Grangeford Structures Limited (In Liquidation), Plaintiff, v. **S.H. Limited**, Defendant [1987 No. 20 Sp.; 1987 No. 152 Sp.]

Supreme Court 11th July, 1989

Arbitration - Award - Application to set aside - Misconduct - Hearing - Directions - Time limits - Counterclaim out of time - Counterclaimant seeking adjournment at hearing - Refusal - Walk out in protest - Hearing continued - Arbitrator - Powers - Exercise - Reasonableness - Whether misconduct - Arbitration Act, 1954 (No. 26), ss. 19 and 38.

The plaintiff and defendant were main contractor and sub-contractor respectively to a shopping centre development by agreement in writing containing an arbitration clause. A dispute was referred to arbitration and a preliminary hearing held by the arbitrator on the 16th May, 1985. Under his directions points of claim and defence were filed by the 24th September, 1985. On the 6th November, 1985, the defendant's solicitor wrote to the arbitrator to say that he was "formulating a substantial counterclaim . . . to be something in the region of £55,000 or thereabouts . . ." The arbitrator replied on the 7th January, 1986, that he was agreeable to allowing the defendant amend its defence to make a counterclaim and allowed it a further 21 days and a further period of 14 days "for filing the list of documents" and wrote "no extension to these periods will be allowed except for grave reasons and if no amended defence and counterclaim is received within the period stated then I will proceed." On the 4th February, 1986, he wrote to the parties that as he had not received any amended claim or other communication from the defendant's solicitor, he proposed to proceed to a hearing on the 7th March, 1986, at 10.30 a.m. On the 5th March, 1986, the defendant's solicitor wrote to the arbitrator that he was not yet in a position to file the counterclaim and would be seeking an adjournment of the arbitration hearing. At the commencement of the hearing he applied for the adjournment which was objected to by the solicitor for the plaintiff and the arbitrator peremptorily adjourned the hearing to 2.15 p.m. on the same day to allow the defendant's solicitor consult his client. At the resumed hearing at 2.15 p.m. the defendant's solicitor walked out in protest when his application for an adjournment was refused. The hearing then continued and by his award of the 4th April, 1986, the arbitrator directed payment to the plaintiff of £18,330.53.

The plaintiff sought leave of the High Court to enforce the award by special summons pursuant to s. 41 of the Arbitration Act, 1954, and the defendant issued a special summons claiming that the arbitrator had misconducted himself and that the award was a nullity and should be set aside.

Costello J. held that the arbitrator had acted reasonably and without misconduct in refusing to adjourn the arbitration hearing and that he had jurisdiction to proceed with the arbitration having given reasonable notice to the parties as to time limits for the presentation of claims and counterclaims and notwithstanding that the defendant had walked out.

The defendant appealed to the Supreme Court from the judgment and order of the High Court and argued that the arbitrator's refusal to adjourn the proceedings was unreasonable and arbitrary and constituted an unfair procedure, and that the arbitrator had no power to proceed with the hearing *ex parte* in the absence of the defendant.

Held by the Supreme Court (Finlay C.J., Griffin and McCarthy JJ.), in dismissing the appeal and affirming the order of the High Court, that the arbitrator had not misconducted himself and had jurisdiction to continue the hearing in the absence of the defendant and make an award on the evidence presented to him.

Bremer Vulkan v. South India Shipping [1981] A.C. 909 considered.

Per McCarthy J.: An arbitrator has an inherent power to issue directions requiring the parties to submit details of their claims, to fix dates for the hearing of the reference and, in a proper case,

to proceed on such dates despite the absence of one or other party, where such party has been refused any further adjournment. There is no sanction that he can properly impose upon a party to a reference which has failed to present its claim in a formal fashion or refuses to participate in the hearing. To proceed in its absence and make an award is not a punishment in such circumstances. Such powers are inherent to an arbitrator rather than conferred by s. 19, sub-s. 1 of the Arbitration Act, 1954.

Observations of Avory J. in *Re Unione Stearinerie Lanza and Wiener* [1917] 2 K.B. 558 approved; *dictum* of Scrutton J. in *Re Crighton and Law Car and General Insurance Corporation Ltd.* [1910] 2 K.B. 738 explained.

