THE HIGH COURT

2004 No. 293 SP

IN THE MATTER OF THE ARBITRATION ACTS, 1954 TO 1998
AND IN THE MATTER OF AN ARBITRATION AWARD OF
KEVIN BRADY, ARCHITECT, DATED 4TH JUNE, 2004

BETWEEN

G.L.C. CONSTRUCTION LIMITED

PLAINTIFF

AND
THE COUNTY COUNCIL OF THE COUNTY OF LAOIS

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 3rd March, 2005.

The Application
1. This is an application by the plaintiff for an order remitting the arbitrator's award mentioned in the title hereof to the arbitrator for formal adjudication of the dispute between the plaintiff and the defendant.

Factual Background
2. The application is made against the following background:

· By an agreement dated 4th April, 1984 (the Agreement) the defendant employed the plaintiff to construct 31 houses and 2 shops at Knockmay, Portlaoise, County Laois.

· Approximately 12 months later the defendant, on the ground that the plaintiff was in default, determined the Agreement and employed another builder to complete the works. In recording that the Agreement was determined, I mean to convey that the plaintiff's involvement on site came to an end, without giving rise to any implication as to the status in law of that circumstance or its consequences.

· At the time of the determination of the Agreement plant and equipment the property of the plaintiff was on the site. The plaintiff was excluded from the site and never recovered possession of the plant and equipment.

· It was provided in the Agreement that any dispute or difference between the parties should be referred to the arbitration and final decision of such person as the parties might agree to appoint as arbitrator or, failing agreement, as might be appointed on the request of either party by the President for the time being of the Royal Institute of the Architects of Ireland.

· Some 16 years after the determination of the Agreement, in mid-2001, the President appointed Kevin Brady (the Arbitrator) to act as arbitrator in relation to the dispute which had arisen between the plaintiff and the defendant in relation to the Agreement. The Arbitrator accepted the appointment.

· Apart from the arbitration clause in the Agreement, which provided that every reference should be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1954 (the Act of 1954) or any Act amending the same, the only document which appears to have governed the submission to the Arbitrator was a document signed on behalf of the parties, and, in particular, on behalf of the plaintiff on 29th August, 2001, which has been described as a "submission to arbitration". This document, in which the parties referred their disputes or differences arising out of or in connection with the Agreement to the Arbitrator for his determination, was primarily concerned with the fees, costs and expenses of the arbitrator in connection with the arbitration.

· Following a preliminary meeting on 10th October, 2001 pleadings were exchanged between the parties. The plaintiff's claim for damages for alleged breach of contract encompassed not only the claim in respect of plant and equipment which the plaintiff did not recover in April, 1985 but also a host of other claims, for example, in relation to retention monies withheld by the defendant, alleged under-valuation of works for the purposes of interim certificates and alleged under-pricing of variations, to mention but a few. The defendant counterclaimed against the plaintiff for damages for alleged breach of contract by the plaintiff of the Agreement.

· The hearing commenced on 15th December, 2003 and lasted for three days. It was resumed on 22nd January, 2004. Thereafter closing submissions were received by the Arbitrator from the plaintiff and the defendant.

· The Arbitrator issued his award on 4th June, 2004.

The Award
3. The award was headed as "Final Award". After reciting the Agreement, his appointment, and the procedure followed, the Arbitrator went on to recite the following findings made by him:

> "Having read the documents and heard the evidence and read the submissions I find there was a valid contract under seal and that the claim was not statute barred. I also find that the employment of the [plaintiff] was properly terminated for failing to proceed with the works with reasonable diligence. I further find that the extent of the damage suffered by the [defendant] cannot at this stage, some twenty years after the event, be verified and that the [defendant] although entitled to claim same and to claim liquidated damages for delay in completion never pursued the same. I further find that plant which the [plaintiff] owned was taken into the possession of the [defendant] and not returned but that the value of the same is impossible now to determine and would in any event be set off against losses incurred by the [defendant]."

4. The Arbitrator then went on to make his award for the reasons previously recited which, insofar as is relevant for present purposes, was in the following terms:

> "1. The [plaintiff] is not entitled to receive any monies from the [defendant] not [nor?] is the [defendant] entitled to

claim any monies from the [plaintiff].

2. The [plaintiff] shall pay his own costs and the [defendant's] costs in relation to the reference to date, such costs if not agreed to be taxed by myself."

The Law

5. Section 36(1) of the Act of 1954 provides as follows:

> "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."

6. The jurisdiction conferred by that provision has been considered twice by the Supreme Court during the last two decades.

7. In *Keenan v. Shield Insurance Company Limited*, [1988] I.R. 89, McCarthy J. with whom the other four judges of the Supreme Court hearing the appeal agreed, stated as follows (at p. 95):

> "Section 36 would appear to be the procedure appropriate, for example, to a case of a patent mistake in monetary calculation, in giving or not giving of a particular credit, in an award that is on its face ambiguous or uncertain, in a case where the arbitrator, himself, seeks to rectify some error and, perhaps, where fresh evidence has become available subject to the standard rules of an appellate court in such cases …"

8. Later in his judgment, McCarthy J. outlined the policy considerations which should inform the courts in intervening in the arbitral process in the following passage at p. 96:

> "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 award final in every sense of the term. … 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. …"

