THE HIGH COURT

[2003 No. 468 SP]

IN THE MATTER OF THE ARBITRATION ACTS, 1954 – 1998

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

LENNON AND HARVEY LIMITED

PLAINTIFF

AND

MARGARET MURPHY AND BRIAN WHELAN

DEFENDANTS

JUDGMENT of Mr. Justice Murphy dated the 21st day of December, 2004.

1. Background

By lease dated 26th May, 1996 made between the first named defendant and Patrick Murphy, now deceased, (the lessors) and John Walsh and Patrick Walsh, the second part (the lessees), the lessors demised unto the lessees the predecessor of the plaintiffs a premises located at Cloghran County Dublin to hold the same for a period of thirty five years from 1st December, 1993 subject to the terms and conditions contained therein.

The initial rent from December, 1993 to November 1997 was £9,750 per annum and, for the following year, £10,000 per annum. The review date was 30th November, 1998 and each fifth year thereafter. No review had taken place in 1998.

The Sixth Schedule to the lease provided for a review of rent. The rental value was defined as the yearly rack rent at which the demised premises might reasonably be expected to be let in the open market at the relevant review date by willing lessor

to a willing lessee without premium or any other payment or inducement on certain standard assumptions. The schedule provided for upwards only review and for the determination by a chartered surveyor in the event of the parties being unable to agree the rental value. The surveyor was to have substantial experience in valuing property of a like kind and character to the demised premises to be agreed upon by the parties and in default of agreement to be nominated by the President for the time being of the predecessor to the Society of Chartered Surveyors upon the application of either the lessor or the lessee. Such surveyor was to act as an arbitrator in accordance with the Arbitration Acts.

By deed dated 24th March, 1997 and made between the lessees and the plaintiffs herein the premises demised by the lease, now registered in folio 86956L of the register County Dublin were assigned to the plaintiff for all the residue on expired of the term of the years granted by the lease and subject to the rent, covenants and conditions therein contained.

The plaintiff and the defendants were unable to agree the rental value and on 13th May, 2003 the President of the Society of Chartered Surveyors (the President) on the application of the lessors, one of its members, to act as arbitrator to determine the revised rent of the property in accordance with the provision on the lease.

The arbitrator, having duly entered upon the reference, purported to make an award in writing on or about 17th September, 2003.

2. The Plaintiff's claim

The plaintiff claimed that the said award was the result of misconduct by the arbitrator and that the proceedings were a nullity in that the arbitrator failed to respond to the plaintiff's request on 1st September, 2003 for an adjournment of the hearing of the reference; failed to allow the plaintiff to properly prepare and properly

present its case; proceeded with an *ex parte* hearing; failed to comply with his own order for directions on 20th May, 2003; exceeded his jurisdiction and wrongfully fettered his discretion in refusing to consider the plaintiff's application for an adjournment. Furthermore the plaintiff alleged that the award contained an error on its face in that it stated that the parties were informed that the arbitrator "in the absence of attendances by either party", would proceed to hear whatever evidence was available to him on 4th September, 2003, the date of the proposed hearing. The plaintiff says that the parties were never specifically so informed.

In the circumstances the plaintiff claimed:

(a) An Order that the award of the arbitrator be deemed null and void;

(b) An Order pursuant to s. 38 of the Arbitration Act, 1954, setting aside the said award;

(c) In the alternative an Order pursuant to s. 36 remitting the Order to the reconsideration of the arbitrator.

3. <u>Plaintiff's affidavit</u>

Stephen O'Connell Miley, the plaintiff's solicitor filed an affidavit on 28th October, 2003. He referred to the lease, assignment and correspondence wherein the defendant, by letter of 16th December, 2002, sought to review the rent from 1998 to 2003 suggesting an increase to IR£200,000. On 24th April, 2003, some four months later, the deponent raised a number of preliminary issues in relation to the review.

Notwithstanding the raising of these issues, he noted that the defendant had proceeded to request the appointment of an arbitrator despite of the fact that there was, arguably, no "default of agreement" at the time of that request.