Cases mentioned in this report:-

Bremer Vulkan v. South India Shipping [1981] A.C. 909; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289; [1981] 1 Lloyd's Rep. 253; (1981) 125 S.J. 114.

Re Crighton and Law Car and General Insurance Corporation Ltd. [1910] 2 K.B. 738; (1910) 80 L.J.K.B. 49; 103 L.T. 62.

Grangeford Structures Ltd. (In vol. liq.) [1988] I.L.R.M. 129 (H.C.).

Stillorgan Orchard v. McLoughlin (Unreported, High Court, Hamilton J., 10th July, 1978).

Re Unione Stearinerie Lanza and Wiener [1917] 2 K.B. 558; [1916-17] All E.R. Rep. 1079; (1916) 117 L.T. 337; 86 L.J.K.B. 1236; 61 S.J. 526.

Special Summonses.

The facts are summarised in the headnote and set out in the judgment of Griffin J., *post.*

On the 10th February, 1987, the plaintiff issued a special summons seeking leave to enforce the arbitrator's award of the 4th April, 1986, pursuant to s. 41 of the Arbitration Act, 1954. On the 11th February, 1987, the defendant issued a special summons claiming that the arbitrator's award was the result of misconduct by the arbitrator of himself and of the proceedings and that the award was a nullity and should be set aside. On the 16th February, 1987, the High Court (Costello J.) by order consolidated the two proceedings and the matter came on for hearing on affidavit on the 25th and 26th March, 1987.

In his judgment delivered on the 26th March, 1987 ([1988] I.L.R.M. 129) Costello J. gave liberty to the plaintiff to enforce the award and ordered the defendant to pay to the plaintiff a total sum of £23,382.11 in respect of the amount of the award and the arbitrator's and plaintiff's costs of the arbitration, together with further interest.

The defendant appealed from the judgment and order of the High Court to the Supreme Court by notice of appeal dated the 22nd June, 1987, which appeal was heard by the Supreme Court on the 25th May, 1989.

Paul McDermott for the defendant: When the defendant was not ready to proceed on the date fixed for the hearing, the arbitrator purported to proceed to determine the matter in the defendant's absence. The defendant did have a counterclaim but this was not before the arbitrator. If his determination purports

to determine also the issue of the counterclaim, then it is unfair. An arbitrator is prohibited from proceeding with an arbitration hearing by the non-attendance of either party: *Bremer Vulkan v. South India Shipping*; *Re Unione Stearinerie Lanza and Wiener* and Debtors (Ireland) Act, 1840, section 63.

Eoin McCullough for the plaintiff: An arbitrator has power to order pleadings to be exchanged and to limit the time in which this may be done. All issues (including those to be raised in any counterclaim) were on the face of the pleadings before the arbitrator: *Bremer Vulkan v. South India Shipping*; *Re Crighton and Law Car and General Insurance Corporation Ltd.* and *Stillorgan Orchard v. McLoughlin.*

Cur. adv. vult.

Finlay C.J. 11th July, 1989
I agree with the judgments to be delivered by Griffin J. and McCarthy J.

Griffin J.
In 1983, Grangeford Structures Ltd. now in liquidation ("the plaintiff"), was the main contractor for the construction of a shopping centre in Bray. On the 26th September, 1983, it entered into an agreement in writing with S.H. Ltd. ("the defendant") for the carrying out by the defendant by way of sub-contract of certain precast concrete works at the shopping centre. That agreement contained an arbitration clause. Disputes and differences having arisen between the parties, these were duly referred to Mr. David Kelly, quantity surveyor, as arbitrator on the 12th March, 1985.

