Neutral Citation: [2014] IEHC 52

THE HIGH COURT

[2013 No. 191 MCA]

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

BETWEEN

FAYLEIGH LTD

APPLICANT

AND

PLAZAWAY LTD TRADING AS HOTEL PARTNERS AND FRANCIS MURPHY

RESPONDENTS

JUDGMENT of Mr. Justice Ryan delivered the 11th February, 2014

By an originating notice of motion dated the 27th June, 2013, the applicant, Fayleigh Ltd, applies to the court for an order remitting the arbitration award made by the second respondent on the 1st May, 2013 for further consideration or, in the alternative, an order setting aside the award on the ground of misconduct.

The applicant company is the lessee of Trim Castle Hotel, Co. Meath, which it holds under a 35 year lease. Plazaway Ltd trades as hotel partners and is a hotel management company. The parties made an agreement in early 2006 whereby hotel partners would manage the Trim Castle Hotel for and on behalf of Fayleigh Ltd. The written agreement contained an arbitration clause in the event of disputes arising between the parties. Such a dispute arose concerning a number of issues in or about December 2008, or January 2009, and the matter was referred to arbitration and the second respondent Mr. Murphy was appointed arbitrator on the 30th April, 2009. The hearing of the arbitration commenced on the 21st February, 2011 and ended with the receipt of legal submissions from the parties in August, 2012. The arbitrator made his award on the 1st May, 2013, and it was published to the applicant on the 21st May, 2013.

By his award, the arbitrator awarded the sum of €476,767.56 to the claimant, Plazaway Ltd, pursuant to its claim under three headings namely:

(a) Management and other fees due to 31st December, 2008, €265,051.94

(b) Design and build fees €36,300

(c) Termination payment €175,415.62

The arbitrator upheld the claim of the hotel management company in full and rejected the counterclaim for negligence and other defaults made by the hotel owner, Fayleigh Ltd.

The central issue in the case was when and how the management agreement came to an end in 2008. Did it happen in March or at the end of December? The claimant in the arbitration, Plazaway Ltd, submitted that it had continued to operate the hotel until the end of December 2008. Its case was that the hotel owners, Fayleigh Ltd, terminated the contract and that there were substantial management payments due and owing at the time of termination. In addition, under the terms of the contract, there was an extra termination payment which amounted to a year's base management payment calculated in accordance with the contract. With the addition of a relatively small amount for the design and build services claimed by the management company, that was how the claim was made up.

The hotel's position was that it had not terminated the contract; that had been done by the management company, Plazaway. That had happened at or about the end of March 2008, and the result was that no termination payment was due or owing to the management company and the management fees were greatly reduced. Instead of being approximately €265,000, a figure of €88,000 was accepted as being due and owing but subject to the counterclaim that the hotel owner made. Fayleigh's case was that the management company had provided some Ltd services from April to December, 2008 following the discontinuance of the operation of the management contract by Plazaway. From the beginning of the contract, it was understood and agreed between the parties that the hotel operators/managers would also provide some additional services over and above those specified in the management agreement. Plazaway ran a number of hotels and they had employees who did work that covered all the hotels and whose services were billed according to the turnovers of the different businesses. In addition to the full management services that were billed under the management agreements specific to this hotel, Trim Castle Hotel was also liable for some shared services under this heading. It was the hotel owner's case that Plazaway had "stepped back" from the full management contract at the end of March 2008, but had continued to provide some skeleton shared services in accordance with the pre-existing understanding. Fayleigh says that in January 2009 it terminated the provision of these shared services that had continued after the management agreement was discontinued.

In support of Fayleigh's contention that the services that Plazaway provided were only these shared services from April 2008 until the end of the year, the company had compiled a dossier in seventeen lever arch files of documents discovered by the operators of the hotel, Plazaway, containing colour-coded bundles arranged in a way that allegedly tended to confirm the owner's argument. Fayleigh's case was that examination of these documents arranged in this way would demonstrate that the services that were provided were not the full management services as provided by the agreement of March/April 2006, but rather were the services shared with the other hotels operated by Plazaway.