4. The rent review provisions

The review of rent provisions contained in the Sixth Schedule provides for the determination by a surveyor appointed by the President where the lessor and lessee

> "shall be unable to agree the rental value of the demised premises (whether or not an attempt to reach agreement shall be made) then it shall be determined at the request of either the lessor or the lessee (made not earlier than three months before the relevant review date) by a chartered surveyor having substantial experience in valuing property of a like kind and character to the demised premises to be agreed upon by the lessor and by the lessee and in default of agreement to be nominated by (the) President upon the application of either the lessor or the lessee".

The clause does contain a repetition or duplication of default in slightly different terms. Firstly it contains a proviso that if the parties "shall be unable to agree the rental value" then it shall be determined at the request of either by a surveyor to be agreed upon by the parties. Secondly, if the parties were not able to agree on such surveyor either could apply for the nomination of such surveyor by the President.

The clause provides for three stages: the parties to agree the rent; the parties, in default of such agreement, to agree on a surveyor to determine the rent or, in default of such second agreement, for the President to nominate such surveyor. The clause is, accordingly, clear as to these stages.

The preliminary issue is whether:

> the parties have been unable to agree the rental value, and
>
> the parties have been unable to agree on a surveyor. If so, then either party could apply to the President for his or her appointment.

5. Correspondence prior to arbitrator's appointment

It is clear from the correspondence that the parties themselves were unable to agree the rental value. The lessor's solicitor's letter of 16th December, 2002 suggested that the rent payable be in the sum of £200,000 by way of formal notice. The lessee's solicitor's letter of 24th April, 2003 regarded such an increase of 2000% from the previous rent as "totally and absolutely unsustainable". The letter suggested that the matter be dealt with at the next review date on 30th November, 2003 to avoid the necessity of having to deal with two rent reviews within a very short space of time. It further added that the review sought was "totally unrealistic". The letter continued:

> "Given the huge planning constraints on user and the fact that the demised premises is little more than a field, its annual value has not changed much over the last ten years or so. It is accordingly our client's view that the amount of any review is nil or very close to nil. This would appear to be supported by your clients' failure to serve a Rent Review Notice at the appropriate time. It seems most unlikely that the parties will be able to agree on the amount of a new rent and the matter will have to be referred to arbitration. In these circumstances you might be kind enough to identify your clients' agent to us so that we may put our client's own agent in touch with him with a view to seeing whether any level of agreement on the amount of the new rent can be achieved and thus avoid the necessity of an arbitration."

This would seem to be the last correspondence between the parties before the application by the lessor for the appointment by the President which led to the appointment of the surveyor on 13th May, 2003 some three weeks after the letter raising the preliminary issues.

There is no doubt that there was a disagreement on rent. This is so notwithstanding the penultimate paragraph of that letter of 24th April which stated as follows:

> "Without prejudice to any of the foregoing our client is quite willing to buy your clients' interest in the property and thus avoid the necessity for any review at all. If this (is) of interest to your clients you might be kind enough to let us know so that negotiations can be opened on the question of price."

The price in question is not, of course, the rent or its review and, to that extent, is not relevant to the procedure to be followed for rent review. However, it is in the form of a commercial negotiation which is not unusual in cases of this nature. The capital value implicit in the negotiation to buy the lessor's interest depends, of course, on the value of the rent review.

6. <u>Defendant's affidavit</u>

The affidavit of Anthony M. Reynolds on behalf of the defendant lessors sworn on 10th December, 2003 averred that the plaintiff had failed to reply to the letter of December, 16th 2002 for some months. Their reply on 24th April, 2003 took issue with the amount claimed and other matters. In the circumstances it was averred that there was default of agreement in the amount of the reviewed rent.

The issue is, of course, not the default of agreement in the amount of the reviewed rent, but whether there was a default of agreement at the second stage to appoint a surveyor. The plaintiffs argued that its letter of 24th April, over four months after the formal notice of 16th December did not create an impasse between the parties but rather sought to open the negotiations on a broader front.

7. **Appointment of arbitrator**

The Court must consider the provision of s. 18 of the Arbitration Act, 1954 and the provisions of the Sixth Schedule to the lease.

That section provides that:

> "Where the parties do not, after differences have arisen, concur on the appointment of an arbitrator then any party may serve on the other party a written notice to appoint or, as the case may be concur in appointing an arbitrator. If the appointment is not made within seven days after the service of the notice, the Court may, on the application of the party who gave the notice, appoint an arbitrator who shall have like powers to act in the reference and make an award as if he had been appointed by consent of all the parties."