From early on the arbitrator encountered delay, most of which he attributed to the defendant. He arranged a preliminry hearing for the 16th May, 1985, and this was attended by the representatives of both parties. It was agreed at that meeting that a joint document setting out the dates and the amounts of certificates and payments under the contract should be submitted to him by the parties. This would seem to be a document that should present little difficulty. As this requirement had not been complied with, on the 16th July, 1985, by notice to the parties he fixed the 2nd August, 1985, as the date for receipt by him of the joint document. As no such document was even then received by him, he fixed the dates for submission to him of the respective points of claim of the plaintiff, the defendant's points of reply and counterclaim, and the plaintiff's reply. All these documents were delivered to him in due course, and were complied with by the middle of October. Paragraph 4 of the defendant's reply and counterclaim was as follows:-

"(4) While the insurance claim following the floor collapse has been settled and the main contractor's insurance policies covered all claims, the re-

sponsibility of the collapse still rests fairly and squarely on the shoulders of Grangeford Structures Ltd. This is borne (sic.) out by the architect and structural engineers."

This could hardly be described as a counterclaim. To that paragraph the plaintiff replied:-

"This point is not relevant as the insurance claim has been settled."

The arbitrator offered to the parties a number of dates in November for the hearing, but before a date was finally agreed on, Mr. Giles Kennedy, solicitor for the defendant, wrote to the arbitrator on the 6th November, 1985, confirming that his firm was:

"formulating a substantial counterclaim as against Grangeford Structures Ltd., for negligence and damages sustained and arising therefrom as a consequence of Messrs. Grangeford Structures' failure to apply proper building practice and their negligence and breach of contract. We estimate that the counterclaim is to be something in the region of £55,000 or thereabouts but in due course we propose submitting same to you for disposal in the arbitration herein."

On the 7th January, 1986, the arbitrator wrote to Mr. Kennedy stating that his letter was, in effect, "an application to amend the defence and make a counterclaim", and that he was, in the circumstances, agreeable to allow the application, on the basis, *inter alia* that:-

"in view of the considerable delays in bringing this dispute hearing (sic), most of which are attributable to your client, a period of 21 days from the date of this letter will be allowed for the filing of the amended defence and counterclaim and a period of 35 days from the date of this letter will be allowed for filing the list of documents; no extension to these periods will be allowed except for grave reasons and if no amended defence and counterclaim is received within the period stated then I will proceed".

On the 4th February, 1986, the arbitrator wrote to the parties stating that as he had not received any amended claim or other communication from the solicitor for the defendant he proposed to proceed to a hearing and fixed 10.30 a.m. on Friday the 7th March, 1986, at the premises of the Society of Chartered Surveyors in Dublin for this purpose.

Nothing further was heard from Mr. Kennedy until the 5th March, 1986 (two days before the date fixed for the hearing), when he wrote to the arbitrator stating that his firm was not yet in a position to file the counterclaim and that they would be looking for an adjournment of the arbitration on the 7th March. No reason for or explanation of the alleged inability to deliver the counterclaim was furnished then, nor indeed at anytime thereafter. On the 7th March the arbitrator opened the hearing, and Mr. Kennedy applied for an adjournment to permit the preparation and submission of a counterclaim. The solicitor for the plaintiff objected to any adjournment, and the arbitrator peremptorily adjourned the hearing to 2.15 p.m. on the same day, so that Mr. Kennedy could consult his client. When the hearing resumed at 2.15 p.m., Mr. Kennedy again applied for an adjournment, and withdrew from the hearing when that application was refused.

The hearing then continued in the absence of Mr. Kennedy and the arbitrator heard such evidence as was offered to him and concluded the hearing.

By his award dated the 4th April, 1986, the arbitrator directed that the sum of £18,330.53 inclusive of value added tax, together with the plaintiff's costs of the reference and of the award, should be paid by the defendant to the plaintiff. The award was forwarded to the defendant on the 3rd September, 1986. As the amounts awarded were not paid by the defendant, a special summons was issued on behalf of the plaintiff on the 10th February, 1987, seeking leave of the High Court to enforce the award, pursuant to s. 41 of the Arbitration Act, 1954. On the 11th February, 1987, a special summons was issued on behalf of the defendant claiming that the award of the arbitrator was a result of misconduct by the arbitrator of himself and of the proceedings and that the award should be set aside. These latter proceedings were not issued for some months after the time limited for doing so had expired, and no application had been made to the court to extend the time for so doing.