An issue concerning the use of these folders in the way that they had been compiled arose on Day 4 of the arbitration hearing when Plazaway's director, Mr Colm Duignan, was being cross-examined by counsel for Fayleigh . In the grounding affidavit, Mr. David O'Brien, director of Fayleigh Ltd, says that the applicant sought to introduce the documentation into evidence by putting them to the

claimant's witnesses. The dossier presented an obvious practical problem as to how all of this mass of papers was going to be processed, proved and evaluated. Counsel argued the matter. The arbitrator made a ruling or determination as follows:-

> "I have listened very carefully to the arguments put forward by counsel for the Applicant and by counsel for the Respondent.
>
> There are seventeen books containing Discovery documents, which have been provided by the applicant. In my view, there is no need to prove the documents themselves. I do not accept that the documents, therefore, have to be put on this or any other witness of the applicant, because I can see them also being put, of necessity, to Mr Savage.
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> Yesterday I indicated my view that it would not be in the interests of either party to do so. Not only because of the additional costs involved, but also because inevitably the applicant's witnesses will have, in many instances, a different view of the significance of the content of them, and I will have to consider that evidence in due course.
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> If they are put to the applicant's witness, that whole exercise would seriously inhibit and delay the progress of this arbitration. I am, therefore, not going to allow them to be put to any witness.
>
> Preparing a second set of seventeen books, with different tags and comments, is unnecessary duplication and will not advance the process one whit.
>
> The next possibility is that the tags are removed and/or portions of the contents are removed, and I read the remainder. Again, that is an exercise that ultimately achieves very little.
>
> I indicated yesterday that I was prepared to read them if required. I am entrusted with the resolving the dispute between the parties. I will not be influenced, as a witness might, by the colour according, or the tagging, and even if I hear the evidence, if it was put, nothing could come out of it, except disagreement, as to the effect of the claims as to whether the colours/flags and the contents of those documents prove that the material is or is not part of the management services, or the shared services.
>
> Therefore, I will read the seventeen books as they are, and I will construe them, and their content, and their relevance, by reference to the pleadings, and in the context of the other evidence."

There the matter rested until the 24th June, 2012, when it was revisited at a Directions Hearing. Counsel for Fayleigh mentioned the documents. Ms. Ciara O'Kennedy, solicitor for Plazaway, in her replying affidavit, describes what happened. The arbitrator indicated that he did not know what he was supposed to do with the documents and whether he was supposed to read them or leave them all aside, but that the matter had been dealt with by a previous Direction which he would revisit if necessary. The respective counsel then made comments as to how the matter should be dealt with and it was agreed "That the documents – and the regard which should be had to them – would be addressed in the legal submissions of the respective parties". That is what happened next.

The claimant in the arbitration, Plazaway, delivered its legal submissions in which it dealt with the matter of the documents as follows:-

> "8. Other matters
>
> 8.1 The arbitrator has requested that the parties express their views on whether or not he should have regard to the folders of Discovery documentation – some seventeen in all – with were marked with a special coloured schematic by the Respondent and were submitted for his consideration. The answer to this issue – is respectfully submitted – is simple. The arbitrator can have no regard whatsoever to that documentation.
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> 8.2 The marked-up folders of documentation which had been submitted by the respondent have been tabulated according to a particular scheme. The purpose of this scheme is to persuade the arbitrator to draw a particular inference from the document.
>
> > The arbitrator is not entitled to draw any inference from any documentation which has not been put to the applicant's witnesses for comment in cross examination: to do so would be a fundamental breach of the basic rules of evidence. Since the documents do not prove themselves – and since the arbitrator is requested to accept that the documents have a particular meaning – then they must have been put to a witness who can give evidence as to their meaning or status or the proper inference to be drawn from them, or else they are inadmissible. The rules of evidence are as simple as that.
>
> 8.3 In the interests of moving the matter forward, the Applicant had expressed willingness for the arbitrator to review the documentation in the absence of the respondent's schematic. This offer was rejected by the respondent and consequently the documents are inadmissible as evidence on any basis whatsoever.
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> > They can form no part of the determination process in which the arbitrator is engaged."

The Fayleigh submission on the documents is as follows:-

> "12. The arbitrator is invited to consider the documentation produced by the applicant on discovery which has been colour tabbed by the respondent to demonstrate the Ltd involvement of the applicant in the management of the hotel in 2008, compared to its weekly if not daily management thereof throughout the period of its retainer prior to that date. This simply serves to illustrate that the involvement of the applicant in the running of the hotel in 2008 could not in any way be regarded as consistent with its obligations under the terms of the management agreement. It should be emphasised that as these documents comprise part of the applicants own discovery, it has already been proved and accordingly, there is no question of documentation creeping into the process of which the applicant is unaware of. But in response to the position of the applicant that it must have been managing the hotel throughout 2008 because of the volume of paper generated by it or sent to it concerning the hotel in that year, the respondent says and examination of the documentation reveals an almost no responsive and much more detached role on the part of the applicant than one might expect if, as the applicant contends, it was fully engaged in the management of the hotel pursuant to the provisions of the Management Agreement during 2008."