The letter of 16th December, 2002, stated to be a formal notice of the lessor's instructions, is not such a letter insofar as it does not seek the appointment of an arbitrator.

The procedure to be followed is that agreed upon by the parties themselves in the Sixth Schedule to the lease of 24th May, 1996 which provides for the appointment of an arbitrator and a mechanism for appointment in default. The agreement of the parties governs the appointment without it being necessary to refer to s. 18. Indeed an application to the Court would be stayed pending the implementation of the provisions of the Sixth Schedule which emphasises the role of the predecessor to the Society of Chartered Surveyors in appointing an arbitrator in default of agreement by the parties.

The constitution of an Arbitral Tribunal is the exclusive domain of the parties. They are entirely free, as widely recognised in national legal systems, to determine its

composition and the procedure for appointing such tribunal. The direct choice of the arbitrators by the parties is undoubtedly the method of appointment most in keeping with the spirit of arbitration. Where there are such provisions there is no necessity to seek the intervention of the Court.

No evidence was given of whether the request to the President of the Society of Chartered Surveyors mentioned the provisions of the Sixth Schedule. The fact that application is made is often regarded as necessarily arising because of the inability of parties to agree. However, given the primacy of the agreed provisions in the lease, an applicant should refer to the relevant provisions and confirm that these have been exhausted in the application for appointment of an arbitrator by default.

The appointing institution should be satisfied that the preliminary procedures have been exhausted. The primacy of the parties' power to resolve their own differences should be paramount.

In the event, despite initial misgivings regarding the procedure, the plaintiff acknowledged the appointment of the arbitrator. Accordingly the plaintiff cannot now argue, nor indeed is it pleaded, that the arbitrator was appointed irregularly.

8. <u>Correspondence subsequent to the arbitrator's appointment</u>

The first letter from the arbitrator, of 3rd June, 2003 stated that he was not aware that "default of agreement" was dependent upon attempts to agree having been made. He intended to hear the matter on a stated date unless he heard other reasons as to why he could not proceed.

In any event the arbitrator wrote on 6th June, 2003 granting both parties an adjournment and requesting that he be advised of the position on 11th July, 2003.

In the meantime Mr. John Morley, Hamilton Osborne King wrote to Paul Good, Chartered Surveyor, noting that the matter had been listed for arbitration, stated

that the lessors would like, if possible, to resolve the matter by negotiation. He confirmed that this was also the wish of his client, the lessee. Solicitors for the lessor wrote to Mr. Morley on 23rd June, 2003 and confirmed that they were "quite prepared to allow reasonable lengths of time for discussions to take place between yourself and our client's valuer, Paul Good in order to see if a settlement can be reached with regard to the rent review in this matter". The letter continued that if the matter were not settled between the respective clients by Friday 11th July - a period of two and a half weeks - then the lessor would revert to the arbitrator to set a date for the hearing of the arbitration.

The lessees asked that in the circumstances the matter be adjourned *sine die* with a view to seeing whether a compromise could be reached. The lessors requested that the matter be put back for two weeks.

The arbitrator replied on 17th July in the following terms:

> "I am perfectly prepared to allow resolution of this matter by agreement and that this will happen quickly. We are now a month past the original date of the hearing, and I am most emphatically not prepared to adjourn *sine die*. Unless the matter is resolved between the parties on or before 5th August, 2003, I will be hearing the reference on Friday 15th August at 10.30am at the offices of the Society of Chartered Surveyors."

By letter of 6th August the arbitrator, not having been advised of a settlement confirmed that he would hear the reference on 15th August.

Solicitors for the lessee, by letter of 13th August expressed surprise by the arbitrator's correspondence and ruled that it was simply not possible for the hearing to take place on that date for some time into the future. It was agreed that the matter had

to be resolved by arbitration as the valuers were unable to reach agreement. The lessees wished to obtain counsel's opinion on a number of legal issues in relation to the correct valuation approach and also in relation to the validity of the appointment of the arbitrator.

On the same day the arbitrator wrote to both solicitors expressing his concern at the passing of three months since his appointment and his duty to proceed expeditiously. He did not think it appropriate for him to be told when he might or might not hear the reference.

The arbitrator referred to the issue raised concerning the valuation approach. He believed this to be a matter for him to decide on the evidence adduced. He had been asked to adjudicate on the rental value.