Both proceedings were consolidated and were heard by Costello J. who gave liberty to the plaintiff to enforce the award and ordered the defendant to pay to the plaintiff a total sum of £23,382.11 in respect of the amount of the award and the arbitrator's costs of the arbitration, and interest, and refused the relief claimed by the defendant (i.e. to set aside the award). In the course of his judgment, Costello J. having recited the facts said:-

> "In my view the arbitrator acted reasonably. I do not think there was any misconduct on his part in refusing to adjourn the arbitration. I think ample time had been given to the defendant to formulate its counterclaim. No explanation was apparently given to the arbitrator and no explanation has been given to me as to why the counterclaim was not furnished in time. The counterclaim has been exhibited in the affidavits filed in these proceedings and it is a very detailed and substantial one, but no explanation has been forthcoming as to why the counterclaim had not been formulated in the months from November to March, months which were available to the defendant before the arbitration.
>
> The question does arise as to whether the arbitrator had jurisdiction to continue the arbitration, one of the parties having walked out and the arbitrator in effect continuing the arbitration on an *ex parte* basis. In my view he had. In my view it would make nonsense of arbitration proceedings if, reasonable notice having been given to the parties as to time limits for the presentation of claims and counterclaims, an arbitrator could not proceed because one party failed to carry out his reasonable requirements. It would mean that one party could frustrate the proceedings by mere inaction. It seems to me that the speeches of the majority in the House of Lords in the case of *Bremer Vulkan v. South India Shipping* [1981] A.C. 909, to which I have been referred, support as a matter of law the conclusions which common sense would suggest are the correct ones."

Costello J. held that, in the circumstances, there was no misconduct involved in the manner in which the arbitrator conducted the proceedings, that he acted

reasonably in the time limits fixed and in refusing the adjournment, and that he was entitled to proceed in the absence of the defendant and had jurisdiction to make the award. He refused the declaration sought in the summons issued by the defendant, who, he held, had not established any merits which would justify extending the time for bringing an application to set aside the award on the ground of misconduct nor shown why he should extend the time for bringing an application to set aside the award.

From the decision of Costello J. the defendant appealed to this Court. On the hearing it was argued that there was misconduct on the part of the arbitrator in the conduct of the proceedings and that his award should be set aside pursuant to s. 38 of the Act of 1954. Two grounds were advanced for this:-

1. that the refusal of the arbitrator to adjourn the proceedings was an unreasonable and arbitrary decision which resulted in an unfair procedure having been adopted by him; and
2. that the arbitrator had no power or jurisdiction to refuse the application for an adjournment made on behalf of the defendant and to proceed *ex parte* in the absence of the solicitor for the defendant.

In my opinion there is no basis for holding that the arbitrator acted unreasonably or arbitrarily in refusing the adjournment or that this resulted in an unfair procedure. Approximately one year had elapsed between the arbitrator's appointment and the date fixed for the hearing. During that time there had been inordinate delay most of which had been the fault of the defendant. More than sufficient time had been afforded to the defendant to prepare any counterclaim which it wished to have included in the arbitration. In the four months between the 7th November, 1985, and the date of the hearing nothing whatever - not even an acknowledgment - had been heard from the defendant, despite reminders and the fixing of times for submission of the counterclaim, until two days before the date fixed for the actual hearing. Costello J. has in his judgment fully considered and decided this issue and his conclusion is in my view unimpeachable.

With regard to the question as to whether in the circumstances the arbitrator had jurisdiction to continue the arbitration in the absence of the defendant, I am satisfied that Costello J. was correct in his conclusion that the arbitrator had jurisdiction to continue the hearing and I would adopt his reasons, which in my view were so clearly and succinctly stated, for so holding. In the High Court and in this Court a good deal of the argument was concerned with the case of *Bremer Vulkan v. South India Shipping* [1981] A.C. 909, and with the judgments in that case, on which case both parties relied. As it was referred to by Costello J., and in deference to the argument of counsel, I feel that I should refer to it. The main issue there was whether, where there has been inordinate and inexcusable delay, an arbitrator has power to dismiss for want of prosecution. Speaking for the majority, Lord Diplock held that the arbitrator *had* power to dismiss for want of prosecution, while Lord Fraser of Tullybelton and Lord Scarman, dissenting, held that he had no such power. That is not the issue which arises in this case, but the speeches in the case did deal with the powers of arbitrators in circumstances

somewhat similar to those which arose in this case. In relation to such powers, Lord Diplock at p. 987 said:-

