

## THE HIGH COURT

## COMMERCIAL

[2019 No. 36 J.R.]

[2019 No. 16 COM]

BETWEEN

ELECTRICITY SUPPLY BOARD

APPLICANT

AND

DESMOND BOYLE

RESPONDENT

AND

KENNETH PAYNE

NOTICE PARTY

**JUDGMENT of Mr. Justice Twomey delivered on the 28th day of June, 2019****Summary**

1. This judicial review arises from a claim for compensation brought by the notice party, ("Mr. Payne") against the applicant ("ESB"), in relation to land owned by him in Cappaboggan, Moyfenrath, Co. Meath.

2. In these proceedings, ESB seeks an order from this Court directing the respondent, a property arbitrator (appointed by the Land Values References Committee under the Acquisition of Land (Assessment of Compensation) Act, 1919) to state a case to the High Court on an alleged point of law, where the arbitrator has refused to do so.

3. The issue in question is whether a previous payment made to a landowner in connection with the landowner's co-operation with the laying of lines across his lands of €66,000 should be taken into account by the arbitrator in calculating the amount of compensation payable to the landowner. This compensation is payable under s. 53(5) of the Electricity (Supply) Act, 1927, arising from the exercise of the statutory powers of ESB to place electric lines across lands.

4. For the reasons set out below, this Court will direct the arbitrator to state a case to the High Court on the point of law in question.

**Background**

5. Mr. Payne was notified on 3rd June, 2014 that works would be commenced on his land for the purpose of the placement of an electric line pursuant to section 53 of the Electricity (Supply) Act, 1927 (as amended by section 1 of the Electricity (Supply) (Amendment) Act, 1985).

6. It is not in dispute that Mr. Payne was paid monies totalling €66,000 between 11th March, 2015 to 25th August 2017 in so called 'Flexibility of Access' ("FOA") payments (although there seems to be some dispute as to whether those payments were made by ESB or by EirGrid on behalf of ESB or otherwise). These FOA payments are made to landowners who agree to cooperate with the construction of new electric lines and are made in recognition of the disruption caused by such construction. The FOA payments to Mr. Payne were made in three stages – at the time of initial access to the land, during construction of the electric line and upon completion of the entire electric line. The letter dated 3rd June, 2014 from EirGrid outlined the FOA payments and then provided as follows:

"In addition, you will be entitled to be fully compensated for any reinstatement works, which, may need to be done on your land arising from the construction of the line."

7. In December 2016, Mr. Payne submitted a compensation claim in the sum of €640,500 to ESB pursuant to section 53(5) of the Electricity (Supply) Act, 1927, as amended. This section states:

"(5) If the owner or occupier of such land or building fails within the seven days aforesaid to give his consent in accordance with the foregoing subsection, the Board or the authorised undertaker with the consent of the Board but not otherwise may place such line across such land or attach such fixture to such building in the position and manner stated in the said notice, subject to the entitlement of such owner or occupier to be paid compensation in respect of the exercise by the Board or authorised undertaker of the powers conferred by this subsection and of the powers conferred by subsection (9) of this section, such compensation to be assessed in default of agreement under the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, the Board for this purpose being deemed to be a public authority."

8. As is clear from this section, where there is a failure to reach agreement on the level of compensation, there is provision for compensation to be assessed in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919 (the "1919 Act"). Section 1 of the 1919 Act provides for the appointment of an arbitrator to determine any question of disputed compensation. In this regard, the respondent, ("Mr. Boyle"), was duly appointed as property arbitrator in May 2017. The arbitration began in January 2018 and at this stage Mr. Payne reduced his compensation claim from €640,500 to €400,660.

9. By letter dated 30th October, 2018, the ESB wrote to Mr. Boyle requesting him to exercise his discretion, pursuant to s. 6 of the Acquisition of Land (Assessment of Compensation) Act 1919, to state a case for the opinion of the High Court in relation to his assessment of compensation under section 53(5) of the Electricity (Supply) Act, 1927. The question which the ESB wanted the arbitrator to ask the High Court was stated in that letter in the following terms:

"Having regard to the fact that €66,000 has been paid by or on behalf of [ESB] to [Mr. Payne] by reason of the

placement of the electricity line on his land ... ought I (a) take into account the said payment or (b) disregard the fact of the said payment, in assessing the compensation to be awarded to [Mr. Payne] against [ESB]?"