The arbitrator adjourned the hearing to Thursday, September 4th, 2003 and advised that no further adjournments would be considered. He would proceed to hear whatever evidence was available to him on that day. He also directed that the comparisons to be relied upon by the respondent lessees be provided to the claimant lessors valuer immediately.

On the 12th August, 2003 the lessors valuer, Mr. Paul Good had sent details of nine comparisons (ranging from €1.19 to €2.08 per square foot) to Mr. Morley, of Hamilton Osbourne King for the lessees.

Two weeks passed until Monday 1st September when the Plaintiff's solicitors, referring to the arbitrator's letter of the 13th, wrote to inform him that counsel's advices were not yet at hand and in consequence they would be unable to deal with the matter on Thursday the 4th following. As it would be another two or three weeks before counsel's advices were to be at hand and he had suggested putting the matter

back towards the end of September with a number of dates suggested. A letter to counsel dated 2nd September from the Plaintiffs' solicitor followed.

Solicitors for the defendants notified the arbitrator that any attempt to adjourn the matter further would be strenuously resisted.

On 4th September, the arbitrator proceeded to hear the defendant/lessors evidence in the absence of the Plaintiff/lessees.

On 17th September the lessee's solicitors wrote to the arbitrator advising him that counsel's preliminary advices were to hand and confirming his client's acceptance of the validity of his appointment and that counsel had directed some further investigations to be undertaken prior to the hearing and suggested the matter be heard on Tuesday or Wednesday the 4th or 5th of November.

On the same date the arbitrator advised both solicitors that he had made and published his award. On receipt of that letter the solicitors for the respondent lessees expressed astonishment at the arbitrator proceeding to adjudicate upon the matter without having heard evidence from his side and for not responding to his letter of the 1st September.

On 30th September, 2003, the defendants, as claimants, having discharged the arbitrator's costs, the arbitrator sent his award to the respondent's solicitors (the Plaintiffs herein).

9. <u>The award</u>

In his award the arbitrator referred to the adjournment by consent of the parties of the oral hearing of 21st June, the new date of 15th August and the direction to the parties that he would make one final adjournment to the 4th September and that, in the absence of attendances by either party, he would hear whatever evidence was available to him on that date. He said that that correspondence (the direction) was

acknowledged by both parties. At the appointed date and time only the claimants and their representatives were present. He said he considered the evidence adduced to him at that time and had studied the lease and had carried out an inspection of the property subsequent to the hearing and had also viewed some with a comparable evidence put before him. He then awarded and determined that the rental value of the subject premises as of 1st December, 1998 was IR£200,000 (€254,000) per annum. He directed that the respondents pay to the claimant the costs of the award.

10. <u>The law in relation to misconduct</u>

Misconduct has been defined by Jenkins L.J. in *London Export Corporation Limited v. Jubilee Coffee Roasting Company Limited* (1958) 2 All E.R. 411 at 413 as follows:

> "Misconduct" is, of course, used in the technical sense in which it is familiar in law in relation to arbitrations as denoting irregularity, and not any moral turpitude or anything of the sort."

The plaintiff submitted that an arbitrator is under duty to act judicially which includes a duty to afford each party a reasonable opportunity to present its own case and a duty to act in accordance with the provisions of natural justice. It was submitted that the arbitrator misconducted himself by not allowing the plaintiff to prepare and properly present its case, in that, the contravention of the plaintiff's right to natural justice, he proceeded with an *ex parte* hearing in circumstances where he was aware (or should have been aware) that the plaintiff wished to put material evidence before him. A lie to this was his failure to respond to the plaintiff's request for an adjournment, which led to the plaintiff to understand that he had agreed to the request.

