 95 SP]

IN THE MATTER OF THE ARBITRATION ACTS 1954 – 1988

BETWEEN

SIMON J. KELLY & PARTNERS

PLAINTIFF

AND

TONY DIXON AND TINA DIXON

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 3rd day of December, 2012.

The application in the context of the proceedings

1. These proceedings were initiated by a special summons which issued on 22nd February, 2002. In the special endorsement of claim the relief sought was formulated as follows:

> "An Order Pursuant to Section 41 of the Arbitration Act 1954 permitting the Plaintiff to obtain and register judgement on foot of an award made the 27th November, 2001 by Kevin Brady, Arbitrator in proceedings entitled '. . . In the Matter of an arbitration between Simon J. Kelly & Partners, Claimant and Tony Dixon and Tina Dixon Respondents'."

The summons was grounded on the affidavit of Oliver Foley, the plaintiff's then solicitor, which was sworn on 6th March, 2002. The affidavit clearly itemised the various elements of the arbitration award, including the costs awarded, and the aggregate of the sums due on foot of the award was stated to be €47,264.38. The special summons came on for hearing on 13th May, 2002. The order made on that day by the Court (Smyth J.) recited that there had been no appearance by or on behalf of the defendants. The curial part of the order provided:

> "IT IS ORDERED pursuant to Section 41 of the Arbitration Act 1954 that the plaintiff be at liberty to enforce the arbitration award made on the 27th November, 2001 by Kevin Brady in the same manner as a Judgment and Order to the same effect."

It was also ordered that the plaintiff recover from the defendants the costs of the proceedings, when taxed and ascertained. The plaintiff's costs were subsequently taxed at €7,059.67, as is evidenced by the certificate of the Taxing Master dated 5th March, 2003.

2. What is significant about the perfected order of 13th May, 2002 is that it did not include, as is usually included in such an order enforcing an arbitration award, an express order that the plaintiff do recover against the defendant the amount due on the award, that is to say, the sum of €47,264.38. The reality, therefore, is that judgment was never entered in the terms of the award, that is to say, for the total amount awarded to the plaintiff in the arbitration. Nonetheless, on 7th November, 2006 the plaintiff secured the registration of a judgment mortgage as a burden on the lands registered on Folio 21952F of the Register of Freeholders, County Galway, of which Anthony Dixon, being, presumably, the first defendant, was the registered owner, on the basis of the order of 13th May, 2002. It was recorded on the folio that the amount due on the judgment was €69,774.05. As I understand it, the judgment mortgage was discharged from the folio on 13th November, 2012 on the application of the plaintiff. That was the proper course for the plaintiff to adopt, because the plaintiff should not have applied to have the judgment mortgage registered and the Land Registry should not have registered it on the folio.

3. In 2011 the plaintiff brought an application in these proceedings under Order 42, rule 24 of the Rules of the Superior Courts (the Rules) for leave to issue execution against the defendants, six years having elapsed since the date of the order of the Court. The application was resisted by the defendants. It was refused on the basis that judgment had not been entered for the amount due on foot of the arbitrator's award.

4. The relief sought on this application is an order entering judgment in the terms of the arbitration award dated 27th November, 2001 in the sum of €47,264.38 as of 13th May, 2002. An alternative relief sought is an order entering judgment for the sum of €82,554.93, or such other amount inclusive of interest as the Court shall deem meet, on foot of the leave to enforce the arbitration award granted by the order of 13th May, 2002. No specific jurisdiction of the Court was invoked by the plaintiff in the notice of motion.

5. In the affidavit of Conor Kelly, a partner in the firm of architects named as plaintiff in the proceedings, grounding this application, it was averred that the deponent had been advised by his legal advisers that an arbitration award carries interest pursuant to s. 34 of the Act of 1954 as and from the date of the award at the same rate as a judgment debt, but, in circumstances where the original application to enforce the award did not seek to calculate the interest that had accrued, the plaintiff was waiving its entitlement to interest on the award between 27th November, 2001 and 13th May, 2002. So, as I understand the position, the sum of €47,264.38 does not include interest for that period. As regards the figure of €82,554.93, which includes interest to 13th September, 2012, my understanding is that counsel for the plaintiff did not press for the alternative relief on the hearing of the application.

6. There was a degree of confusion discernible in the submissions made on behalf of the parties in relation to the application of the Statute of Limitations, 1957 (the Act of 1957) to the plaintiff's claim in the events which have happened. Counsel for the plaintiff submitted that the plaintiff has twelve years from 13th May, 2002 in which to enforce the judgment. I assume that in making that submission, counsel was relying on s. 11(6)(a) of the Act of 1957 which provides:

> "An action shall not be brought upon a judgment after the expiration of twelve years from the date on which the

judgment became enforceable."

