No Redaction Needed

Approved Judgment
[2018] IEHC 718

THE HIGH COURT
COMMERICAL

[RECORD NO. 2018/194JR]

BETWEEN

ELECTRICITY SUPPLY BOARD

APPLICANT

AND

DESMOND BOYLE

RESPONDENT

AND

TIMOTHY MC CARTHY

NOTICE PARTY

[RECORD NO. 2018/195JR]

BETWEEN

ELECTRICITY SUPPLY BOARD

APPLICANT

AND

PAUL GOOD

RESPONDENT

AND

DERMOT KELLEHER

NOTICE PARTY

[RECORD NO. 2018/1555P]

BETWEEN

ROSSMORE PROPERTY LIMITED

PLAINTIFF

AND

DONAL FFRENCH O'CARROLL

AND

ELECTRICITY SUPPLY BOARD

DEFENDANTS

Judgment of Mr. Justice Quinn delivered on the 14th day of December, 2018

1. Where the Electricity Supply Board ("the Board") exercises its statutory powers to place electric lines across lands in private ownership and the owner of the property has not consented, the owner is entitled to compensation. The amount of this compensation, if not agreed, is determined by a property arbitrator appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919. That Act contains rules regarding the measurement of compensation, and particular rules governing the exercise of the arbitrator's discretion in determining liability for the costs of the arbitration process. The general rule is that the arbitrator has a discretion as regards the awarding of costs. However, where an unconditional offer of compensation is made to the landowner and not accepted and the amount of compensation awarded by the arbitrator does not exceed the amount of the unconditional offer, the arbitrator shall, unless there are special reasons not to do so, order the claimant to bear its own costs of the process and pay the Board's costs incurred after the date of the offer. In a number of cases before property arbitrators, disputes have arisen regarding the validity and effect of the forms of letters containing what are described as unconditional offers made by the Board.

2. In these proceedings, orders are sought directing three property arbitrators to state cases for the opinion of this Court concerning the validity and effect of the relevant offers. The applications for entry into the Commercial List for the *Boyle* and *Good* cases cite identical reasons for instituting the current proceedings:–

> "The service of an unconditional offer is the method provided by statute pursuant to which ESB can make a former offer to the claimant of a sum that ESB believes is a fair amount in compensation and obtain costs protection, thereby minimising ESB's exposure to costs.

...different property arbitrators have reached different decisions in relation to the validity and effect of unconditional offers made by ESB...

The decisions of property arbitrators on issues related to letters of offer has created considerable uncertainty for ESB as to the manner in which it is enabled to make such offers pursuant to statute and the effect of such offers, and has undermined the efficacy of the unconditional offer process (in terms of its principle objective to save costs)...

...the validity or invalidity of unconditional offers made on the underlying reference to arbitration in this cases raises important questions of law, which have implications not only for the instant reference but for such other references to arbitration. With the increasing volume of claims, and increased *quantum* of compensation claimed, and the significant costs associated with arbitrations, the ability of ESB to make efficacious unconditional offers is integral to the fair and expeditious resolution of these claims."

3. The *Rossmore* case is largely similar, but was framed in slightly different terms:–

"The varying decisions of different property arbitrators on the nature of, and arising on, such letters of offer has created considerable uncertainty for ESB as to the manner in which it is enabled to make such offers pursuant to statute and has undermined the efficacy of the unconditional offer process (in terms of its principle objective to save costs) and is causing commercial issues for ESB.

Accordingly, the issues arising on the service and acceptance of an unconditional offer made on the underlying reference to arbitration in this cases raises important questions, which may have implications for other

references. With the increasing volume of claims, and increased *quantum* of compensation claimed, and the significant costs associated with arbitrations, the ability of ESB to make efficacious unconditional offers is integral to the fair and expeditious resolution of these claims."

4. Before turning to the facts giving rise to these proceedings it is necessary to outline the relevant statutory framework.