9. In *Tobin & Twomey Services v. Kerry Foods Limited*, [1996] 2 I.L.R.M. 1, Blayney J., with whom the two other judges of the Supreme Court hearing the appeal concurred, in outlining the grounds on which a matter may be remitted to an arbitrator under s. 36, adopted the statement of the law contained in the judgment of O'Hanlon J. in *Portsmouth Arms Hotel Ltd. v. Enniscorthy U.D.C.* (14th October, 1994, Unreported). O'Hanlon J., having quoted s. 36 and having referred to the corresponding provision of the English Arbitration Act, 1950 went on to state:

> "It has been held, however, both in this country and in England that there are only a limited number of grounds which would entitle the court to intervene in this manner, generally considered as falling under one of the following four headings:
>
> (1) that there is some defect or error patent on the face of the award;
>
> (2) that the arbitrator has admittedly made some mistake and desires the award to be remitted to him in order that he may correct it;
>
> (3) that material evidence, which could not with reasonable diligence have been discovered before the award was made, has since been obtained;
>
> (4) that there has been misconduct on the part of the arbitrator – which has been taken to include a situation where the award is on its face erroneous in matters of law."

10. In this case it has not been submitted on behalf of the plaintiff that the grounds on which a court can remit an award for reconsideration by an arbitrator are more expansive than indicated by the Supreme Court in the authorities to which I have just referred, although the court was referred to the decision of Herbert J. in *McCarrick v. The Gaiety (Sligo) Ltd.* [2001] 2 I.R. 266. The plaintiff's case is that there are errors patent on the face of the award and that the arbitrator failed to fulfil the function which was reposed by the parties in him.

Relevant Evidence

11. Although the court is not concerned with the merits of the claim and counterclaim, in order to address the submissions made on behalf of the parties it is necessary to refer to some of the evidence adduced on this application.

12. In his affidavit grounding the application Sean Lambe, a director of the plaintiff, identified, in paras. 12 to 17, the witnesses who testified before the Arbitrator and outlined their testimony. In para. 17 the deponent outlined the evidence of Sean Ryan, on behalf of the defendant, who, he testified, averred that any funds paid out by the defendant had been reimbursed by the Department of the Environment. Further, in para. 18 he averred that no witness at the hearing had stated that they had any difficulty in recollecting the events at issue having regard to the passage of time. In para. 19 he averred that detailed figures in relation to the loss suffered by the plaintiff were submitted to the Arbitrator, exhibiting a copy of a report of Gerry Wynne, Quantity Surveyor. It was averred that each item of loss was fully particularised and verified.

13. In a replying affidavit on behalf of the defendant, Sean Ryan, who is the senior executive engineer with the defendant, referred to the deaths of the plaintiff's and the defendant's quantity surveyors prior to the arbitration. This I understand to mean a reference to the quantity surveyors who were involved on behalf of both parties in the mid-1980s. He accepted the outline given by Mr. Lambe in paras. 12 to 17 "if somewhat biased". He disagreed with paras. 18 and 19 of Mr. Lambe's affidavit insofar as they were based on personal opinion.

Submissions

14. Counsel for the plaintiff acknowledged that the plaintiff is bound by the finding of the Arbitrator that the Agreement was terminated for failure to proceed with the works with reasonable diligence. He submitted that no evidence was adduced by the

defendant before the Arbitrator on which the damages claimed by the defendant in the counterclaim could be assessed. The Arbitrator found that the plaintiff suffered loss as a result of the retention of the plant and equipment by the defendant. However, he slipped into error in failing to quantify that loss. Further he erred in holding that he was entitled to set off the loss suffered by the plaintiff against the loss suffered by the defendant in circumstances where the latter losses had not been quantified or verified. As I understand it, the patent errors of law for which the plaintiff contends are the failure to quantify his loss and the purported set off. The patent error of fact for which the plaintiff contends is that, given the evidence of Sean Ryan that any funds paid out by the defendant had been reimbursed by the Department of the Environment, the Arbitrator erred in finding that the defendant had incurred loss.

15. Counsel for the defendant acknowledged that the defendant is bound by the Arbitrator's finding that the plaintiff's claim was not statute-barred. However, because of the lapse of time between the occurrence of the events the subject of the arbitration and the holding of the arbitration, the Arbitrator was entitled to find the quality of the evidence unsatisfactory. If the evidence to support the claim and the counterclaim was insufficient, the conclusion he reached that the claim and the counterclaim cancelled each other out was legitimate. It was particularly apposite given the twenty years which had elapsed since the events occurred and the fact that the quantity surveyors were dead. The Arbitrator did not have to accept or reject the evidence given by Mr. Wynne. He was entitled to say that either side had not made out a case that loss had been suffered. Counsel for the defendant rhetorically queried what kind of fact finding the Arbitrator would be able to embark on if the matter were remitted to him, given that he would be asked to draw conclusions which he felt unable to reach when the matter was previously before him. It was submitted that there is no error on the face of the award; that it is a valid award, having regard to the nature of the evidence.

Conclusions

16. I am satisfied that there is an error of law patent on the face of the award to the following extent. The Arbitrator was not entitled to determine that any damages to which the plaintiff was entitled would be set off against any damages to which the respondent was entitled without first assessing the damages, if any, due to each party against the other having regard to the evidence adduced before him.

17. However, even assuming that there was evidence before the Arbitrator that "any funds paid out by the defendant had been reimbursed … by the Department of the Environment", whatever that may mean and whatever consequences it may have, I am not satisfied that there is an error patent on the face of the award arising out of the Arbitrator's treatment of the evidence. As I have stated, the court is not concerned with the merits of the claim or counterclaim.

Order

18. There will be an order remitting the award to the Arbitrator for reconsideration in the light of this judgment.