Counsel for the defendants referred the Court to s. 11(1)(d) of the Act of 1957 which provides that there shall not be brought after the expiration of six years from the date on which the cause of action accrued –

> "actions to enforce an award, where the arbitration agreement is not under seal or where the arbitration is under any Act other than the Arbitration Act, 1954."

Notwithstanding that it was the position of the defendants that the arbitration agreement was not under seal, I cannot see the relevance of that provision to this application, which seeks to amend an order which was made on foot of an application which was brought within the limitation period.

7. There was also a degree of confusion on the plaintiff's case as to the date from which the plaintiff is entitled to interest. Section 11(6)(b) of the Act of 1957 was cited by counsel for the plaintiff as being of relevance. That section provides:

> "No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due."

Counsel for the plaintiff acknowledged that interest could only be claimed by the plaintiff for six years and my understanding was that the plaintiff's position was that the six years would run from 13th May, 2002. That seems to me to be inconsistent with the averment of Mr. Kelly referred to in paragraph 5 above. In any event, the determination I propose making obviates having to address that apparent inconsistency.

8. No explanation has been given and no reason has been advanced in the grounding affidavit or otherwise for the delay in bringing this application. What the Court is being asked to do, in effect, is to amend the order of 13th May, 2002 after the lapse of ten and a half years after that order was made. On the other hand, while the defendants were represented at the hearing and have resisted the making of the order sought by the plaintiff, no replying affidavit was filed on their behalf and there is no evidence before the Court of any specific prejudice to them, if the Court accedes to the plaintiff's application.

The law

9. Section 41 of the Act of 1954 provides:

> "An award on an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the award."

10. The authority upon which counsel for the plaintiff primarily relied was the decision of the Supreme Court in *McMullen v. Clancy* [2002] 3 I.R. 493. In that case, the Supreme Court dismissed an appeal by the plaintiff appellant against an order made by a High Court Judge amending an order made by the same Judge under the so-called "slip rule", that is to say, Order 28, rule 11 of the Rules which provides:

> "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court on motion without an appeal."

11. In delivering judgment in the Supreme Court in *McMullen v. Clancy*, Murray J. distinguished between the Court's inherent jurisdiction to amend a final order and the Court's jurisdiction under Order 28, rule 11.

12. First, he referred (at p. 500) to the decision of the Supreme Court in *Belville Holdings Ltd. v. Revenue Commissioners* [1994] 1 ILRM 29 in which the issue as to the circumstances in which a final order of a court may, in common law, be interfered with was considered. Counsel for the plaintiff on this application laid particular emphasis on passages from the judgments in *Ainsworth v. Wilding* [1896] 1 Ch. 673 quoted in that case, which included the following passage from the judgment of Bowen L.J.:

> "An order, as it seems to me, even when passed and entered, may be amended by the Court so as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice."

In the *Belville* case, Finlay C.J. stated that the expressions of opinion he had cited "validly represent what the true common law principle is concerning the question". Murray J. also quoted the following passage of Hamilton C.J. in *Re Greendale Developments Ltd. (No. 2)* [2000] 2 I.R. 514 at p. 527 as summing up the effect of the common law principle as outlined in the Belville case:

> ". . . it set out in detail the common law principle concerning [this] question, holding that where a final order has been made and perfected it can only be interfered with
>
> (1) in special or unusual circumstances, or
>
> (2) where there has been an accidental slip in the judgment as drawn up, or
>
> (3) where the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended."

13. Secondly, Murray J. characterised Order 28, rule 11 as "an express jurisdiction of the court to correct mistakes or errors in an order of the High Court which would otherwise be final" and he commented that it is no doubt a reflection, at least in part, of the inherent common law jurisdiction of the Court to do so.

14. In *McMullen v. Clancy*, the plaintiff appellant had argued that the delay on the part of the defendant, which in that case was about a year and a half, amounted to acquiescence on the part of the defendant to the order, which estopped him from asking the Court to exercise its jurisdiction to amend the order. The Supreme Court rejected that argument. Murray J. stated (at p. 502):

> "There is a fundamental public interest in the due administration of justice which requires that the order of a court should accord with what the court has decided and that the decision of a court should not be thwarted by an accidental slip or error or clerical mistake. This is undoubtedly why the courts have, after the making of a final order, very exceptionally and in the defined circumstances to which I have referred, an inherent as well as an express . . . jurisdiction to amend a final

> order. . . . It seems to me, in the public interest and in the interest of the due administration of justice, that the High Court at all times retains its jurisdiction to amend its own orders where, due to accidental error, they do not correctly state what the court actually decided."