Electricity (Supply) Act 1927

5. S. 53 of the Electricity (Supply) Act 1927 confers on the Board the power to place electricity lines above and below ground across any land, with or without the consent of the owner and subject to certain regulations. Before exercising this power, the Board must serve a Wayleave Notice on the owner and occupier of the land, stating its intentions and describing the intended line and works. If, within fourteen days of receiving the Notice, the owner has not consented to the proposed works the Board may enter on the land and proceed and the landowner is entitled to compensation pursuant to s. 53(5) of the Act of 1927, as amended by the Electricity (Supply) (Amendment) Act 1985:–

> "If the owner or occupier of such land or building fails within the seven days aforesaid to give his consent in accordance with the foregoing subsection, the Board or authorised undertaker with the consent of the Board but not otherwise may place such line across such land or attach such fixture to such building in the position and manner stated in the said notice, subject to the entitlement of such owner or occupier to be paid compensation in respect of the exercise by the Board or authorised undertaker of the powers conferred by this subsection and of the powers conferred by subsection (9) of this section, such compensation to be assessed in default of agreement under the provisions

of the Acquisition of Land (Assessment of Compensation) Act 1919, the Board for this purposes of this being deemed to be a public authority."

S. 53(9) of the Act of 1927 reads as follows:–

"Where the Board or an authorised undertaker is authorised by or under this section to place or retain any electric line across any land or to attach or retain any fixture on any building the Board or such authorised undertaker (as the case may be) may at any time enter on such land or building for the purpose of placing, repairing, or altering such line or such fixture or any line or apparatus supported by such fixture."

Acquisition of Land (Assessment of Compensation) Act 1919

6. The relevant provisions of the Acquisition of Land (Assessment of Compensation) Act 1919 are as follows:–

"1. — (1) Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any Government Department or any local or public authority, any question of disputed compensation, and, where any part of the land to be acquired is subject to lease which comprises land not acquired, any question as to the apportionment of the rent payable under the lease, shall be referred to and determined by the arbitration of such one of a panel of official arbitrators to be appointed under this section as may be selected in accordance with rules made by the Reference Committee under this section.

4. Where notices to treat [*which include Wayleave Notices pursuant to the Electricity (Supply) Amendment Act 1985*] have been served for the acquisition of the several interests in the land to be acquired, the claims of the person

entitled to such interests shall, as far as practicable, and so far as not agreed and if the acquiring authority so desire be heard and determined by the same official arbitrator, and the Reference Committee may make rules providing that such claims shall be heard together, but the value of the several interests in the land having a market value shall be separately assessed.

5. — (1) Where the acquiring authority has made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by an official arbitrator to that claimant does not exceed the sum offered, the official arbitrator shall, unless for special reasons he thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as such costs were occurred after the offer was made.

5. —(4) Subject as aforesaid, the costs of an arbitration under this Act shall be in the discretion of the official arbitrator, who may direct to and by whom and in what manner those costs or any part shall be paid, and the official arbitrator in any case may disallow the cost of counsel.

5. — (5) An official arbitrator may himself tax the amount of costs to be paid, or may direct in what manner they are to be taxed.

6. — (1) The decision of an official arbitrator upon any question of fact, shall be final and binding on the parties, and the persons claiming under them respectively, but the official arbitrator may, and shall, if the High Court so directs, state at any stage of the proceedings, in the form of a special case for the opinion of the High Court, any question of law arising in the course of the proceedings, and may state his award as to whole or part thereof in the form of a special case for the opinion of the High Court.

6. — (2) The decision of the High Court upon any case so stated shall be final and conclusive and should not be subject to any other Court."

Arbitration Acts 1954 – 2010

7. S. 35 of the Arbitration Act of 1954, provides as follows:–

"35. — (1) An arbitrator or umpire may, and shall if so directed by the Court, state—

(a) any question of law arising in the course of the reference, or

(b) any award or any part of an award,

in the form of a special case for the decision of the Court.

35. — (2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be ordered by the Court to be stated, notwithstanding that proceedings under the reference are still pending."

