[2008] IEHC 38

THE HIGH COURT

[2007/318 S.P.]

IN THE MATTER OF

THE ARBITRATION ACTS, 1954-1980 (AS AMENDED)

AND IN THE MATTER OF AN ARBITRATION

BETWEEN

OFFICE AND INDUSTRIAL CLEANERS LIMITED

PLAINTIFF

AND

JOHN PAUL CONSTRUCTION LIMITED

DEFENDANT

JUDGMENT of the Honourable Mr Justice Brian McGovern delivered on the 21st day of February 2008

1. This case concerns a challenge to an Arbitrator's award made on the 20th February, 2007.

2. The plaintiff is a limited liability company which carries on the business of office and industrial cleaning. The defendant is a limited liability company engaged in the business of general construction and civil engineering works.

3. The plaintiff agreed to carry out work for the defendant, pursuant to written agreements which included an arbitration clause. A dispute arose between the parties on foot of works carried out pursuant to the written agreement and the dispute was referred to Arbitration. The Arbitration hearing took place on the 9th January, 2007, 24th January, 2007, and concluded on the 8th February, 2007.

4. At the conclusion of the Arbitration hearing, the defendant put in written submissions. The plaintiff in these proceedings did not submit written submissions,

although the final award records that the Arbitrator has *". . . considered the representations of the parties and the documents submitted and the evidence given".*

5. In his award, the Arbitrator awarded to the claimant a sum of €15,254 plus Value Added Tax of €2,059.29, making a total of €17,313.29. The Arbitrator ordered the claimant to pay the costs of the award which came to a total of €7,865 and directed that each party bear their own costs in the reference. Although the defendant had a counter-claim in the Arbitration, it appears that no order was made in respect of the counter-claim.

6. The normal rule in relation to costs is that they follow the event. In this case, it is clear that the Arbitrator departed from the normal rule insofar as he directed the successful claimant to pay the costs of the award, and he directed each party to pay their own costs of the Arbitration.

7. The plaintiff has sought to challenge the decision of the Arbitrator on a number of grounds. In the first place, it claims that the Arbitrator erred in failing to set out his findings on the claim and counter-claim separately. Secondly, it claims that the Arbitrator erred in failing to permit submissions on costs, and, thirdly, it submits that the Arbitrator's decision on costs was wrong in substance.

8. The parties agreed that the arbitrator was to give an unreasoned award. In the circumstances, the plaintiff is not entitled to raise the point that the arbitrator has failed to assess the claim and counter-claim separately. In the course of the hearing before me, the plaintiff accepts that they cannot raise this point now.

9. Thus, the only issue which remains is whether or not the Arbitrator's decision on costs should be interfered with by this Court.

10. Section 29 of the Arbitration Act, 1954 provides that the costs of the reference and award are to be in the discretion of the Arbitrator *". . . who may direct to, and by*

whom, and in what manner, those costs or any part thereof shall be paid . . .". The Arbitration Acts give the High Court jurisdiction either to remit an award to an Arbitrator for his re-consideration, or to set aside an award where the Arbitrator has misconducted himself or the proceedings or where the Arbitration or award has been improperly procured. There is a long line of authority which establishes that the Courts should exercise considerable restraint in setting aside an award of an Arbitrator. The policy of the law is to uphold the certainty of Arbitration awards once they have been made. The discretion given to the Courts to interfere with an award should only be invoked where it would be inequitable for an award to take place. See *McCarthy v. Keane* [2004] 3 I.R.617. In *Limerick City Council v. Uniform Construction Limited* [2007] 1 I.R. 31, Clarke J. held that the jurisdiction to set aside an award would only arise in circumstances where the award disclosed an error of law so fundamental that the Courts could not stand aside and allow it to remain unchallenged.

11. In looking at the Arbitrator's decision on costs, it is necessary to see whether any agreement had been reached between the parties as to how he should deal with the issue.

12. The parties are in dispute as to what, if anything, had been agreed. Mr Conor Cahill, a solicitor on behalf of the defendant, says in an affidavit sworn on the 26th June, 2007, that at the end of the hearing, he suggested to the Arbitrator that he give an unreasoned award, subject to the view of the plaintiff's solicitor, Mr Andrew Turner. He says that Mr Turner agreed with this suggestion and the Arbitrator noted this. He then says in para. 6 of the affidavit *"in respect of costs, I suggested that the Arbitrator should deal with costs in his award to save the parties from coming back*

on another day. Mr Turner agreed to this suggestion also. The Arbitrator noted the party's agreement".

13. Mr Andrew Turner swore an affidavit in reply in which he stated that *". . . it was never agreed that the Arbitrator proceed to make a determination as to costs simultaneous to the making of his Award. My recollection is that the only mention of costs which took place during the Arbitration is that whilst packing away my papers following the close of the hearing, the Arbitrator asked me what my position was regarding costs. I replied that I would be seeking same in the normal way".* He goes on to say that at no stage was he invited to make formal submissions on costs, nor was it indicated to him that the costs award would be delivered with the award on the substantive claim and counter-claim. Mr Cahill wrote to the Arbitrator seeking his recollection on the matter and he responded by letter of the 14th May, 2007 in which he said he had consulted his notes and was able to confirm that:

1. *"The parties specifically agreed that a reasoned award was not required.*
2. *The parties agreed that I, as Arbitrator, should deal with costs and there were no submissions by either side with regard to costs.*
3. *At no time did either party make me aware of the existence of a sealed offer"*

14. The reference to a sealed offer concerned a *"Calderbank"* offer made by the defendant in the Arbitration. The offer was made by letter of the 14th December, 2006, by the solicitors for the defendant and was stated to be *"without prejudice save as to costs".* The defendant in this action objects to the plaintiff making reference to this letter, but as reference is made to it in the context of costs, and as all other matters are outside the scope of this action, it seems to me that the plaintiff was entitled to refer to the letter. The letter is of limited significance because, in fact, the plaintiff recovered a sum in excess of that which was offered in the letter. But the plaintiff

argues that the very fact that it recovered more than what was in the offer, was a reason for the arbitrator not to depart from the usual order as to costs.