10. Arising from this request, a preliminary issue arose in the arbitration as to how the payment totalling €66,000 should be treated by the arbitrator, in the context of the assessment of the compensation to be awarded to Mr. Payne by the arbitrator. At the hearing of that preliminary issue, ESB requested Mr. Boyle to state a case to the High Court in similar terms to its letter of 30th October, 2018 in relation to how the FOA payments should be treated, i.e. whether such payments should be deducted from the overall award of compensation or whether they should be ignored for the purposes of the compensation award. The ESB relied upon the terms of s 6(1) of the 1919 Act for the purposes of making its application to the arbitrator to state a case, or to use the terms of that Act, 'a special case'. As the arbitrator failed to accede to ESB's application to state a case, ESB relies on s. 6 for the purposes of this application to the High Court for a direction to the arbitrator to state a case. Section 6(1) of the 1919 Act states:

"The decision of an official arbitrator upon any question of fact, shall be final and binding on the parties, and the persons claiming under them respectively, but the *official arbitrator may, and shall, if the High Court so directs, state at any stage of the proceedings, in the form of a special case for the opinion of the High Court, any question of law arising in the course of the proceedings, and may state his award as to the whole or part thereof in the form of a special case for the opinion of the High Court.*" (emphasis added)

11. In a decision taken on 4th December, 2018, Mr. Boyle refused to state a case to the High Court for the reason that he did not view the preliminary issue as 'a point of law germane to this Arbitration' and that he lacked the jurisdiction 'to state a case of that nature'. It was on foot of this refusal that these judicial review proceedings were issued by ESB on 18th January, 2019 to seek an order from the High Court pursuant to s. 6 of the 1919 Act.

#### **Amenable to judicial review?**

12. In these judicial review proceedings, the ESB seeks an order of certiorari quashing the decision of Mr. Boyle taken on 4th December, 2018 refusing the ESB's application to have a special case stated for the opinion of the High Court on a point of law. The ESB also seeks a declaration that Mr. Boyle erred fundamentally in law and acted irrationally and an order of mandamus to direct Mr. Boyle to refer the point of law to the High Court.

13. It is relevant to note that neither Mr. Boyle nor Mr. Payne are taking part in these judicial review proceedings. As Mr. Boyle was appointed a Statutory Property Arbitrator, the Chief State Solicitor's Office ("CSSO") is acting for him and the CSSO indicated that it was not Mr. Boyle's intention to take any part in the proceedings, in accordance with what the CSSO stated was the normal policy adopted by Statutory Property Arbitrators in relation to judicial review challenges. Therefore, there is no opponent to this application by the ESB.

14. It is the case however that in correspondence, Mr. Payne did suggest that judicial review was not the appropriate procedure to use to have a case stated by a property arbitrator. However, it is clear from the High Court decision of *Shackleton v. Cork County Council* [2007] IEHC 241 that the exercise of powers by a property arbitrator are amenable to judicial review, since at para. 9.5 of that judgment, Clarke J. (as he then was) states:

"Argument was addressed in the course of the hearing before me concerning the extent to which it would be inappropriate for the court to interfere with the decision of the arbitrator in this case. It was accepted that a decision of an arbitrator in a case such as this was open to judicial review. It should be recalled that a property arbitrator exercising the powers of such an arbitrator under statute is carrying out a public law function. The court should, of course, exercise significant deference to the decisions of such an arbitrator. However it seems to me that it follows from the fact that a property arbitrator is carrying out a public law function and is thus amenable to judicial review, that the ordinary rules of judicial review apply."

#### **Application of Arbitration Act?**

15. There is one other issue which should be briefly referenced, that is the effect of the Arbitration Act, 2010 on these proceedings. This is because the 2010 Act, and in particular Article 5 of the UNCITRAL Model Law, which is adopted into Irish law by s. 6 of the 2010 Act, is prima facie inconsistent with section 6 of the 1919 Act, insofar as Article 5 states that no Court shall intervene in matters governed by the Model Law. However, section 29 of the Arbitration Act, 2010 also states that the 2010 Act shall apply to every arbitration under any other act 'except in so far as this Act is inconsistent with that other Act'. Since the entitlement of the High Court to intervene in a property arbitration under the 1919 Act is inconsistent with Article 5, it seems clear to this Court that Article 5 of the Model Law does not apply to property arbitrations under the 1919 Act and that therefore a decision made by a property arbitrator under the 1919 Act may be subject to judicial review.

