Neutral Citation Number: [2006] IEHC 441

THE HIGH COURT

[2005 No. 36 MCA]

IN THE MATTER OF AN ARBITRATION BETWEEN MCGUIGAN CONSTRUCTION – V- GREYRIDGE DEVELOPMENTS LIMITED AND IN THE MATTER OF THE ARBITRATION ACTS, 1954-1980 AND IN PARTICULAR SECTION 39 THEREOF AND IN THE MATTER OF ORDER 5 AND ORDER 56 OF THE RULES OF THIS HONOURABLE COURT

BETWEEN

GREYRIDGE DEVELOPMENTS LIMITED

PLAINTIFF

AND

LAURENCE MCGUIGAN TRADING AS MCGUIGAN CONSTRUCTION

DEFENDANT

AND

ANTHONY REDDY

NOTICE PARTY

Judgment of Mr. Justice Gilligan delivered on the 28th day of June, 2006.

1. These proceedings arise from two contracts as concluded between the parties on 7th day of March, 2000, in respect of a housing development scheme then being developed by the plaintiff at Carrick on Shannon in the County of Leitrim. In essence the plaintiff is a development company who employed the defendant as a building contractor to undertake certain building works on the plaintiff's lands. Both contracts were in the Royal Institute of Architects of Ireland form and both contained clause 38, an arbitration clause, which states as follows:-

> " … In case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor either during the progress of the works or after the determination of the employment of the contractor under the contract or the abandonment or breach of the contract, as to the construction of the contract or as to any matter or thing arising thereunder … such dispute or difference shall be and is hereby referred to the arbitration and final decision of such person as the parties hereunto may agree to a point as arbitrator … and the word of such arbitrator shall be final and binding on the parties … the arbitrator shall have power to open up, review and revise any opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him …".

2. During the progress of the works under both contracts a dispute arose between the parties largely regarding payment of sums allegedly due and the time for the performance of the contracts. As a result of this dispute the defendant stopped work and the matter was referred to arbitration in 2001 with Anthony Reddy, architect, the notice party, being the agreed arbitrator.

3. The arbitration proceedings duly commenced and points of claim were submitted by the defendant on 31st May, 2002, and a defence and counterclaim on the plaintiff's behalf was delivered on 3rd July, 2002, the document being amended on two further occasions. A reply to the defence and counter claim was served by the defendant on 21st March, 2003, and it then appears that there was a series of meetings and various documents were exchanged and on a number of occasions a date for the hearing of the arbitration was fixed but never in fact took place.

4. In these proceedings pursuant to a notice of motion dated 15th day of May, 2005, the plaintiff seeks an order directing that the arbitration agreement concluded *inter partes* pursuant to the contracts of 7th day of March, 2000, shall cease to have effect by reason of the fact that the plaintiff alleges that a fraud has been committed by the defendant upon the plaintiff company.

5. The original contract price was approximately €1.2 million. In the arbitration proceedings the defendant is claiming from the plaintiff a sum of €525,623.00. The defendant has been paid to date, pursuant to architect's certificates, a sum of €711,850.00. The plaintiff in the arbitration proceedings counterclaims against the defendant for damages for non completion by the defendant whether pursuant to s. 29 of the contract or otherwise and further counterclaims for the additional costs in completing the housing contract, additional costs in completing the roads and services contract remedial works in both contracts, defects in both contracts, rectification of a retaining wall making good the intentional damage inflicted on the site by the defendant and such further and other damages for breach of contract to which the counterclaimant is deemed to be entitled.

6. The nature of the fraud allegation is the furnishing of a purported invoice from an entity called Kreaney Concrete as dated 2nd May, 2000, which invoice claimed the sum of STG £8,547.50 in relation to a number of deliveries of concrete with a combined quantity of 125.5 metres3 of concrete. The plaintiff asserts that this document is a forgery and a fraud and during the course of the arbitration proceedings sought clarification and further detail thereof. It is clear that the defendant was not co-operative in respect of the additional information that was sought in respect of this document and eventually the defendant admitted that the invoice is a forgery and was used in support of a claim for payment of a total quantity of 498 metres3 of concrete poured on site. However, the defendant denies that any fraud was committed and alleges that his claim for payment in respect of the delivery and pouring of concrete was valid as to the quantity of concrete delivered to the site and poured and was in accordance with the quantity claimed by him in the course of the arbitration proceedings.

7. The defendant claims that the resolution of the sums that are properly due in respect of poured concrete can be quantified on the basis of measurements of quantity rather than on the basis of vouched invoices. The defendant maintains that the plaintiff's quantity surveyor carried out a measurement on site to determine the quantity of concrete delivered and indicated that he was prepared to certify a quantity of poured concrete of 445m3. The defendant alleges that the divergence of opinion in relation to the quantity of concrete delivered is not unusual in the determination of issues that arise in building disputes.

