In the matter of the **Arbitration Act 2010** and in the matter of an arbitration: **Fergus Hoban**, Applicant v. **Kieran Coughlan** and **Claire Riordan**, Respondents and **Frank Nyhan**, Notice Party [2017] IEHC 301, [2016 No. 399 MCA]

High Court 12 May 2017

Arbitration – Application to set aside arbitral award – Notice of arbitration – Failure to engage in arbitration process – Failure to deliver points of defence – Reasons for decision – Whether applicant given proper notice of arbitral proceedings or unable to present case – Whether reasoned award – Rules of the Superior Courts 1986 (S.I. No. 15), O. 56, r. 3 – Arbitration Act 2010 (No. 1), ss. 6, 9 and Sch. 1 – UNCITRAL Model Law on International Commercial Arbitration 1985, articles 18, 31 and 34.

Article 18 of the UNCITRAL Model Law on International Commercial Arbitration provides that each party to an arbitration shall be treated with equality and given a full opportunity of presenting his case. Article 34(2) of the Model Law provides that an arbitral award may be set aside by the court if, *inter alia*, the party making the application was not given prior notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case. Article 31(2) of the Model Law provides that the award shall state the reasons upon which it is based.

The applicant, during the course of an arbitration, failed to deliver points of defence and did not appear at the hearing and, in his absence, the notice party published the arbitral award, having decided that the applicant was liable to the respondents on foot of a guarantee.

The applicant brought an application to the High Court, pursuant to article 34(2) of the Model Law, seeking to set aside the arbitral award of the notice party. The applicant submitted that he was not given proper notice of the arbitral proceedings or was otherwise unable to present his case. The application also submitted that the award made by the notice party was not a reasoned award.

Held by the High Court (McGovern J.), in dismissing the application, 1, that the jurisdiction to set aside an arbitral award under article 34 of the Model Law was very limited and to be exercised sparingly. Article 18 of the Model Law was not intended to protect a party from its own failures or strategic choices and, where a party to an arbitration failed to appear at the hearing having been given reasonable notice of the arbitration, the hearing could proceed without that party.

Grangeford Structures Ltd. (In liquidation) v. S.H. Ltd. [1990] 2 I.R. 351, *Re Corporación Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A.* (Unreported, Ontario Superior Court of Justice, Lax J., 22 September 1999) and

Snoddy v. Mavroudis [2013] IEHC 285, (Unreported, High Court, Laffoy J., 19 June 2013) followed.

2. That an arbitrator was not under an obligation to provide the sort of reasoned judgment that would be expected from a judge of the superior courts but he still had to give a reasoned award to the extent required to enable a party to see why he reached his decision.

Bremer v. Westzucker [1981] 2 Lloyd's Rep. 130 and *English v. Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409 followed.

3. That when considering whether an award was a reasoned award in the context of an uncontested hearing, some regard had to be had to the fact that a party had not engaged in the arbitration process and had not delivered points of defence.

Obiter dictum: If a party failed to deliver points of defence, and was represented at the arbitration hearing, it was a matter for the arbitrator as to whether (and to what extent) he would permit cross-examination of the witnesses.

Cases mentioned in this report:-

Bank of Ireland Mortgage Bank v. Heron [2015] IECA 66, (Unreported, Court of Appeal, 26 March 2015).

Bremer v. Westzucker [1981] 2 Lloyd's Rep. 130.

Re Corporación Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A. (Unreported, Ontario Superior Court of Justice, Lax J., 22 September 1999).

Deerland Construction v. Aquaculture Licences Appeals Board [2008] IEHC 289, [2009] 1 I.R. 673.

English v. Emery Reimbold & Strick Ltd [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409; [2002] 3 All E.R. 385.

Foley v. Murphy [2007] IEHC 232, [2008] 1 I.R. 619.

Grangeford Structures Ltd. (In liquidation) v. S.H. Ltd. [1990] 2 I.R. 351; [1990] I.L.R.M. 277.

Grealish v. An Bord Pleanála [2006] IEHC 310, [2007] 2 I.R. 536; [2006] 1 I.L.R.M. 140.

Mulholland v. An Bord Pleanála (No. 2) [2005] IEHC 306, [2006] 1 I.R. 453; [2006] 1 I.L.R.M. 287.

