2005 IEHC 334

THE HIGH COURT

Record No: 2005 No. 379 SP

CAMPUS AND STADIUM IRELAND DEVELOPMENT LTD

PLAINTIFF

AND

DUBLIN WATERWORLD LTD

DEFENDANT

Judgment of Mr. Justice Gilligan as delivered on the 26th day of September, 2005.

1. On the 3rd June, 2005, in proceedings entitled Campus and Stadium Ireland Development Limited and Dublin Waterworld Limited, Record No. 2005 No. 1466P, an order was made by Kelly J. in the Commercial Court directing that the issue between the parties in relation to a claim for €10,254,600 relating to a VAT payment on a lease as entered into between the parties on the 30th day of April, 2003, be referred to arbitration.

2. The agreed arbitrator Mr. Dermot O'Brien, a recognised VAT expert, gave his award on 1st July, 2005, finding that the amount of VAT of €10,254,600 charged by Campus and Stadium Ireland Development Limited (CSID) on the capitalised value of the lease of 30th April, 2003, to Dublin Waterworld Limited (DWL) was correctly charged. By letter dated 7th July, 2005, solicitors for CSID wrote to DWL seeking payment of the aforesaid sum and no payment has been forthcoming. These proceedings were issued on 14th July, 2005, between the parties seeking an order granting the plaintiff leave pursuant to s. 41 of the Arbitration Act, 1954 and Order 56, rule 4F of the Rules of the Superior Courts, 1986, as amended to enforce the arbitration award of 1st July, 2005, in the sum of €10,254,600 as made by the arbitrator Dermot O'Brien in favour of the plaintiff as against the defendant and further the plaintiff claims interest pursuant to the Courts Act, 1981 and such further or other order as to this Honourable Court shall deem fit in addition to the costs of the proceedings.

3. The defendants, DWL, seek to set aside the order of the arbitrator pursuant to s. 38 of the Arbitration Act, 1954, as amended on the basis that the arbitrator misconducted himself.

4. McCarthy J. in *Keenan v. Shield Insurance Company Ltd* [1988] I.R. 89 succinctly summed up the appropriate approach of the courts to arbitration awards wherein, at p. 96, he states:-

> *"Arbitration is a significant feature of modern commercial life; there is an International Institution 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.* Church and General Insurance Company v. Connolly and 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. There may be incidents 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."*

5. This approach was reiterated again by the Supreme Court in *McStay v Assicurazioni Generali SpA* [1991] I.L.R.M 237 where Finlay C.J. stated, at p. 242. that:-

> *"A fundamental ingredient of the concept of arbitration, as contained in the common law, is the finality of the decision of the arbitrator, subject, of course, to certain qualifications and precautions. Broadly speaking, however, as one might expect, the law appears to acknowledge that where two parties agree to refer a particular question which is in dispute between them to the decision of a particular individual by way of arbitration, they are taken to have abandoned their right to litigate that precise question."*

6. In *Doyle v Kildare County Council* [1995] 2 I.R. 424 the Supreme Court followed the previous decisions in Keenan and McStay. Furthermore, Hamilton C.J. at p. 444 approved Murphy J.'s statement in Power Securities Limited v Daly (Unreported High Court, Murphy J., 27 February, 1984) to the effect that:-

> *"The Courts should be slow to usurp the functions of the chosen tribunal by intervening whether by way of setting aside an award, remitting an award or directing a case to be stated."*

7. I take the view that it follows from the decision of the Supreme Court in *Doyle v. Kildare County Council* [1995] 2 I.R. 424 that this court has no statutory jurisdiction to set aside an award of an arbitrator in the absence of a finding that the arbitrator has misconducted himself or the proceedings pursuant to s. 38(1) of the Arbitration Act 1954 as amended.