8. During the course of the hearing of the motion before this Court a dispute arose as to whether or not poured concrete can actually be measured post facto and it is clear that the expert witnesses as retained on behalf of the respective parties cannot agree on this particular issue both adopting a completely contrary view as to whether or not poured concrete can be measured after it has been poured and used as a foundation.

9. In any event the amount of the admittedly forged invoice is STG £8,847.50 and the volume involved is 125.5 metres3 of concrete against a background where the total claim was for 498 metres3 of poured concrete.

10. The plaintiff also queries a number of invoices from PT McWilliams Contracts and from a Colum McMahon all of which relate to a claim in respect of labour allegedly supplied by the defendant on site.

11. The total of the invoices from PT McWilliams Contracts is £8,063.27 and the total of the invoices from Colum McMahon amount to £37,474.00 sterling.

12. The plaintiff makes serious allegations in respect of the credibility of these invoices pointing out for example that the mobile telephone number on the Colum McMahon invoice was only activated two years after the 5th day of August, 2000, being the date of the invoice. When attempting to clarify the subject matter of the PT McWilliams contracts the plaintiff was advised by Mr. McWilliams that if the defendant said that they were on the plaintiff's site then they were there.

13. I am quite satisfied that the Kreaney Concrete invoice is a forgery and is admitted to be so by the defendant. I am further satisfied that very serious issues as to credibility have been raised by the plaintiff in respect of the PT McWilliams and Colum McMahon invoices.

14. Counsel for the plaintiff urges upon the Court that these proceedings should be removed from the arbitrator and the issue of fraud should be decided by the Court. Counsel refers to the fact that in respect of part of the defendant's claim amounting to a sum in the region of €300,000 there is a lack of documentation and that this lack of documentation when combined with forgery and fraud renders the arbitration process unsatisfactory and inappropriate.

15. Counsel for the plaintiff further submits that there has to be a concern as regards the manner in which the defendant runs his business and his general modus operandi. He refers to the lack of candour of the defendant in his approach to the plaintiff's claim, the fact of having produced the now admitted forged invoice to the plaintiff's quantity surveyor for the purpose of securing agreement as to the actual amount of poured concrete and having regard to the general manner in which the defendant has run his business, including making purchases for cash, there has to be a public interest issue in having the plaintiff's claim as against the defendant ruled upon in the High Court.

16. Counsel for the defendant urges upon the Court that the arbitration process which has been ongoing since 2001 is the appropriate method of resolving the dispute that exists between the parties. The invoices in respect of which issue has been taken do not represent any significant amount of money when taken in the overall context of the defendants claim in the sum of €525,623.00. For example counsel for the defendant refers to the fact of the Kreaney invoice representing 0.5% of the contract price. Counsel refers to the fact that this is not a situation where the entire substrata of the claim is vitiated by an alleged fraud and the issue relates only to a minor part of the claim. It is contended that the arbitration machinery gives the arbitrator all relevant powers to deal with the points that arise and that clearly it would be a matter for the defendant to prove his claim as against the plaintiffs and to satisfy the arbitrator in respect thereof. Simply because matters may not be adequately vouched is not a reason for the dispute that has arisen between the parties at this stage to be removed from the jurisdiction of the arbitrator which necessarily would bring about a situation where High Court proceedings would have to be commenced.

17. As regards the public interest aspect as contended for by counsel for the plaintiff, it is submitted on the defendant's behalf that it is accepted that the Kreaney invoice is a forgery and further admitted that the concrete as claimed for was not bought from Mr. Kreaney and that concrete which was poured on site was purchased for cash. Counsel submits that these facts do not give rise to an issue of public interest.

18. Section 39 of the Arbitration Act 1954 states as follows

> "(1) Where –
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> (a) an agreement between any parties provides that a dispute which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement, and
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> (b) after a dispute has arisen any party, on the ground that the arbitrator so named or designated is not or may not be impartial, applies to the Court for leave to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be impartial
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> (2) Where –
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> (a) an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and
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> (b) a dispute which so arises involves the question whether any party has been guilty of fraud, the Court shall, so far as may be necessary to enable the question to be determined by the Court, have power to order that the agreement shall erase to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement.
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> (3) In any case where by virtue of this section the Court has power to order that any arbitration agreement shall cease to have effect, or to give leave to revoke the authority of any arbitrator or umpire, the Court may refuse to stay any action brought in breach of the agreement.

19. I am satisfied in the particular circumstances of this case that the parties entered into a valid and binding agreement which provided that disputes which may arise in the future between them shall be referred to arbitration and I am further satisfied that a dispute has arisen between the parties which involves the question whether the defendant, being a party to the agreement, has been guilty of fraud.