Reference was made by Carroll J. to a party having a reasonable opportunity to make its case in *Geraghty v Rowan Industrial Estates* (1988) I.R. 419 at 427 in the following terms:

> "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... (T)he arbitrator, having stated that he would make an interim award at the first hearing, failed to make it clear to the solicitor or counsel for the plaintiff that he intended to deal with all issues at the second hearing. In my opinion the failure on the part of the arbitrator to conduct the arbitration in such a manner so that both parties might reasonably be aware that he had abandoned the idea of an interim award and intended to deal with all issues amounted to misconduct in the proceedings within the meaning of s. 38, subs. 1 (a). *The State (Hegarty) v. Winters* (1956) I.R. 320 is authority for the proposition that want to fairness and fairness alone, even though there is no partiality on the part of the arbitrator, is grounds for setting aside an award. Reference was also made to *Montrose Canned Foods Limited v. Eric Wells (Merchants) Limited* (1965) 1 Lloyds Rep. 597 at 602 where Magaw J. stated:
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> > "... it is incumbent upon the arbitrators to take steps to ensure, as far as is reasonably possible, before they make an award, that each of the parties to the dispute before them know the case which is being put against them, and has had the opportunity to put forward that party's own case."

Donaldson J. in *The Myron* (1969) 1 Lloyd's Rep. 411 at 416-7 stated:

> "The practice of allowing each party to submit their evidence and arguments to the arbitrators separately only works on the assumption that

> neither party will be taken by surprise by either evidence or the assumptions advanced by the other party. Normally both parties are fully aware of the issues, the arguments and the evidence available for consideration and no problem arises. If, however, the arbitrators have the slightest grounds for wondering whether one of the parties had fully appreciated what is being put against him or whether he might reasonably wish to supplement his evidence are arguments in the light in what has been submitted to the other party, it is their duty to take the appropriate steps to resolve those doubts. This would normally be done by one of the arbitrators writing to the party concerned summarising the case made against him and inquiring whether in the light of the summary he wished to add anything by way of evidence or argument."

On the other hand *Grangeford Structures Limited (in liquidation) v. S.H. Limited* (1990) 2 I.R. 351 an arbitrator was deemed by the Supreme Court who acted reasonably in proceeding where parties had failed to file a counterclaim notwithstanding extensions, had unsuccessfully requested an adjournment and subsequently left the hearing. In the present case the solicitor for the respondent genuinely understood that an adjournment would be granted and was unaware that the matter would be proceeding to a full hearing. The request for adjournment was not considered by the arbitrator. The arbitrator failed to comply with his own order for directions affording the plaintiff's representative an opportunity to accompany him on his site inspection of the subject premises after the hearing and before the award.

In *McCarrig v. Gaiety (Sligo) Limited* (2001) 2 I.R. 266 Herbert J. adopted the statement of Brandon J. in *Sokradis Rokopoulos v. Experia Spa v. Aros* (1978) 1 Lloyds Rep. 456 at 464 that the Court does not necessarily refuse to assist a party out

of difficulty because he had got into it by his own fault although it may impose strict terms, with regards to costs or other matters, as a condition of giving such assistance.

11. Decision of the Court

11.1 The general issue between the parties is the balance between the autonomy of the parties in the appointment of an arbitrator and the power of the arbitrator, once appointed, to proceed with the reference. There are convincing arguments in general, and in particular the circumstances of this reference, to support each side of that balance. In reality, however, the issue is who determines the balance to be struck between one of the parties wishing to continue negotiation, while at the same time acceding to the appointment of the arbitrator, and the arbitrator, supported by the other party by proceeding to determine the matter in the absence of the first party.

11.2 Having been appointed on 13th May, 2003 the arbitrator duly entered upon the reference and purported to make an award in writing on or about 17th September, 2003, some four months later. The plaintiff says that the award was the result of misconduct by the arbitrator.

11.3 In chronological order the first alleged misconduct was a failure of the arbitrator to comply with his own order for directions dated 20th May, 2003, in particular with paras. 4, 6 and 8 thereof.

Paragraph 4 of that order provided that both parties should agree matters affect and in particular the floor area of the accommodation prior to the hearing of the reference.

Paragraph 6 provided that both parties should agree the extent of improvements carried out by the lessee in accordance with the terms of the lease.

It was further provided, in paragraph 8 of the order for directions, that following the hearing of the reference, the arbitrator should be provided with access to

inspect the property. If either party wished to accompany him during such inspection then the other party should also accompany him.

There was no agreement regarding matters of fact (paras. 4 and 6) and none, in particular, in relation to the floor area nor of improvements carried out by the lessee in accordance with the terms of the lease.