8. Atkin J. in *Williams v. Wallis and Cox* [1914] 2 K.B. 478, at p. 485, refers to the meaning of the expression misconduct of an arbitrator where he stated:-

> *"That expression does not necessarily involve personal turpitude on the part of the arbitrator, and any such suggestion has being expressly disclaimed in this case. The term 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, and one instance that may be given is where the arbitrator refuses to hear evidence upon a material issue".*

9. In *London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.*, [1958] 1 Lloyd's Rep. 367; [1958] 1 W.L.R. 661, at pp. 369 and 665, Jenkins L.J. (as he then was) referred to "misconduct" as "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." Of course, it would be stretching the meaning of the term misconduct to say that it included mistakes. As Donaldson J. (as he then was) pointed out in *Port Sudan Cotton Co. v. Govindaswamy Chettiar & Sons* [1977] 1 Lloyd's Rep. 166 at p. 178:

> *"... there is a distinction between error and misconduct. To err in fact or law is not only human but an occupational hazard. Unless it is so often repeated as to give rise to some suggestion of incompetence it happily involves absolutely no reflection upon the person concerned, whether Judge, umpire or arbitrator."*

10. In the case of *Pratt v. Swanmore Builders Ltd. and Baker* [1980] 2 Lloyd's Rep 504, in deciding whether or not the arbitrator had misconducted himself, Pain J. applied the test set out by Cozens-Hardy, M.R., in *Re Enoch and Zaretzky, Bock & Co.'s Arbitration* [1910] 1 K.B. 327. In that case the learned judge had said at p. 331:

> *"… I wish to make it clear that I am not suggesting fraud on the part of Mr. Von Lymburg, [who is the umpire] but I do say his conduct as umpire, as manifested by the particulars which I have given, is such that it would not be satisfactory, it would not be fair, it would not be just, to leave the rights of the parties, as they necessarily would be, in his sole hands."*

11. *Fennelly J. in McCarthy v. Keane and Others* (Unreported, Supreme Court, 16th December, 2004) deals very fully with the meaning of misconduct in the context of the actions of an arbitrator in and about the conduct of the arbitration when he states at p. 12 of the judgment:-

> *"Real cases of misconduct may arise in the conduct of the arbitration, where the arbitrator acts unfairly either by clear acts of favouritism towards a party or adopts procedures which place one or other party (perhaps even both) at a clear disadvantage.*
>
> *It seems to me that the standard or test of misconduct of such a nature would be something substantial, something that smacks of injustice or unfairness. One of the cited examples is of an arbitrator inspecting the farm he was to value in the presence of one party and in the absence of the other or of any representative of the other … []there is a sharp distinction between acts committed in the course of the arbitration and its result. Mere error is not misconduct. Parties submit disputes, including disputes as to the law to arbitration. They expect the arbitrator to rule on all matters in dispute, but they do not have any guarantee that the arbitrator will reach the correct result. An arbitrator may err in his interpretation of the law or of the facts, without being guilty of misconduct".*

12. The arbitration in question was conducted by way of a review of documents furnished by representatives of both parties and by an oral hearing held at the office of the arbitrator on 28th June, 2005. It was accepted by both parties that the lease of the 30th April, 2003, by CSID to DWL is a lease which would be subject to VAT at 13.5% on its capitalised value subject to the provisions of s. 4(3A) of the Value Added Tax Act, 1972, as amended. These provisions are commonly referred to as the economic value test.

13. The economic value of the lease is the amount of money excluding VAT incurred by the landlord in acquiring and developing the property and in this case it was accepted by both sides that the economic value was a figure of approximately €62 million. In order for the lease of the National Aquatic Centre to be subject to VAT the capitalised value of the lease determined in accordance with the provisions of the Value Added Tax Act, 1972 would have to equal or exceed the economic value.

14. CSID obtained a valuation report for VAT purposes from Mr. Cahill of the Valuation Office which came to the conclusion that the value of the unencumbered rent per annum was €3.376 million and that the open market price of the interest being disposed of by CSID was €35 million.