O'Donoghue v. An Bord Pleanála [1991] I.L.R.M. 750.

Snoddy v. Mavroudis [2013] IEHC 285, (Unreported, High Court, Laffoy J., 19 June 2013).

Motion on notice

The facts have been summarised in the headnote and are more fully set out in the judgment of McGovern J., *infra*.

By notice of motion dated 22 December 2016, the applicant sought to set aside an arbitral award made by the notice party.

The application was heard by the High Court (McGovern J.) on 25 April 2017.

Colm Ó hOisín S.C. (with him *Peter Shanley*) for the applicant.

John Lucey S.C. (with him *Conor Cahill*) for the respondents.

Cur. adv. vult.

McGovern J. 12 May 2017

[1] This is an application brought pursuant to O. 56, r. 3(1)(i) of the Rules of the Superior Courts 1986 and under article 34(2)(a)(ii) and (iv) of the UNCITRAL Model Law on International Commercial Arbitration 1985 ("the Model Law") to set aside an arbitral award made by the notice party ("the arbitrator") on 4 October 2016.

[2] For the purposes of this application, the relevant parts of article 34 of the Model Law, as adopted pursuant to the Arbitration Act 2010, are as follows:-

"(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(*a*) the party making the application furnishes proof that:

(i) …

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) …

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot dero-

> gate, or, failing such agreement, was not in accordance with this Law; or…".

[3] The dispute relates to premises owned by the respondents within the Blackrock Hall commercial development in Blackrock, Co. Cork. Two companies connected with the applicant executed leases and agreements to lease in respect of separate units at Blackrock Hall and the applicant executed a personal guarantee in respect of the liabilities of each of his companies under the leases and agreements to lease.

Chronology of events

[4] On 1 February 2010 the tenant companies took possession of the premises. On 4 May 2012 the respondents and BHL Pharmacy Limited (one of the applicant's companies) entered into a 35-year lease for ground floor unit 4 at Blackrock Hall. The lease was executed on that date.

[5] On 8 June 2012 the respondents and BHL AMS Limited (another of the applicant's companies) entered into a 35-year lease for part of the second floor at Blackrock Hall. The lease was executed on that date.

[6] On 28 January 2015 the respondents called upon the applicant to discharge the sum of €400,049.42 which was claimed to be due and owing by the applicant in respect of his liabilities on foot of the 2012 leases pursuant to his guarantee dated 15 October 2009.

[7] On 29 January 2015 a notice to refer to arbitration was sent by the respondents' solicitor to the applicant and to the applicant's solicitor at that time; Mr. Ciaran Desmond of Messrs. McGuire Desmond.

[8] On 21 May 2015 the arbitrator wrote to the applicant and to the respondents advising that he had been nominated by the President of the Law Society of Ireland to act as arbitrator. No response was received from the applicant. By letter of 24 June 2015, the arbitrator wrote once more to the applicant noting the absence of a response to his previous correspondence and stating that if he did not hear from the applicant within seven days he proposed to accept his appointment and to issue preliminary directions. No response was received from the applicant. By further letter to the applicant dated 31 July 2015, the arbitrator confirmed that he was accepting his appointment and that he would issue preliminary directions in due course. No response was received from the applicant.

[9] By letter to the applicant dated 9 October 2015, the arbitrator confirmed that he intended to conduct a preliminary meeting on 21 October 2015 and he advised that each party should be present or represented and

that he proposed to issue directions for the conduct of the arbitration following the meeting. Again, no response was received from the applicant.

[10] The preliminary meeting proceeded on 21 October 2015 with the respondents' solicitor present and in the absence of the applicant or any representation on his behalf. Preliminary directions were issued by the arbitrator to the applicant and the respondents on 28 October 2015. Points of claim were delivered on 8 April 2016.

[11] On 12 April 2016 Messrs. McGuire O'Halloran wrote to the arbitrator on behalf of the applicant seeking relevant documentation. The arbitrator responded enclosing all correspondence and a copy of the preliminary directions which had already been forwarded to the solicitor at the request of Ms. Eleanor Hackett and to the applicant at three different addresses. On 13 June 2016 the arbitrator wrote to the applicant's solicitor and informed him that the time for the delivery of points of defence had expired and requested to hear from him.