It would seem to the Court that, in agreeing to the dates for arbitration, the plaintiff was waiving any consideration of those matters until the hearing itself. It had the option of agreeing these matters or raising them at the hearing. The plaintiff could not seek to nullify the award made in its absence on the grounds of lack of agreement of these matters for such would allow the plaintiff to thwart the matter ever coming to arbitration. While it might have been possible or, indeed, prudent for the arbitrator to request this information within a certain reasonable period, it does not seem to me to be sufficient grounds for this Court to nullify an award on those grounds alone.

While it seems clear that the provision of access to inspect following the hearing (para. 8) was not a precondition for the hearing it would seem that the plaintiff as lessee should have been notified particularly where it had not attended at the hearing. It was the lessee, as occupier, who had to provide access if such were indeed needed.

It does not seem to me that the alleged failure to comply with directions affected the validity of the hearing of 4th September, 2003.

11.4 The second and the principal allegation of misconduct was that the arbitrator failed to respond to the plaintiff's request on 1st September, 2003 for an adjournment of the hearing which was due to take place three days later on 4th September. It was submitted that this failure prevented the plaintiff preparing and presenting its case where it had indicated that it wished to put material evidence before the arbitrator. It

was argued that, where such evidence was not before the arbitrator, the arbitrator exceeded his jurisdiction in the absence of the plaintiff and wrongfully fettered his discretion.

The critical issue, in this debate is, of course, the application by the former party to apply for a third adjournment and the arbitrator's failure to reply to that application made within three days from the 1st September to 4th September, 2003.

The arbitrator has a duty of care, diligence and impartiality.

The arbitrator is under a legal as well as a moral obligation to perform his duties in a proper and careful manner. While the case law providing that an arbitrator "ought to" proceed in a certain way this relates to the effectiveness of the award rather than to the duty towards the parties. In undertaking the burden of the reference an arbitrator undertakes the three principal duties aforementioned of care, diligence and impartiality.

Mustill and Boyd refer to certain conditions which should be observed for full oral hearing.

(1) Each party must have notice that the hearing is to take place.

(2) Each party must have a reasonable opportunity to be present at the hearing, together with his advisors and witnesses.

(3) Each party must have the opportunity to be present throughout the hearing.

(4) Each party must have a reasonable opportunity to present evidence and arguments in support of his own case.

(5) Each party must have a reasonable opportunity to test his opponent's case by cross examining his witnesses, presenting rebutting evidence and addressing oral arguments.

(6) The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and arguments. (at 302, op.cit.)

These requirements follow logically from the principle of *audiam alteram partem* in relation to procedures.

It is clear that the respondent did have notice that the hearing was to take place on 4th September but did not, at that time, have the advices he deemed necessary. The fact that the advices may not have been requested until September may have been excusable by reason of the long vacation. However it did deprive the plaintiff/respondent from having full advices. It would not have been prudent to have had a partial hearing on that day if all of the evidence and arguments had to be adjourned to a later date.

Mustill and Boyd continue as follows:

> "It is of no value to give a party notice of a hearing, if arrangements are such that he has no reasonable opportunity to be present in person, with such legal advisors and witnesses that he wishes to bring with him. Thus, the arbitrator shall ensure that the date for the hearing is not so close that a case cannot be properly prepared. Similarly, he should try to accommodate any party who is placed in a difficulty by the absence abroad, illness or competing engagements of himself or of an important witness. But a party has no absolute right to insist on his convenience being consulted in every respect, the matter is within the discretion of the arbitrator, and the Court will intervene only in cases of positive abuse. In each case the arbitrator must balance the legitimate interests of each party

against the general purpose of arbitration, which is to provide a speedy method of resolving disputes.

Naturally, the arbitrator's duty goes no further than to ensure that a party has an opportunity to attend the hearing if he wishes. If a party, after been given proper notice, chooses not to appear, then the proceedings may properly continue in his absence". (at 303)

Mustill and Boyd deal with the failure to appear at the hearing as follows:

"If a respondent fails to appear at the hearing, having been given reasonable notice of the time and place fixed by the arbitrator, the hearing may proceed without him. (Certain authorities are cited)

If there is a reason to think the respondents absence is unintentional, the arbitrator would do well to adjourn the hearing for a short while in order to find out if there is a good reason why he has not appeared – see *The Myron (owners) v Tradex Export SA* (1969) 1 Lloyds Report 441, (1970) 1 Q.B. 527.