15. CSID did not rely on Mr. Cahill's valuation for VAT purposes in relation to the open market price but instead preferred to use one of the prescribed formulae in Regulation 19 to multiply the unencumbered rent figure of €3.376 by 75% by 30 years thereby giving a capitalised value of the lease of €75,960,000, a value in excess of the economic value of the lease, it being clear that if CSID had relied on Mr. Cahill's valuation of €35 million then the capitalised value of the lease would not have equalled or exceeded the economic value and VAT would not be payable on the lease nor would CSID be entitled to recover the VAT expenditure it occurred on the cost of developing the property.

16. On the basis of the calculation used by CSID an invoice was issued to DWL on 15th May, 2003, charging VAT of €10,254,600 on the lease.

17. In contending that this VAT was not properly chargeable, DWL accepted neither Mr. Cahill's valuation of €3.376 million in respect of the unencumbered rent nor his open market price in the sum of €35 million and they in turn engaged the services of the firm of valuers Hamilton Osborne King who in a report gave a substantially lower rental figure and consequently a figure which if accepted and used on the same basis of calculation as that proposed by CSID would not yield a figure which would meet or exceed the economic value of €62 million.

18. An issue then centered on an interpretation of the relevant VAT regulation and as to whether or not CSID were obliged to rely on the valuation as obtained from Mr. Cahill and were prevented from relying on the alternative formula which were available to calculate the open market value, because of the valuation obtained from Mr. Cahill.

19. The arbitrator in his award proceeded as follows.

> *"The issues to be resolved are as follows;*
>
> 1. If the valuer has given his opinion as the market value of the interest being disposed of, is CSID then entitled to rely on one of the other formula based methods of capitalising the lease set out in Regulation 19?
>
> 2. Is CSID entitled to rely on the opinion of its appointed valuer or does it need to question his method of valuation?"

20. Mr. Sanfey on the defendants' behalf submits that for the arbitrator to disregard the opinion of Mr. Cahill is a radical departure of a unique nature from the standard practice and that his clients did not have an opportunity to address this issue at the arbitration. He accepts that Mr. O'Brien is an expert arbitrator who knows the VAT code inside out but says there is a basic unfairness in the arbitrator coming to a conclusion that the expert opinion of Mr. Cahill, in respect of the €35 million valuation as the open market price of the property the subject matter of the lease, is an estimate and does not provide evidence because the nature of the property is unique with no close comparison in the state. Mr. Sanfey argues that the point was not flagged and in effect the arbitrator found a way not to answer the very question he had posed for himself to the effect that if the valuer has given his opinion as to market value of the interest being disposed of was CSID then entitled to rely on one of the other formula based methods of capitalising the value of the lease as set out in Regulation 19. He submits that the attitude adopted by the arbitrator was virtually unprecedented, unfair, and took his clients utterly by surprise.

21. Mr. Sanfey refers to paragraph 22 of the affidavit of Mr. Broderick wherein he deposed;

> "I say and believe also that the arbitrator, given his particular expertise in VAT matters, would be aware that it has been established and accepted in principle and practice since the introduction of VAT in 1972 that a valuation by a competent valuer is regarded as evidence of OMP for VAT purposes. In this regard I beg to refer to the guide to the Value Added Tax

produced in July 1972 by the Revenue Commissioners … that if the arbitrator was of this view it should have been communicated to the parties. Not to do so was unjust and unfair to the defendant."

22. Mr. Sanfey makes the case on his clients behalf that the arbitrator should have advised both parties that in view of the unique nature of the property he was of a mind that contrary to the usual practice and procedure in relation to VAT principles he would not regard Mr. Cahill's opinion as the opinion of a competent valuer as in his view it was only an estimate.

23. He further relies on the inconsistency of the arbitrator, instancing the situation whereby on the one hand the arbitrator declined to accept the evidence of Mr. Cahill as regards his valuation of the open market price but praised his evidence as regards the unencumbered rent of the property to the extent of stating that he believed that CSID were entitled to rely on that opinion and that it would be absurd to expect a non-qualified person to question the professional judgment of a qualified valuer. Mr. Sanfey argues that this is further evidence of an unfair approach.