The paragraph footnotes as follows:

> "See transcript, day 4, pp. 28-29, ruling of arbitrator where he indicates that 'I will read the seventeen books as they are, and I will construe them and their content, and their relevance, by reference to the pleadings, and in the context of other evidence'."

Ms. O'Kennedy's contemporaneous memo dealing with the directions hearing concludes "all agreed that they would deal with the colour coding by way of legal submissions".

In his award, at p. 46, the arbitrator stated:-

> "I have trawled through every paper and documents submitted to the hearing and I have not admitted the seventeen extra Lever Arch files proffered, I do not consider them appropriate."
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> At p. 61 he said:-
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> "I have read, and re-read all of the documentation (transcripts of over 100 hours of evidence)and taken careful stock of the many documents submitted to me (comprising several thousand pages) and my conclusions are based on extrapolating the facts from the evidence and fitting them in to the matrix of fact to arrive at a fair conclusion."

In the grounding affidavit Mr. O'Brien deposes that at the end of day 4, the arbitrator said "just before we close the record, I am not taking the seventeen booklets for me. Just for the record".

It is clear and is not disputed that the arbitrator did not have the seventeen lever arch files of documents in his possession when he was considering his award. He did of course have the transcript of evidence in which the documents were referred to in some measure and he also had the submissions. He ruled on the basis of the submissions that he would not take the folders into account, but it is evident that he did not base that decision on any examination of the documents in the files. The arbitrator did not ask for the folders and the parties did not submit them to him. It is true that the management company that was the claimant in the arbitration had made a submission that the folders were inadmissible but that had been answered in its submission by the hotel ownership, Fayleigh Ltd. The latter's point was that the documents had all emanated from the discovery made by the management company, that they were the claimant's documents and that in those circumstances the question of admissibility did not arise.

Another complaint made by the hotel owners in this application is that the arbitrator made basic and obvious errors of calculation in regard to the operator's claims for management fees and the termination payment. The management company does not concede that any such errors are either basic or obvious or are sufficient to justify setting aside or remitting the award. In Mr. O'Brien's grounding affidavit, he says that the sum claimed for management fees is overstated in the amount of €33,172.98. Because of that, the termination fee is also overstated, this time in an amount of €33,260.63. Mr. O'Brien complains that, having decided the liability issue, so to speak, the arbitrator miscalculated the amount of the payments that were payable to the claimant and that they represent larger amounts than the claimant was entitled to under the terms of the management agreement, which contains detailed provisions as to how the sums are to be calculated. In response, Ms. O'Kennedy denies any entitlement on the part of Fayleigh to reopen the arbitration which is what she says is being sought. She also offers two specific reasons why this complaint is untenable. First, the applicant acknowledged that the hotel achieved its Gross Operating Profit between March and December 2008. Secondly, Fayleigh conceded through its counsel that it was not making an issue of the calculation of the invoices that were the subject of the arbitration. Plazaway's accountant deposes that the actual figures for the hotel's business in the relevant period justify the amount of the award but that information does not appear to have been available to the arbitrator.

I now turn to consider the law on remitting and setting aside the award of an arbitrator.

The Law
Section 36 of the Arbitration Acts, 1954-1998 allows the Court to remit an award back to the Arbitrator:

> "(1) 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.
>
> (2) Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order."

Section 38, which the Notice of Motion invokes in the alternative, provides that the Court may set aside an arbitrator's award where:

> "(a) an arbitrator or umpire has misconducted himself or the proceedings, or
>
> (b) an arbitration or award has been improperly procured…"

"'Misconduct' is, of course, 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."—see London export Corp Ltd v Jubilee coffee roasting coffee Ltd [1958] 1 W. L. R. 661 at 665 per Jenkins L. J.

The headnote of the Supreme Court judgment in *McCarthy v. Keane* [2004] 3 I.R. 617, records the Court as holding, thirdly

> "That the grounds to remit the award back to an arbitrator pursuant to s. 36 of the Act of 1954 were not Ltd to the four traditional grounds, developed over time, of error on the face of the award, mistake, new material evidence or misconduct. While the courts do not have an unLtd discretion to remit the award and should always respect the procedural autonomy of the arbitrator, the discretion to remit could be invoked where it would be inequitable for the award to take effect or where the dispute between the parties had not been adjudicated in accordance with overarching requirements of fairness or to the extent envisaged in the arbitrator's terms of reference."

Fennelly J. delivering the Court's judgment said at p.626:

> "As counsel for the plaintiff has submitted, the notion of misconduct does not connote moral turpitude. He says that his client had been procedurally disadvantaged by the rulings of the arbitrator and that this would suffice. Atkin J. in *Williams v. Wallis and Cox* [1914] 2 K.B. 478, at p. 485 spoke of the meaning of the expression:-

> 'That expression does not necessarily involve personal turpitude on the part of the arbitrator, and any such suggestion has been 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."'