20. The question accordingly to be answered is as to whether or not in the exercise of my discretion on the particular facts as found by me, this Court should direct that the two agreements shall cease to have effect in so far as each provided that any disputes which may arise in the future shall be referred to arbitration and to revoke the authority of the notice party Anthony Reddy and to refer the issues between the parties to a plenary hearing.

21. In *Cunningham-Reid and Another v. Buchanan-Jardine* (1988) 2 All E R 438 a similar situation arose. Flowing from a contract for the refurbishment of the plaintiffs' house the defendant claimed that she had frequently arranged for falsely inflated suppliers invoices to be sent to the plaintiffs and had frequently used money advanced by the plaintiffs for her personal expenses instead of for the agreed purpose of purchasing furnishing and services. The defendant applied under s. 4(1) of the Arbitration Act 1950 for a stay of the proceedings pending arbitration. The master granted a stay, but on appeal the High Court removed the stay on the ground that the allegation of fraud, supported by strong and convincing evidence, made the case unsuitable for arbitration. The defendant appealed and on the hearing of the appeal the plaintiffs contended that the court had a discretion under s. 24(2) and (3) of the Arbitration Act 1950 to order that an arbitration agreement had no effect and to refuse a stay of proceedings where a dispute which would otherwise be referred to arbitration involved a question of fraud. The Court of Appeal held that where a party accused of fraud opposed a stay of proceedings the court would almost invariably refuse a stay so that the matter could proceed to trial at which the party accused of fraud could have the opportunity to clear his name in open court. However, where the party alleging fraud opposed a stay and the party accused of fraud wished to proceed to arbitration, the allegation of fraud was not by itself sufficient reason for the court to refuse a stay. Instead the court has discretion dependent on all the circumstances of the case. Since the parties had agreed, without reservation, that disputes between them should be decided by arbitration and since the plaintiffs wish to proceed with their action was not sufficient reason to justify refusing a stay, a stay of the plaintiffs' action would be granted so that the matter could be referred to arbitration. The defendant's appeal was therefore allowed.

22. Woolf LJ in the course of his judgment at pp. 445 - 446 stated:

> "In my view this is a case where there is a serious charge of fraud made, but in which there is no good reason why the normal course should not adopted of allowing the matter to proceed to arbitration in accord with the parties agreement … There is no difficulty in this day and age in appointing an arbitrator who is well capable of properly determining and trying an issue of fraud of this sort, indeed many members of both sides of the profession now have very considerable experience as recorders of trying just issues. … In addition it is to be noted that, apart from the fact that there is this allegation of fraud made by the party opposing the stay, there is no feature about this case which means that it is particularly suited to trial by a court rather than an arbitrator. In my view there can be circumstances which would make a case unsuited to be the subject of a stay where the stay is being opposed by the party charging fraud, but this is not one of those cases. There is in particular no special public interest aspect arising from this charge of fraud which means that it is undesirable from the public point of view that the matter should be dealt with by arbitration rather than in open court. I regard this case as one where, while there is an allegation of fraud at this stage that is something which clearly falls within the arbitration agreement and therefore the proper exercise of discretion looking at all the circumstances of this case was one which required the judge to uphold the decision of Master Lubbock and to grant a stay and I would therefore allow this appeal and restore the Master's order".

23. O'Hanlon J. in the course of his judgment in *Administratia Asigurarilor de Stat, Winterthur Swiss Insurance Company and Others v. The Insurance Corporation of Ireland plc* (Under Administration) [1990] 2 I.R. 246 specifically applied *Cunningham-Reid v. Buchanan-Jardine* stating at p. 256 of his judgment;

> "I think that the general approach adopted by Woolf LJ represents the correct approach in giving effect to the provisions of s. 39(2) and (3) of the Arbitration Act 1954. The provisions of the section do not fetter in anyway the manner in which the court should exercise its discretion and I do not see any reason for reading into the section any qualifications which are not already inherent in the words used by the draftsman. Accordingly, it is a matter of staying or refusing to stay the legal proceedings, having regard to all the salient features of this particular case".

24. O'Hanlon J. also dealt with the suggestion, as made in some of the English cases, that the party opposing a stay on legal proceedings must establish a *prima facie* case of fraud against his opponent. He indicated that he preferred the approach adopted by the Irish Queen's Bench Division in the case of *Workman v. Belfast Harbour Commissioners* [1899] 2 I.R. 234 where Kenny J. expressed himself as follows at p. 244;

> "Therefore, without offering any opinion whatever as to the merits of the plaintiff's claims, I am convinced that they are made with perfect *bona fides* and with the deliberate intention of prosecuting them, and that on the documents before us there is no foundation for the contention that they are either sham or frivolous, or that they are put forward with the object of placing an obstacle in the way of a compulsory reference under the 14th section of the Common Law Procedure Act 1856".