...but it does not necessarily follow that there will automatically be an award against (the respondent) for the full amount of the claim. The arbitrator must do two things before he can make an award adjudicating on the claim. First, he must be satisfied that the claimant has brought forward evidence sufficient to make out a *prima facie* case for the amount claimed. Second, he must take into consideration any evidence for submissions which the respondent has put before him on any previous occasion or in correspondence. Then, but only then, may the arbitrator proceed to make his award." (at 346).

The circumstances in this case are not of total default by the respondent but rather of an imprudent misunderstanding of procedure by the respondent's solicitor in circumstances where it was indicated to the arbitrator that evidence would be given and submissions made in relation to the respondent's claim. Several adjournments were applied for and granted.

It is clear that the arbitrator was entitled to fix a date for the reference, to grant a first adjournment and to grant what purported to be a final adjournment to 4th September, 2003.

However, to proceed without the respondent on that day raised potential problems relating to fairness of procedure, and a possible partiality which outweighed the duty of diligence. There was no evidence of any attempt to contact the respondent on the day nor any consideration of making a costs order against the respondent for his failure to attend. The arbitrator may have imposed strict terms including an order for costs against the plaintiff, the respondent to the reference, where he overlooked a date set for a hearing or presumed, despite the strict terms of the final adjournment, that a request, a few days earlier, would suffice.

On the other hand the arbitrator did not reply to that late request of 1st September, or, indeed, may not have received the request. No reference was made by the arbitrator in his award to the letter of 1st September requesting an adjournment *sine die* or to any other time.

Moreover no notification was given of the arbitrator's intention to inspect the subject property. The respondent was not made aware that the hearing had, in fact taken place or that the arbitrator had inspected the property or, indeed made the award, until notification on the making of the award was made to the respondent on 24th September.

However casual the assumption may have been that an adjournment would have been granted on receipt of the letter of 1st September, the fact of no communication from the arbitrator in reply thereto, the knowledge from previous correspondence that the respondent wished to make submissions and was in the process of seeking legal advice, made it all the more necessary that the arbitrator hear the other side or, at least communicate with the other side to deal with the issue of costs in relation to, a further adjournment.

11.5 Finally, the plaintiff pleaded that the award itself contained an error of law on its face where it stated that the parties to the arbitration were informed by the arbitrator "in the absence of attendances by either party" that he would proceed to hear what evidence was available to him on 4th September, in circumstances where the parties were never specifically so informed. The letter of 13th August advised that the arbitrator would proceed to hear whatever evidence was available to him on that day. It did not refer to the absence of attendance by either party even if this might have been implied.

11.6 There is one other factor that, in the circumstances, may have had some bearing on the exercise of an arbitrator's discretion. That was the nature of the rent review procedure which allowed the lessor to review after the date of the first rent review. Time was not of the essence and any delay that could not have prejudiced the lessor insofar as the revised rent would apply retrospectively.

Another factor that might help in taking into account was the fixing of a date during or immediately after the traditional summer holiday period. Indeed the Court might assume that the non reply to the respondent's solicitor's letter on 1st September may, indeed, have been due to such circumstances.

It seems to me that what occurred was a procedural mistake and proceeding. It is clear that the parties were informed that no further adjournments would be considered and that the arbitrator would proceed to hear whatever evidence was available to him on that day. He had also directed the comparisons to be relied upon by the respondents (the plaintiffs herein) to be given to the claimants' valuer immediately. There is no indication on the face of the award that the plaintiff's comparisons were available to the arbitrator nor, indeed, that they were considered by him. Indeed the award reflects the arbitrator's attendance at the appointed date and time, at which time only the claimants and their representatives were present, and says that: "I have considered the evidence adduced to me at that time..."

However, the reference by the arbitrator to the one final adjournment where, *in the absence of attendances by either party*, he would hear whatever evidence was available to him on that date does constitute an error on the face of the award in that, while it may have been the intention of the arbitrator, such was not communicated in those terms to the plaintiff, the respondent in the arbitration.

12. <u>Order</u>

In view of the finding in relation to the error on the face and the misconduct of the reference the Court, pursuant to s. 38 setting the award aside together with an order under s. 36 (1) remitting the matter referred to the reconsideration of the arbitrator. The Court, pursuant to Order 36 (2) directs that the arbitrator make his award within three months after the date of the order.