At p. 627, Fennelly J said that "the standard or test of misconduct of such a nature would be something substantial, something that smacks of injustice or unfairness."

It was noted in *McCarthy* that a mere error on the part of the arbitrator does not constitute misconduct.

In *Galway City Council v. Kingston and another* [2010] 3 I.R. 95, the Supreme Court held, per O'Donnell J that

> "The position has thus been reached where this approach can and should be taken to each of the grounds for remittal (and indeed any new or extended ground), namely, that it is not enough that there should be an error or misconduct, or new evidence, etc., but that the factor must reach the level of being "so serious and so substantial, or so fundamental, that it smacks of injustice and the court cannot permit it to remain unchallenged."

O'Donnell J. said at 115 that "evidence is relevant to an issue when if accepted it would tend to prove or disprove it."

In *Geraghty v. Rohan Industrial Estates* [1988] I.R. 419, Carroll J. held at 427:

> "It appears to me to be essential to the requirements of justice that all parties be given a reasonable opportunity to adduce evidence considered necessary and to make submissions relevant to the issues to be decided."

Discussion

Sections 36 and 38 of the Arbitration Act give the relevant statutory powers. The first provides for remitting the award back to the arbitrator for further consideration and the second for setting aside an arbitrator's award. The law on setting aside awards of arbitrators is very clear. It is an uphill task for the person who wants to overturn the award. There have to be very clear grounds amounting to injustice and the test is described in a variety of ways. The term used for the ground of setting aside the award is misconduct. It does not mean personal misbehaviour or hostility to one of the parties or dishonesty or something of that kind, although something of that kind would obviously amount to misconduct. But the point is that it does not require some such wrongdoing on the part of the arbitrator.

The issue was whether the management company was entitled to the amounts of its claim under various headings which it set out in the points of claim or whether there was any substance in the counterclaim that was set up by the hotel. The hearing took twelve days and occupied 100 hearing hours, which would have amounted to about 25 days if normal court hours were being observed.

Fayleigh Ltd claimed that there were 17 level arch files containing relevant documents obtained from the management company's discovery and organised with, it was said, considerable effort, by the hotel management and its solicitors. The papers were colour-coded so as to show various documents and different kinds of work and to support the hotel's claim that this would assist its case and defeat the case of the management company.

After a good deal of discussion about what was going to happen to these folders, the arbitrator said that he would take them with him and read them all and take them into account to the extent that he thought appropriate when he was giving his award. But that is not what happened. The arbitrator did not actually take the folders or any of them with him and gave his award without taking them into account.

That was contrary to what the arbitrator had said he was going to do. It meant that he did not consider potentially relevant evidence. He decided the case against the people who had produced the 17 lever arch files with the documents that they wanted to introduce. He disbelieved the hotel owner's witnesses and dismissed the counterclaim in its entirety and he upheld the claim made by the hotel management company in every particular.

It is easy to understand why the arbitrator was reluctant to have the documents put to one or more or even all the witnesses. It may well be that there was unnecessary paper produced or even that the dossier might have been something of a procedural weapon produced by the hotel. I think that it might have been possible for counsel to produce some selection or edited version or some kind of synopsis of the material so as to enable the arbitrator to proceed at a reasonable pace and to come to a conclusion. However, that would have meant that there was some consideration of the documents in the lever arch files.

One can think of a number of ways in which the arbitrator might have addressed the practical question of how he was going to deal with the large volume of material. It was unsatisfactory that a witness should have to sit giving evidence while page after page amounting to thousands of documents was put to him and the same perhaps with other witnesses who came later whether on the same side or on the opposite side.

That could have been deal with perhaps by a decision on case management. The arbitrator could have asked counsel for the hotel to produce the most relevant documents and proceeded on the basis of some selected number of those to see whether there was anything in the case that was being made by reference to those documents before embarking on a larger trawl through the material.

Whatever may have been the options available, the fact is that the arbitrator made a clear decisive ruling on Day 4 of the hearing, following submissions made by counsel. Counsel for the management company, Mr. Dunleavy, said that although the arbitrator did indeed on day 4 say that he was going to look at the 17 lever arch files himself and although he did not actually do so in the end, the situation changed when the evidence finished in July, 2013. At that time, the arbitrator raised the question as to what he was to do with the 17 lever arch files and he called for submissions on the question. Mr Dunleavy put in a written submission, as did Mr. Keaney for the hotel owners and each of them addressed the question of the files. Mr. Dunleavy submitted that the arbitrator should pay no attention to them. Mr Keaney at para. 12 of his submission invited the arbitrator to take then into account.