> "My Lords, arbitrators have in the past often exercised the power to make an award ex parte against a respondent who failed to appear at the time and place fixed for the hearing; and, if he did appear, to debar him from raising a defence of which, in breach of the arbitrator's directions, he had failed to give to the claimant adequate and timely notice. The power of arbitrators to refuse to allow a new defence to be raised for the first at the hearing where they thought that it would not be fair to allow this to be done was recently upheld by the Court of Appeal in *Congimex S.A.R.L. v. Continental Grain Export Corporation* [1979] 2 Lloyd's Rep. 346. In agreement with Bridge J. (in *Crawford v. A.E.A. Prowting Ltd.* [1973] Q.B. 1) I see no reason why an arbitrator should not have the like power to fix a date for the hearing and to make an award ex parte in favour of the respondent when the claimant failed to appear at the time and place so fixed, and likewise, if he did appear, to debar the claimant from raising any claim of which, in breach of the arbitrator's directions, he had failed to give the respondent adequate and timely notice."

Lord Fraser of Tullybelton at p. 989 said:-

> "I do not think it can make any difference whether an arbitrator purports to dismiss a claim for want of prosecution in so many words, or reaches the same result indirectly, by making a peremptory order for the plaintiff to lodge his claim by a certain day, and then, if the claimant fails to obey the order, refusing to hear him. There seems to be no authority as to the arbitrator's power in these circumstances."

He said at p. 990A that he considered "that an arbitrator does not have power to refuse to hear a party who has failed to obey a peremptory order for lodging a claim." Lord Scarman, having stated that he could find no justification for the view that an arbitrator had power to dismiss an application for want of prosectution, continued at p. 1001:-

> "His power was limited to making an award upon the merits. The nearest he could get to a dismissal on grounds of delay would have been to fix a day for hearing and make an award upon the merits based upon whatever evidential material was then available to him."

That case does not in my view offer support to the defendant. What Lord Diplock and Lord Scarman said the arbitrator had power to do is precisely what the arbitrator did in this case. He made an award on the evidence presented to him. This did not include any evidence in relation to any counterclaim of the defendant, since no such counterclaim was in fact before him. His award which is expressed to be in full settlement of all claims by each of the parties against the other in the reference must be confined to the matters properly before him and evidence which he heard and determined. The question as to whether or not, in the circumstances, the defendant can now proceed with a counterclaim was not discussed either in the High Court or in this Court and I would express no opinion on that question.

I would affirm the order made by Costello J. in the High Court and accordingly dismiss this appeal.

McCarthy J.

The defendant, S.H. Ltd., appeals against the refusal of the High Court judge (Costello J.) to hold that the arbitrator's award on the defendant's counterclaim in the arbitration has been obtained as a result of the misconduct of the arbitrator. The misconduct alleged is the refusal of the arbitrator to allow time to the defendant for the submission of a counterclaim in the arbitration and proceeding with what is called an *ex parte* hearing of the reference in the face of objection by the defendant. The sequence of events leading to and being part of the arbitration are set out in the judgment of Griffin J. In his award, the arbitrator refers to the defendant's points of reply and counterclaim, defence and counterclaim, amended defence and counterclaim, amended defence and counterclaim or other communication. The arbitrator awarded and directed the payment of the sum stated "in full settlement of all claims made by each of the parties against the other in the reference." Costello J. concluded that the conduct of the arbitrator in the directions that he gave and fixing times for filing documents and giving notice of the hearing of the arbitration had been reasonable. On the conclusion of the argument for the defendant in this Court counsel were informed that the Court did not require to hear argument on this point. I mention this to emphasise my view not alone that the learned trial judge was correct in his conclusion that the arbitrator acted reasonably, but that any other conclusion would have been quite unfounded. Apart from the continued failure of the defendant to deliver details of the counterclaim, no explanation whatever was offered to the arbitrator, to the High Court, or indeed to this Court for that failure.