As counsel for the plaintiff pointed out, some of the examples of delay in the authorities cited by Murray J. (lapses of nineteen years and thirty three years) were much longer than the lapse of time in this case.

15. Later, Murray J. addressed the issue of delay and prejudice separately (at p. 505 *et. seq.*). In particular, he considered the possibility that delay in applying for an amendment to an order may affect the rights and interests of not only the parties to the order, but also of third parties. Having cited certain authorities, he stated (at p. 506):

> "In the light of the case law which I have cited, I come to the following conclusions. Even where there has been undue delay in the making of an application to correct an order pursuant to O. 28, r. 11, this in itself is not a ground for refusing the order unless it would be inequitable to do so because it would prejudice the rights of other parties in the proceedings or rights which had been acquired by third parties in the meantime. A primary consideration is that it is in the interests of justice that effect be given to the true decision of the court. Where there is an ostensible prejudice, the order may be made if it may be made on terms which remedy or preclude that prejudice. My conclusion is reinforced by the words of Bowen L.J., cited with approval by this court, that an order may be amended if that can be done 'on terms which preclude injustice'."

16. Counsel for the plaintiff also relied on the decision in *McCaughey v. Stringer* [1914] 1 I.R. 73. The headnote in the report of that case states:

> "The Court has jurisdiction to correct an error in an order arising from an accidental slip on the part of the person who obtained the order and seeks to have it corrected, although there was no error in the sense that the order as made did not carry out the intention of the Court."

In that case, there had been a mistake in the notice of motion which sought payment of £X less £Y which had already been paid into Court. The order followed the terms of the plaintiff's notice of motion. However, the notice of motion was incorrect in that the defendant should only have got credit of one half of £Y. The error was corrected. O'Connor M.R. stated (at p. 75):

> "No doubt in this case there was no mistake in the sense that the order made did not carry out the intention of the Court. But still there was a mistake, induced by the form of the notice of motion, and I think that the cases which have been cited by counsel show that I have jurisdiction to correct it."

Conclusions

17. There are two elements incorporated in s. 41 of the Act of 1954. The first is that, subject to the leave of the Court, an arbitration award may be enforced in the same manner as a judgment or order to the same effect. The second is that, where leave is so given, judgment may be entered in the terms of the award. The second element, it seems to me, is an inevitable consequence of the first element. It is difficult to envisage a situation in which a court would give leave to enforce the arbitration award in the same manner as a judgment or order to the same effect, but would not intend that judgment would be entered in the terms of the award. In my view, it is reasonable to infer that the intention of the Court, when making the order of 13th May, 2002, was that judgment would be entered for the total amount of the award as proved by the affidavit evidence before the Court. I also think it is reasonable to infer that the fact that the second element was not spelled out in the order of 13th May, 2002 was due to a mistake, which was probably attributable to the manner in which the relief sought was formulated in the special summons. Therefore, I am satisfied that the Court has power under its inherent jurisdiction to amend the order by ordering that the plaintiff do recover against the defendant the amount due on the award as at 13th May, 2002, that is to say, €47,264.38, provided it is not inequitable to do so, in other words, provided that the amendment can be made without injustice or on terms which preclude injustice.

18. As I have recorded, the defendants have not filed any affidavit in response to this application asserting that there would be a specific prejudice to them if the order was amended. There is no suggestion that the rights of any third party would be affected, if the order was amended. If the order is amended and the plaintiff applies to have a fresh judgment mortgage registered against Folio 21952F County Galway, the owner of an existing encumbrance registered on that folio when the application to register the judgment mortgage is lodged will not be adversely affected by the registration of the judgment mortgage.

19. The sum of €47,264.38 has been due and owing by the defendants to the plaintiff since the award was made on 27th November, 2001. Interest has been running on the award since 27th November, 2001 in accordance with s. 34 of the Act of 1954 at the Court rate. By reason of its failure to move to have the order of 13th May, 2002 amended, the plaintiff has been unable to execute for, or otherwise procure the enforcement of payment of, the debt due to it. Having regard to the delay on the part of the plaintiff in moving to have the order amended, I think it would be unjust to the defendants to allow the plaintiff at this point in time to be in a position recover the interest at the Court rate to which the plaintiff would have been entitled, if it was in a position to execute after the making of the order of 13th May, 2002. Therefore, I consider that, in order to preclude injustice to the defendants, the order of the Court should make it clear that the order which the Court makes on foot of this application is an order which expressly precludes the plaintiff from recovering any interest on the sum of €47,264.38.

Order

20. There will be an order under the Court's inherent jurisdiction amending the order of 13th May, 2002 by adding to it an order that the plaintiff do recover against the defendants the amount of €47,264.38, provided however that the plaintiff shall not be entitled to any interest whatsoever on the said sum.