#### **Test for a property arbitrator stating a case on a point of law**

16. The next issue to consider is the test that a property arbitrator appointed under the 1919 Act should apply in considering whether to state a case to the High Court on a point of law. In *ESB v. Boyle & Anor.* [2018] IEHC 718, Quinn J. quoted with approval the decision of Lord Denning M.R. in *Halfdan Greig & Co. v. Sterling Coal Ltd.* [1973] Q.B. 843 in which Lord Denning set out the three pre-requisites to be satisfied before an arbitrator should state a case on a point of law, which are as follows:

"The point of law should be real and substantial and such as to be open to serious argument and appropriate for a decision by a court of law...as distinct from a point which is dependent on the special expertise of the arbitrator or umpire..."

The point of law should be clear cut and capable of being accurately stated as a point of law – as distinct from the dressing up of a matter of fact as if it were a point of law.

The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case – as distinct from a side issue of little importance.

If those three requisites are satisfied, the arbitrator or umpire should state a case."

17. Taking these three pre-requisites in turn the issue in question is clearly whether the payment of €66,000 to Mr. Payne, for his cooperation in allowing ESB to access his lands and in recognition of the disruption that such access might cause, should be taken into account in calculating the statutory compensation due to him under section 53 of the Electricity (Supply) Act, 1927. It seems quite clear to this Court that the question of whether Mr. Payne is, as suggested by the ESB, being 'doubly compensated at the

*expense of the public purse* is not an insignificant issue. Indeed, not only is it significant to the ESB, but it is also of significance to Mr. Payne, since his solicitor wrote, on 14th February, 2018, to the arbitrator in the following terms regarding this issue:

"It is critical to the interests of [Mr. Payne] that it be determined as a preliminary issue, so that [Mr. Payne] can be fully advised as to the consequences of its resolution, having regard to the existence of an unconditional offer and the potential detriment to [Mr. Payne] arising from a determination adverse to his interest."

It is clear from this letter that Mr. Payne (not unreasonably) needed to know whether the previous payment he received would be taken into account by the arbitrator in calculating the compensation now due to him, in order for Mr. Payne to properly assess whether he should accept the amount on 'unconditional offer' from ESB or whether he should proceed with the arbitration. Not only is this a real and substantial issue, but it is also open to serious argument and is appropriate for a decision by a court of law, and is not a matter of fact or a point which is dependent on the special expertise of the arbitrator, thus satisfying the first pre-requisite

18. Taking the second pre-requisite, the issue of whether the payment of €66,000 should be taken into account is one which is clear cut and is capable of being very accurately stated as a point of law, since it would seem to be either a 'yes' or 'no' answer, as is evident from the wording of the question framed by ESB which the ESB asked the arbitrator to put in a case stated to the High Court.

19. Taking the third pre-requisite, it is self evident that the point of law in question is of such importance that its resolution is necessary for the proper determination of the case, since the final amount of compensation can only be finalised once a decision is taken as to whether or not to take account of the previous FOA payment.

### **Conclusion**

20. For all these reasons, it seems to this Court that the arbitrator should have stated a case and this Court will direct the arbitrator, pursuant to s. 6 of the 1919 Act, to state a case to the High Court in the terms requested by the ESB.

21. Finally, although this Court has found the arbitrator's refusal to state a case to be an erroneous decision, based on the transcript of the arbitration hearing, it is clear that the arbitrator appeared to be concerned about stating a case to the High Court unnecessarily, and at unnecessary cost (which costs are ultimately paid for out of public funds since the ESB will be responsible for these costs). For his part, the arbitrator appears to have felt that his job was to award compensation, which job he thought he should discharge, and it was not his job, as he saw it, to determine whether previous payments should be taken into account. However, despite these understandable concerns of the arbitrator, in this instance there was also the argument that the issue could have a significant impact on the amount of money paid out of public funds in compensation by the ESB. This is because the ESB argued at the preliminary hearing that the resolution of this point is not just a matter of real and substantial importance to the parties in the present case, but that it is also a matter of considerable national significance, since compensation is paid to landowners by the ESB throughout the country each time new lines are installed, which is not an altogether irregular occurrence. For this reason, ESB argued at the arbitration hearing that the issue of whether previous payments made to a landowner should be taken into account, in calculating compensation, is likely to have a considerable significance for not just the public funds used in building new lines, but also for the competitiveness of the Irish economy.