The Appeal

Having disposed of the "reasonableness" point, the real issue concerns the power or jurisdiction of the arbitrator to proceed when one of the parties to the reference has withdrawn having failed to secure an adjournment. The defendant contends that the arbitrator has no such power; being appointed pursuant to a contract, the basis of his appointment must lie in the terms of the contract subject to the provisions of any relevant statute. If, it is argued, the parties wished to give such powers to the arbitrator, they could have provided for them in the sub-contract, in particular in clause 26 which, so far as relevant, reads:-

> "In the event of any dispute or difference between the Contractor and the Sub-Contractor . . . in regard to any matter or thing of whatsoever nature arising out of this Sub-Contract or in connection therewith, then either party shall give to the other notice in writing of such dispute or difference and such

dispute or difference shall be and is hereby referred to the arbitration of such person as the parties hereto may agree to appoint as Arbitrator or failing such agreement as may be appointed on the request of either party by the Chairman for the time being of the Quantity Surveyors Section of the Royal Institute of Chartered Surveyors (Republic of Ireland Branch) and in either case the Award of such Arbitrator shall be final and binding on the parties . . . Every or any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1954 . . .

In support of the arbitrator's power, the plaintiff relies upon the sub-contract to be construed as conferring such power by implication, and on s. 19, sub-s. 1 of the Arbitration Act, 1954, which reads:-

> "Unless a contrary intention is expressed therein every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrator or umpire, on oath or affirmation, in relation to the matters in dispute and shall, subject to any legal objection, produce before the arbitrator or umpire all documents (other than documents the production of which could not be compelled on the trial of an action) within their possession or power respectively which may be required or called for, and do all such other things which during the proceedings on the reference the arbitrator or umpire may require."

This last provision, it is said, confers a power on the arbitrator to give directions, to fix a date for hearing, and to proceed in the absence of one of the parties. In my view, the section does not have this statutory effect; it imports into every arbitration agreement a provision that the relevant witnesses will be available together with necessary documents. No power of sanction is expressly given nor could any be implied from its terms. I find support for this view in the observations of Avory J. in *Re Unione Stearinerie Lanza and Wiener* [1917] 2 K.B. 558. Reference was made in the course of argument to the observations of Scrutton J. in *Re Crighton and Law Car and General Insurance Corporation Ltd.* [1910] 2 K.B. 738 as to an arbitrator being a judicial officer; if this has any real meaning more than that he must act judicially, I would not uphold such a view.

There is to be implied into every agreement establishing a forum for the resolution of disputes that there will be fair procedures. Such are not the prerogative of one side or the other. Just as one side is entitled to the opportunity of stating and making his case, the other is entitled to expedition in the determining of the dispute. It is for the arbitrator to balance one against the other insofar as they affect the timing of his decision. Equally fundamental to the principle of fair procedures is that the arbitrator will only decide what is before him. There was no counterclaim before the arbitrator and his award was therefore confined, as Griffin J. says, to the matters properly before him and evidence which he heard and determined. No argument based upon alleged uncertainty in the award has

been advanced on the hearing of this appeal, no more than it was in the High Court.

In my judgment, an arbitrator has an inherent power to issue directions requiring the parties to submit details of their claim or claims, to fix a date or dates for the hearing of the reference and, in a proper case, to proceed on such date or dates despite the absence of one or other party, where such party has been refused any further adjournment. There is no sanction that the arbitrator can properly impose upon a party to a reference where he has failed to present his claim in a formal fashion or refuses to participate in the hearing. To proceed in his absence is not a punishment no more than it is such to make an award in such circumstances.

It follows that the award should stand and the appeal be dismissed.

Solicitors for the plaintiff: *Esmond A. Reilly & Co.* (High Court); *Arthur Cox & Co.* (Supreme Court).

Solicitors for the defendant: *Giles J. Kennedy & Co.*

Éanna Mulloy, B.L.