[12] The applicant's solicitor claims that a letter of response was sent to the arbitrator on 24 June 2016 but the arbitrator claims that he did not receive this. The letter stated, *inter alia*, that the applicant was "out of the country at this time but available to us". It further stated that they would update the arbitrator "as to the time frame in which we will have a response" to him. No update was provided to the arbitrator.

[13] On 12 July 2016 the arbitrator wrote to the applicant's solicitor referring to earlier correspondence to which no reply had been received and he stated that he would allow a further extension of time for seven days for delivery of points of defence. No response was received to that letter.

[14] On 27 July 2016 the arbitrator wrote to the applicant's solicitor noting that he had not received any points of defence and that no application had been made seeking a further extension of time for delivery of same. He informed the applicant's solicitor that he would conduct an oral hearing on 1 September 2016. Again, no response was received from the applicant.

[15] On 19 August 2016 the arbitrator wrote to the applicant's solicitor asking him to confirm whether he intended to be in attendance at the hearing on 1 September 2016 and in the course of his letter he stated "[a]s no defence has been filed, the hearing will be to hear the evidence on behalf of the claimants". Curiously the letter also asked the applicant's solicitor to confirm the number of witnesses that would be called on behalf of the applicant.

[16] The applicant's solicitor made contact with the arbitrator on 31 August 2016, (the eve of the hearing date), stating that he was in difficulty

in respect of attending at the arbitration the following day and requested an adjournment. The arbitrator informed him that he could not deal with such an application *ex parte* and suggested that the solicitor contact the respondents' solicitor Mr. Niall Daly.

[17] Following a number of missed calls between the applicant's solicitor and the respondents' solicitor on the evening of 31 August 2016, the applicant's solicitor spoke to the respondents' solicitor at 10.26 a.m. on the morning of 1 September 2016, the date of the arbitration. The arbitration was due to begin at 11.00 a.m. There is some disagreement as to what was said but what is clear is that the respondents were not willing to have the matter adjourned. On arrival at the arbitration hearing the arbitrator confirmed that the applicant's solicitor had been in contact by telephone and had requested an adjournment of the hearing and counsel for the respondents confirmed that the applicant's solicitor had also contacted the respondents' solicitor. The arbitrator decided not to adjourn the arbitration hearing and the matter proceeded accordingly.

[18] It is important to note that no application for an adjournment was made by the applicant to the arbitrator in the presence of the respondents.

[19] On 13 September 2016 (almost two weeks after the arbitration hearing), the applicant's solicitor requested the arbitrator to withhold publishing an award "while we can try to file our points of defence". The letter also stated: "we either need to get proper instructions from [the applicant] or apply to come off record for him in these proceedings".

[20] On 19 September 2016 the arbitrator notified the parties that he intended to proceed with the publication of his award and the award was duly published on 4 October 2016.

[21] It was necessary to set out in some detail the above facts to put the first issue in context; namely, the complaint by the applicant that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

The first issue

[22] It is very clear that over a protracted period of time the applicant or his solicitor was aware of the reference of the dispute to arbitration, the appointment of the arbitrator and the fixing of a date for the arbitration hearing. From 21 January 2015 (when notice of referral to arbitration was sent to the applicant and his solicitor) to the publication of the award on 4 October 2016, there had been extensive attempts by the arbitrator to engage with the applicant for the purpose of conducting the arbitration. A great

deal of correspondence from the arbitrator to the applicant's solicitor was ignored or went unanswered. Having failed to comply with the time limit for delivering points of defence the applicant was given a further extension of time of seven days but even then there was no response to the arbitrator's letter of 12 July 2016 to the applicant's solicitor, granting such an extension. In those circumstances the applicant can hardly complain that the arbitrator wrote to the parties informing them that he intended to conduct an oral hearing and the parties were duly notified of the date of that hearing; namely, 1 September 2016.

[23] When the applicant's solicitor contacted the arbitrator the day before the hearing to request an adjournment the arbitrator quite correctly informed him that he could not entertain such an application in the absence of the other party to the arbitration. The evidence establishes that the applicant's solicitor was informed by the respondents' solicitor that he was of the view that the respondents would not agree to an adjournment but that he would speak with them and get back to him. He informed the applicant's solicitor that the respondents were ready to proceed.