25. The courts in general have been reluctant to interfere in arbitrations unless there is a good reason to do so. In the context of awards Murphy J. stated the following in *Noel Hogan v. St. Kevin's Company* [1986] I.R. 80 at pp. 88 – 89:

> "It seems to be where parties refer disputes between them to the decision of an arbitrator chosen by them, perhaps for his qualification in comprehending technical issues involved in the dispute or perhaps for reasons relating to expedition, privacy or costs, it is obviously and manifestly their intention that the issue between them should be decided and decided finally by the person selected by them to adjudicate upon the matter…and it seems to me that at the end of the day both parties were content to have the important point of law determined not by the Courts but by the arbitrator and that notwithstanding the fact that he himself possessed no legal qualification. Having adopted that course, it seems to me that it would be unfair and unjust to permit the unsuccessful party to assert a right to have a decision of the High Court substituted for that of the arbitrator."

26. This view was endorsed by the Supreme Court in *Keenan v. Shield Insurance Company Limited* [1989] I.R. 89. The defendant's submissions relied on the statements of McCarthy J. in *Keenan*, where the learned judge stated at p. 96 of his judgment:

> "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."

27. Keane C.J. in Re *Via Net Works (Ireland) Ltd* [2002] 2 I.R. 47 adopted as correct, the statement of law by Lord Mustill in *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] A.C. 334, who stated at p. 353 of his judgment:

> "I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their case to the experts and if

necessary to the arbitrators, that is where the respondents should go."

28. I am satisfied in the particular circumstances of this case that the plaintiff's allegations against the defendant in respect of forgery and fraud are made *bona fide*.

29. I do not consider that this case is one of great complexity or that the matter involves the resolution of any serious or difficult questions of law, although I accept that any allegation of fraud raises a serious issue. The claim in my view is a standard dispute between a developer and a building contractor as retained and pertains solely to sums of money claimed in respect of works allegedly carried out and a counterclaim by the developer against the building contractor for having failed to complete the necessary works as agreed in the contracts.

30. The arbitrator as appointed is particularly distinguished and experienced in dealing in matters of this nature and I am not satisfied that a case has been made out that he would not be in a position to deal with the issues that arise herein.

31. The amount of money specifically involving the various invoices as previously referred to herein which are bona fide disputed by the plaintiffs do not represent a significant amount of money when taken in the context of the overall claim. Insofar as Mr. Mohan contends on the plaintiff's behalf that there remains a claim in the region of €300,000 which is unvouched, clearly this will be a matter for the arbitrator to decide upon and no specific allegation of fraud has been made out in respect of this aspect of the claim.

32. The arbitration in this matter has been ongoing since 2001 and a substantial amount of documentation has passed between the parties. Several actual hearing dates have been set but for a variety of reasons, allegations and counter allegations, it has not actually been possible to get the arbitration to a hearing. Suffice to say however that it is clear that it should be possible to get the arbitration hearing under way in the near future. To come to a conclusion that I revoke the authority of the arbitrator appointed by virtue of the agreements and to set the arbitration procedure to date at nought would necessarily involve very substantial additional costs and expenses which in my view having regard to the actual amount of money which is the subject matter of the allegation of fraud could not be justified.

33. I further come to the conclusion that to revoke the authority of the arbitrator and to set the arbitration procedure at nought when it is now some five years in existence would only serve to bring about a very substantial delay in the final determination of these proceedings which in my view on the facts as presented before me could not be justified.

34. Further in the particular circumstances of this case it is the plaintiff who is the party alleging fraud and who now wishes the dispute to be decided by way of a plenary hearing while the defendant being the party charged with fraud is the party resisting the application and who wishes the matter to remain within the arbitration procedure in accordance with the contracts as entered into.

35. I also have to bear in mind that in respect of the Kreaney Concrete invoice the defendant has admitted that the invoice is a forgery and that he never bought any concrete for the plaintiff's site from Mr. Kreaney. The arbitrator in my view is clearly capable of drawing the appropriate inferences from this admission.

36. I do not consider on the facts as presented before me that any public interest issue arises. It may be that the defendant did not conduct his business in an orthodox manner, that he was prepared to rely on forged invoices, that other invoices as produced by him in respect of the vouching of his claim are open to serious question and that he purchased goods for cash but these in my view are all matters which the arbitrator will be well able to deal with and to draw where necessary the appropriate inferences. None of these aspects of the plaintiff's claim in my view taken either individually or collectively give rise to the necessity for a plenary hearing.

37. Accordingly for these reasons in the exercise of my discretion I come to the conclusion that in the particular circumstances of this case it is appropriate that I refuse the relief as sought by the plaintiff herein.