8. The Arbitration Act 1954 was repealed by the Arbitration Act 2010, but certain features of the previous legal regime have been retained. S. 6 of the Arbitration Act 2010 provides that the United Nations Commission on International Trade Law (UNCITRA) Model Law on international commercial arbitration shall have the force of law in the State and shall apply to other arbitration agreements, whether or not they are international commercial arbitrations.

Article 5 of the Model Law provides as follows:–

"In matters governed by this Law, no court shall intervene except where so provided in this Law."

9. However, there is an exception made for arbitrations that are governed by pre-existing statutory regimes. S. 29 of the Arbitration Act 2010 provides as follows:–

"29. — (1) This Act, other than the excluded provisions, shall apply to every arbitration under any other Act as if the arbitration were pursuant to an arbitration agreement and as if that other Act were an arbitration agreement, except in so far as this Act is inconsistent with that other Act or with any rules or procedure authorised or recognised under that other Act."

10. It has been submitted and accepted by the parties that insofar as Article 5 of the Model Law would appear to oust the potential jurisdiction of an arbitrator to state a case to the High Court, such a provision is inconsistent with s. 6 of the Acquisition of Land (Assessment of Compensation) Act 1919 and, therefore, that s. 6 of the Act of 1919 prevails and the jurisdiction of an arbitrator to state a case or, for that matter, the jurisdiction of this Court to direct that a case be stated under s. 6 of the Act of 1919 continues notwithstanding the provisions of the Arbitration Act 2010.

11. I shall return later in this judgment to relevant cases concerning the jurisdiction of arbitrators to refer cases stated, and governing the exercise of their discretion, and concerning the jurisdiction of the Court to order cases to be stated under s. 6.

Electricity Supply Board v Desmond Boyle

12. By a Wayleave Notice dated the 5th of June, 2014 and 21st of March, 2016, the Board gave notice to the notice party, Timothy McCarthy of its intention to place an electric line above grounds across the lands owned by Mr. McCarthy in Knockaghaduff, Co. Cork, for the purpose of works associated with the construction of the Clashavoon-Dunmanway 110 kV Line. With Mr. McCarthy not having consented to the entry onto the lands, on 11th of July, 2016, in exercise of the statutory powers under the Act of 1927, the Board entered into the lands to undertake the works pursuant to the way-leave notice. On 24th of September, 2016, Mr.

McCarthy applied to the Land Values Reference Committee for the appointment of a property arbitrator to assess the quantum of compensation payable under the mechanism of the Acquisition of Land (Assessment of Compensation) Act 1919.

13. On 21st of November, 2016, the Respondent was appointed as the property arbitrator by the Reference Committee.

14. On 9th of January, 2017, Mr. McCarthy delivered his Statement of Claim in the Reference to Arbitration for the total sum of €707,000. On 21st of January, 2017, the Board delivered its reply and on 8th of February, 2017, the Board made what it described as an unconditional offer.

15. The unconditional offer made by letter dated 8th February, 2007, was in the following terms:–

> "Timothy McCarthy v ESB
>
> Unconditional Offer
>
> Dear Sirs,
>
> We refer to this claim in which the Arbitration is due to commence on 21 February 2017.
>
> Pursuant to s. 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919, the Electricity Supply Board hereby makes an unconditional offer to pay the sum of [>*redacted*<] in full and final settlement of your client's claim for compensation, and to pay the reasonable costs incurred by your client up to the date of this letter plus reasonable costs to cover the taking of advice in respect of this offer, those costs to be taxed in default of agreement.
>
> Yours faithfully,
>
> Ray Clarke,
>
> Solicitor"