24. Mr. Sanfey further relies on an error of law on the face of the award wherein the arbitrator stated that the VAT system could not function effectively if a supplier's VAT charge was subject to review by his customer. He contends that this is a misstatement of the law and a purchaser can question any charge in relation to VAT as demonstrated in the Supreme Court decision of Forbes v. Tobin (Unreported, Supreme Court, 17th July, 2002).

25. Mr. Sanfey urges on the court that in the circumstances of this case there is particular disquiet as to the arbitrator's approach and his decision is fatally flawed.

26. Mr. Sanfey did have to accept that his clients were at all times aware that it was the intention of CSID to use the formulae and not to rely on the open market price valuation of Mr. Cahill.

27. Mr. McDonald, on the plaintiffs' behalf, submits that it was a matter for the arbitrator either to accept or reject Mr. Cahill's view as regards his opinion of €35 million as the open market price. He contends that it is an essential part of the defendants argument that Mr. Cahill's opinion not be regarded as evidence of the open market value. He refers specifically to the cross examination of Mr. McCarthy, the valuer from Hamilton Osborne King, who conceded that where two valuations were to hand and they are so wide apart it was perfectly proper to adopt a different approach and this, Mr. McDonald submits, was part of the evidence and was clearly flagged as a central part of the case and no objection was taken and there was no reference to the defendants requiring any further time to consider the matter. He further refers to the fact that both valuers in giving evidence before the arbitrator accepted that this particular property was unique, Mr. Cahill stating the nature of the property was a once off totally unique specialised property whose main function was to hold major sporting events on an international and national basis and that there was no comparator. Mr. McCarthy from Hamilton Osborne King accepted that he had carried out many valuations but nothing quite like this particular building as it was unique in nature. In particular Mr. McDonald refers to Mr. O'Keeffe's summing up and in particular to the point he made in respect of the wording of Regulation 19 that if there is evidence of an open market value that should be relied on and he submitted, at the time to the arbitrator, that the evidence would have to be clear and adequately established and that this was not the case in the circumstances that pertained and there was no clear evidence and in the circumstances the far more appropriate approach was to move to a more mathematical method of calculation which was the "multiplier method".

28. Mr. McDonald submits that clearly the defendants were not taken by surprise as to the argument being advanced during the course of the arbitration on the plaintiffs behalf.

29. Insofar as Mr. Sanfey relied on inconsistency on the part of the arbitrator Mr. McDonald submits that this frequently occurs where a trial judge accepts part of the evidence of a witness but rejects some other aspect and that is what occurred in the circumstances of this case in that the arbitrator disregarded part of Mr. Cahill's evidence as he was fully entitled to do so and also accepted part of his evidence as regards the value of unencumbered rent. He was, Mr. McDonald urges fully and clearly, entitled to adopt this approach.

30. As regards the alleged error of law Mr. McDonald relies on the judgment of the Supreme Court in *Keenan v. The Shield Insurance Company* [1988] I.R. 89 that any error of law would have to be fundamental. He draws a distinction between the facts of the present case and those in *Forbes v. Tobin* and that in the present case the only issue was conflicting opinions and the arbitrator came to a conclusion that the nature of the property was unique with no close comparison and in his view the figure of €35 million was an estimate and did not provide evidence of its open market price thereby enabling CSID to use an unencumbered rent figure to calculate the capitalised value of the lease by means of one of the prescribed formulae in Regulation 19.

31. Mr. Sanfey in reply accepts that there is no doubt but that Mr. O'Keeffe did refer to the argument in his summing up and he accepts that this also appears from certain notes that were taken on his clients' behalf. He emphasises however that in circumstances where the practice and principle of VAT law is applied, and is well known to this particular arbitrator, and was to regard the opinion of a competent valuer as being synonymous with evidence, if there was to be a departure from that practice such a departure should have been flagged to the parties and in particular the parties prejudiced by such a view and on behalf of his clients he says it was unfair of the arbitrator not to do so.