[24] At the very least the applicant's solicitor knew, on the morning of the hearing, that there was no consent to an adjournment at that point and that it was unlikely the respondents would agree to an adjournment. There was no reasonable basis upon which the applicant or his solicitor could have expected that the respondents would have agreed to an adjournment. In the first place there was a substantial sum being claimed on foot of the guarantee and there had been no meaningful engagement by the applicant in the arbitral process up to the date of the hearing. Furthermore, no points of defence had been delivered.

Legal principles applicable to the first issue

[25] The right to set aside an arbitral award under article 34 of the Model Law is very limited and it is a jurisdiction which the court should only exercise sparingly (see *Snoddy v. Mavroudis* [2013] IEHC 285, (Unreported, High Court, Laffoy J., 19 June 2013)). If a party to an arbitration fails to appear at the hearing having been given reasonable notice of the arbitration the hearing may proceed without that party. Such an authority is provided for under article 25(c) of the Model Law and was recognised by the Supreme Court in *Grangeford Structures Ltd. (In liquidation) v. S.H. Ltd.* [1990] 2 I.R. 351 in the context of the Arbitration Act 1954 as a corollary of the principle of party equality (see also, Mustill and Boyd, *Commercial Arbitration* (3rd ed., Lexis Nexis Butterworths,

2013). Article 34(2)(a)(ii) provides that an arbitral award may be set aside by the court if the party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case. This refers back to article 18 which provides:-

> "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

[26] In *Re Corporación Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A.* (Unreported, Ontario Superior Court of Justice, Lax J., 22 September 1999) the Ontario Superior Court of Justice refused to set aside an award noting that the purpose of article 18 is to protect a party from egregious and injudicious conduct by a tribunal. It is not intended to protect a party from its own failures or strategic choices.

Conclusion on the first issue

[27] The facts of this case clearly establish that the applicant (a) was given proper notice of the appointment of the arbitrator; (b) was given an opportunity to partake in the arbitral process; and (c) was informed of the date of the arbitration. No formal application for an adjournment was made to the arbitrator in the presence of the other party and no good reason has been shown by the applicant why such an application was not made. Furthermore, insofar as contact was made with the arbitrator in the absence of the other side on the eve of the arbitration for the purpose of seeking an adjournment, no reasonable explanation has been given for making such an application at such a late stage.

[28] From the very beginning of the arbitral process there was a complete lack of meaningful engagement by the applicant and I am satisfied that the arbitrator was entitled to proceed with the hearing and there is no basis upon which the applicant is entitled to an order setting aside the arbitral award on the basis of article 34(2)(a)(ii).

The second issue

[29] Article 31(2) of the Model Law states as follows:-

> "The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30."

At the hearing of the application both parties agreed that there was a requirement for a reasoned award in this case. The applicant claims that the

award was not a reasoned award and the respondents dispute this saying that the decision of the arbitrator met the criteria required for a reasoned award.

[30] In considering the award some regard must be had to the fact that the applicant (who was the respondent at the arbitration hearing) had not engaged in the process and had not delivered points of defence. To that extent the hearing could be considered as one taking place in default of defence where the applicant in the arbitration only had to formally prove the relevant documents and the amount due and owing. If the applicant or his legal advisors had turned up it was a matter for the arbitrator as to whether (and to what extent) he would permit cross-examination of the witnesses having regard to the failure to deliver points of defence. But, in any event, neither the applicant nor his solicitor turned up at the hearing.

[31] The award recites the fact that the arbitrator heard evidence on oath from Mr. Kieran Coughlan on behalf of the applicants (the respondents to the within application) and from Ms. Margaret O'Callaghan, his accounts executive. His award then goes on to recite a number of original documents that were produced by Mr. Coughlan and he states that he was satisfied that the same were duly executed and in the case of leases referred to, duly stamped. The award recites that Ms. O'Callaghan gave evidence of all sums due by way of arrears of rent, service charges and rates by BHL AMS Limited and BHL Pharmacy Limited and she also gave evidence of fees incurred by the applicants in the High Court examinership application of BHL Pharmacy Limited and related matters.