Mr. Dunleavy's point is that the arbitrator was no longer committed to the position that he had originally adopted. But assuming that to be correct, it surely follows that the arbitrator was obliged to give consideration to the admissibility of the material. In order to reject the dossier as having no relevance, he had to consider it. He had indeed done just that in general terms on Day 4 and decided that it was relevant. He held that it was unnecessary in the circumstances to prove the documents by putting them to a witness.

The issue was principally about the manner of compilation and he said he would not be influenced by that. Those comments would have reassured both parties.

One might ask: In deciding whether or not to consider the proffered files, what question could the arbitrator in justice have asked himself, the answer to which would not have involved looking at the documents? I think that the question answers itself. This would appear to be a clear case of misconduct in the technical legal sense.

It is not an answer for the claimant to say that it would have succeeded anyway, even if the material had been considered. Plazaway argued that the arbitrator decided the case by reference to objective evidence offered by both sides in the hearing, citing in support observations of Clarke J in *Limerick City Council v. Uniform Construction Ltd* (Unreported, High Court, 1st November, 2005) where he said:

> "The overall principle is that it is not appropriate to parse and analyse an arbitrator's award but rather to consider from an overall point of view whether it may be said that the arbitrator has dealt properly with each of the matters referred to him."

The situation in this case is quite different. A party putting forward evidence in support of its case and to defeat the opponent's is deprived of a fair hearing if the tribunal rejects the evidence out of hand.

The fact is that the arbitrator made a serious mistake and the award cannot be left alone because there was a departure from fair procedures and a significant, even substantial risk of an injustice. A tribunal cannot ignore a large body of potential evidence. To take a small selection of quotations from the authorities cited above, there was "irregularity"; "it would be inequitable for the award to take effect or where the dispute between the parties had not been adjudicated in accordance with overarching requirements of fairness"; "one instance that may be given is where the arbitrator refuses to hear evidence upon a material issue"; "the factor must reach the level of being so serious and so substantial, or so fundamental, that it smacks of injustice"; [it is] "essential to the requirements of justice that all parties be given a reasonable opportunity to adduce evidence considered necessary."

In the result, the application must succeed. The question then is what remedy is appropriate, that is, should the case be remitted to the arbitrator under s.36 or should the award be set aside under s.38? the better option in my view is remission to the arbitrator for reconsideration.

The first remedy the applicant seeks is remission under s.36 and there is a great deal to be said for that. There are of course some disadvantages but no option is perfect in this situation. Very large costs have been expended on this claim and a huge amount of time has gone into it. It is five years since the dispute first arose with the termination of the relationship between the parties.

As to a complete rehearing, the principal but not the only disadvantages of this course are time and cost. Since the arbitration occupied some 100 hours without examining the documentary folder material it is hard to hazard a guess as to the time it would take to rehear the matter entirely.

I think that this was an error that the arbitrator fell into, but there is no suggestion of any personal or actual misconduct or bias or anything of that kind. It was a mistake and I do not think there is any difficulty for him in re-examining the material.

Nether of the two possible solutions is entirely satisfactory. Each has disadvantages. One solution adds monstrously to the cost and time. That would also reactivate the issue of the counterclaim which the arbitrator rejected in its entirety. The material in question here impacts on the Plazaway claim but not on the counterclaim, which is another reason for not sending it for a complete rehearing.

Sending it back to the arbitrator has the disadvantage that he has reached conclusions in favour of Plazaway and against Fayleigh. On the other hand, the issue is whether this unexamined material affects the arbitrator's decision. He will no doubt carefully and conscientiously embark on the task and seek assistance from the parties.

I am sure that the arbitrator will be quite capable of reviewing his findings in light of the consideration of the documentation that he carries out. His experience and integrity are not in question and it is after all a question of recognising a mistake that has come about and putting it right. The way to put it right is to look at the documents. If he had done that previously then the issue would not arise.

Taking everything into account, I think that the best course is to grant the first relief sought by the applicant and what in my view is the just and reasonable solution, namely, to remit the arbitration to the arbitrator with a direction to him to resume the matter taking account of the 17 lever arch files and with liberty if necessary to re-open the hearing for further evidence or submissions in light of his consideration of these documents.

I also find that the hotel owners have made out a case for reconsideration of the calculation of the amounts due to the management company, in the event that they are found to be entitled to succeed on their claims. In *Keenan v Shield Insurance Co Ltd* [1988] 89 McCarthy J delivering the Court's judgment said 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 the 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."