32. In coming to a decision in this matter I take the view that this Court has to be mindful of the clear statement of law as laid out by the Supreme Court in *Keenan v. The Shield Insurance Company* as regards interference with an arbitrator's award. In my view it follows that for this Court to interfere with the award of Mr. O'Brien it would have to be satisfied that the award showed on its face an error of law so fundamental that this Court could not stand aside and allow it remain unchallenged or alternatively Mr. O'Brien misconducted himself or the arbitration to such an extent that it was tainted by a substantial injustice or unfairness.

33. The defendants were at all times aware that CSID was not relying on Mr. Cahill's valuation of the open market price being €35 million and was instead going to rely on one of the alternative formula as set out in Regulation 19 of the Value Added Tax Act, 1972, which brought about a situation whereby the open market price was valued at a sum in excess of €75 million. There was evidence before the arbitrator that the particular property was unique with no close comparison in the State and at the hearing before him the defendants queried that valuation of €35 million suggesting a lower open market figure. Mr. McCarthy, the valuer from Hamilton Osborne King, was cross examined by Mr. O'Keeffe, Barrister at Law, on behalf of the plaintiffs in relation to the position pertaining if there were two valuations and in summing up it is clear that Mr. O'Keeffe indicated that if there was no clear evidence as regards the open market value you go the unencumbered rent formula and that the question for the arbitrator was as to what CSID was entitled to do. He submitted, during the course of the arbitration, to the arbitrator that there was no evidence of the open market value of the lease and that the plaintiffs then proceeded to do what the legislation required of them and what the Revenue Commissioners had advised them to do and on the basis of the evidence adduced before him and clearly taking into account the submissions of counsel for the plaintiff the arbitrator arrived at a decision whereby in his view because of the unique nature of the property with no close

comparison in the state he did not consider Mr. Cahill's opinion in respect of the figure of €35 million to be evidence of the property's open market price. He took the view that the opinion of Mr. Cahill was an estimate of the open market price of the property.

34. I come to the conclusion that on the evidence available, having regard to the submissions as made by Mr. O'Keeffe, during the course of the arbitration the decision arrived at was available to the arbitrator and was one of the possible conclusions that he could have arrived at in respect of the issues before him. I accept that this brought about a situation whereby the arbitrator did not have to decide the central issue which he posed for himself as regards the situation of Mr. Cahill 'having given his opinion as to the market value of the interest being disposed of were CSID then entitled to rely on one of the other formula based methods of capitalising the lease set out in Regulation 19' but in the circumstances of the decision the arbitrator came to the conclusion that there was not evidence of the property's open market price before him and thus it was not necessary for him in the circumstances to answer the very issue that he proposed for himself.

35. I do not consider that it was necessary for the arbitrator to have flagged to the defendants in advance of making his award the view he was considering adopting as it was not something new and had been the subject matter of cross examination and submissions by counsel before him during the course of the arbitration.

36. I do not accept the submission advanced on the defendants' behalf that the arbitrator was inconsistent in his approach. I take the view that insofar as he was referring to 'CSID being entitled to rely on the opinion of Mr. Cahill and that it would be absurd to expect a non qualified person to question the professional judgment of a qualified valuer' he was at all times referring to Mr. Cahill's evidence in respect of the unencumbered rent and quite clearly he was entitled to accept part of Mr. Cahill's evidence and to reject that part of his evidence which did not find favour with him.

37. I am satisfied that the arbitrator made an incorrect statement of the law when he indicated that the VAT system could not function effectively if a supplier's VAT charge was subject to review by his customer having regard to the judgment of the Supreme Court in *Forbes v. Tobin* (Unreported, Supreme Court, 17th July, 2002) but in my view this statement cannot be regarded as a fundamental error of law on the face of the award, or of having any significant impact on the decision of the arbitrator.

38. In these circumstances I come to the conclusion that no basis is laid out to set aside the award of the arbitrator as delivered on 1st July, 2005, and I refuse the defendants application for relief in this regard.

39. I will hear the submissions of counsel as to the form of the order to be made.