[32] Having considered the evidence and the submissions made by counsel for the applicants to the arbitration, the arbitrator made a number of findings of law and of fact. He found the respondent to the arbitration liable on foot of the guarantee in writing of 15 October 2009, and that his liability was limited to a period of five years from 1 February 2010. The award went on to set out particulars of the sums representing the liabilities of the two companies connected to the respondent to the arbitration.

[33] During the course of the hearing of this motion, the applicant stated that the reasons of the arbitrator did not disclose the legal basis upon which the guarantees of 2009 could be enforced in respect of the leases of 2012. Insofar as this legal argument is raised, such was never raised in correspondence with the arbitrator. Notwithstanding the opportunity afforded to the applicant by the arbitrator to furnish points of defence, no such points were raised and the arbitrator proceeded without knowledge of this issue upon that basis.

[34] The arbitrator declined to award fees or expenses incurred by the respondents in the High Court examinership proceedings relating to BHL Pharmacy Limited and he set out his reasons why he found they were not properly recoverable on foot of the guarantee.

Legal principles applicable to the second issue

[35] In *Bremer v. Westzucker* [1981] 2 Lloyd's Rep. 130, Donaldson L.J. stated at pp. 132 and 133:-

> "All that is necessary is that the arbitrators should set out what on their view of the evidence, did or did not happen, and should explain succinctly why in the light of what happened, they have reached their decision and what that decision is. That is all that is meant by a 'reasoned award'".

[36] In *English v. Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409, Phillips M.R. stated at p. 2418, with regard to court judgments:-

> "21 … The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision."

[37] In *Bank of Ireland Mortgage Bank v. Heron* [2015] IECA 66, (Unreported, Court of Appeal, 26 March 2015), Kelly J., as he then was, stated at p. 5:-

> "16. For many years the superior courts have held that administrative bodies making judicial or quasi-judicial decisions must give reasons for so doing. Such bodies must satisfy the criteria identified by Murphy J. in *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750 where he said at p. 757 in the context of a decision given by the Planning Board that it:-
>
> > '… must be sufficient first to enable the courts to review it and secondly to satisfy the persons having recourse to the tribunal that it has directed its mind adequately to the issues before it.'
>
> 17. That line has been followed in many subsequent decisions including *Grealish v. An Bord Pleanála* [2006] IEHC 310, [2007] 2 I.R. 536, *Mulholland v. An Bord Pleanála (No. 2)* [2005] IEHC 306, [2006] 1 I.R. 453 and *Deerland Construction v. Aquaculture Licences Appeals Board* [2008] IEHC 289, [2009] 1 I.R. 673. Given that administrative bodies are required to give reasons for their decisions, no lesser standard can be required of courts exercising judicial functions.

18. That such is the case cannot be doubted having regard to the decision of McCarthy J. in *Foley v. Murphy* [2007] IEHC 232, [2008] 1 I.R. 619."

[38] The arbitrator is not under an obligation to provide the sort of reasoned judgment that would be expected from a judge of the superior courts but he still must give a reasoned award to the extent required to enable a party to see why he reached his decision.

Conclusion on the second issue

[39] I am satisfied that the award of the arbitrator is a reasoned award in accordance with the criteria which I have set out above. I have regard to the fact that the arbitration was an uncontested hearing. Mr. Coughlan proved a number of relevant documents and correspondences which are referred to in the arbitration. These were important and necessary documents in order to establish the liability of the applicant. His award also records that Ms. O'Callaghan gave evidence on relevant matters concerning quantum. He sets out the various headings of damage and the amounts due under each heading. He also considered whether or not fees and expenses incurred in the High Court examinership proceedings relating to BHL Pharmacy Limited were recoverable and he found that they were not and set out the basis of that finding; namely, that they could not properly be described as arising from a default by the tenant in payment of rent.

[40] I am satisfied that the award meets the criteria for a reasoned judgment and it meets the criteria set out in article 31(2) of the Model Law. Accordingly, the award does not come within the ambit of article 34(2)(a)(iv) and the applicant is not entitled to relief under that heading.

[41] I refuse the relief sought by the applicant on both issues.

Solicitors for the applicant: *McGuire O'Halloran Solicitors*.

Solicitors for the respondents: *BDM Boylan Solicitors*.

Kate Conneely, Barrister