15. The defendant maintains that it did, to some extent, make a submission on costs, because its written submissions contain material which would enable the Arbitrator to exercise his discretion when he came to awarding costs. It seems to me that the submission made by the defendant to the Arbitrator did not specifically deal with the issue of costs, but merely dealt with issues of fact and controversy between the parties, and that the Arbitrator is correct when he says that neither party made any submission on costs. It does seem likely that at some point at the conclusion of the hearing, that the question of costs was raised because the Arbitrator says in his letter of the 14th May, 2007, that the parties agreed he should deal with costs and Mr Turner says that the Arbitrator asked him what his position was regarding costs.

16. From the evidence before me, I am satisfied that some reference was made to the Arbitrator on the question of costs, but that the parties were not *ad idem* as to what was the true position when the hearing concluded. Undoubtedly, the Arbitrator had power to deal with the costs and that is not an issue. Furthermore, he had a discretion as to how he should deal with the costs, and that, again, is not in dispute.

17. What appears to have happened is that each of the parties to the Arbitration left the hearing with a different understanding as to what was going to occur. The defendant, for its part, says it did not intend to make any further submissions as to costs, and understood the Arbitrator would deal with the costs issue at the same time as giving his final award. The plaintiff, on the other hand, understood that it would have an opportunity to address the Arbitrator on costs, when the final award was published and had gone no further than indicating to the Arbitrator that it would be looking for its costs.

18. The Arbitrator, for his part, understood that he was given *carte blanche* to deal with the issue of costs with his final award.

19. I have to decide whether the Arbitrator was entitled to deal with the question of costs as he did, having regard to the circumstances of this case.

20. In *Vogelaar v. Callaghan* [1996] 1 I.R. 88, the High Court, and later, the Supreme Court (Unreported Judgment 13th July, 1998) held that an Arbitrator was wrong in deciding an issue of costs, without taking into account an open offer made by the plaintiff, and that the Court should set aside that part of the award which related to costs. The Supreme Court held that it was an error which, in a technical sense, could be described as misconduct, even if not intentional misconduct. The facts of that case were somewhat different because the amount of the open offer was in excess of the sum awarded to the claimant in the Arbitration.

21. I am satisfied in this case that the parties agreed that the Arbitrator would give an unreasoned award. However, I do not accept that this also means an Arbitrator is thereby excused from giving reasons for his order on costs, or that he does not, in appropriate circumstances, have to hear the parties on that issue in order to reach a fully informed decision. While it is true that the "*Calderbank*" offer in this case was not of particular importance, there will be many cases where a claimant in an Arbitration fails to recover more than the *"Calderbank"* offer. In those circumstances, the Arbitrator would not be in a position to properly exercise his discretion on costs without being made aware of that fact and the issue would only become live after the final award was published. It simply could not be dealt with at the conclusion of the hearing in a way which would be fair to the party who had made the offer.

22. An Arbitrator should be aware of the issues that might arise on costs, depending on what is contained in his final award, and he should clarify with the parties at the Arbitration, what they wish him to do about costs. If there is no *"Calderbank"* offer and if the issues are straightforward, the parties could address the Arbitrator at the conclusion of the hearing, and before the final award, on the basis of what he ought to do, depending on the result of the Arbitration. But where, as in this case, there is a claim and a counter-claim and a *"Calderbank"* offer, it seems to me that the Arbitrator fell into error in dealing with the issue of costs without hearing submissions from the parties, particularly as he had decided not to make the usual order as to costs. The decision in *Harrison v. Thompson and Another* [1989] 1 W.L.R. 1325 appears to me to be of some relevance. In that case, both parties to the Arbitration had made *"Calderbank"* offers and expected the Arbitrator to provide them with an opportunity to make submissions on costs. The Arbitrator did not do so and published his award and dealt with costs at the same time. His decision was challenged and was found to be a procedural mishap and the award on costs was remitted to the Arbitrator.

23. The second error which was made by the Arbitrator in this case was failing to give any reasons for departing from the usual order as to costs. The Arbitrator has a discretion as to how to deal with costs, but he must exercise this discretion judicially. The usual order is that costs *"follow the event"*. So if the Arbitrator is going to depart from this rule, he should set out clearly his reasons for doing so. By failing to do so in this case, it seems to me that the Arbitrator has misconducted himself and the Court should intervene and set aside the award insofar as it deals with costs. In the circumstances of this case, it appears to me that the appropriate order to make is an

order remitting the issue of costs back to the Arbitrator who should deal with the matter after giving the parties an opportunity to be heard.

Approved 21-02-08
S. J. M. L.