16. The hearing of the arbitration was adjourned and ultimately scheduled for the 29th of June, 2017.

17. On 21st of June, 2017, the Board delivered a second letter of offer in the following terms:–

> "Timothy McCarthy v ESB
>
> Unconditional Offer
>
> Dear Sirs,
>
> We refer to the above Reference to Arbitration, which is listed for hearing on 28 – 30 June 2017. Pursuant to s. 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919, the Electricity Supply Board hereby makes an unconditional offer to pay the sum of [>*redacted*<] in full and final settlement of your client's claim for compensation.
>
> In addition, the Electricity Supply Board hereby makes an unconditional offer to pay:
>
> - the amount as directed by the Property Arbitrator to be paid in respect of your clients costs of, and incidental to, the preparation of the claim (i.e., the pre reference costs); and
> - the amount as directed by the Property Arbitrator to be paid in respect of your client's costs of the Reference to Arbitration, whether as taxed by the Property Arbitrator or as taxed in the manner directed by the Property Arbitrator; and
> - the reasonable costs inccurred by your client in taking advice in relation to this offer.
>
> Yours faithfully,

Ray Clarke,

Solicitor"

Second Offers

18. It appears that from time to time, and not infrequently, second offers are made because additional information may come to the attention of the acquiring authority, either through further submissions or reports furnished during the progression of the claim or otherwise, which would justify the increase of the offer by contrast to the amount offered when more limited information was available.

19. The Board submits that there is nothing fundamentally objectionable in making a second offer in such circumstances, but a question arises concerning the effect of a second offer on previous offers for the purposes of s. 5(1).

20. It is also said that letters in the form of the letter of offer made to Mr. McCarthy on 8th February, 2017, have been found by certain arbitrators to fall short of the conditions required for an unconditional offer within the meaning of s. 5(1) of the Act of 1919. The Board wishes to eliminate any scope for further controversy about such forms of letter.

Arbitration Hearings

21. At the commencement of the hearing before the Arbitrator on 29th of June, 2017, counsel for Mr. McCarthy applied for a preliminary ruling as to the validity of the two letters of offer. Counsel for Mr. McCarthy submitted that the letters of offer were not unconditional for the purpose of s. 5 of the 1919 Act and the Board, in response, maintained that they were unconditional. Extensive debate ensued as to the validity of the forms of the letters and on questions as to whether an unconditional offer could be withdrawn, modified or updated and whether a second offer could be made and the respective implications of such steps.

22. The Arbitrator ruled that the first offer letter had in effect been withdrawn by the making of the second offer letter and ruled that the second offer letter, in its terms, was not an unconditional offer for the purpose of s. 5 of the 1919 Act. The transcript of the hearing before the Arbitrator records his ruling as follows:–

> "Firstly, that an unconditional offer can be changed and withdrawn and resubmitted for different amount [*sic*] or whatever. The opportunity or the point of the whole – the whole *raison d'être* of unconditional offer [*sic*] is to give the Claimant or in some cases the Respondent but in this case the Claimant, the opportunity of deciding whether that [*amount that is offered*] is sufficient [*in terms of funds*] to cover his – his claim for compensation, which may include costs, depends on the terms of the unconditional offer. And in my view, the second letter presupposes that it is not unconditional insofar as it presupposes that the matter is going to Arbitration which, if you like is a complete negation of the intention of an unconditional offer. So in my view, the second letter is not unconditional offer [*sic*] for that reason. And if there is to be an unconditional offer referred to, it must be the first letter, i.e. the 8th of February, if I am correct.
>
> Now that is my ruling on that. Clearly, as I said earlier, if my award depending on the amount of my award, this matter may whither. If, for whatever reason it doesn't whither, insofar as my ruling has been made in respect of what is the unconditional offer. It is presumably open to the respondents to ask the Courts for a view on that. I am saying no more about it, other than in my consideration, the second offer is invalid."

23. The Arbitrator then proceeded with the substantive hearing of the claim, taking evidence and submissions. On 4th January, 2018, he issued his award as a

"final award save as to costs" noting the dispute as to the validity and effect of the offer letter. The amount of compensation awarded was €65,102.50. This transpired to be a sum higher than contained in the first offer, but lower than the amount in the second offer. Therefore, the question of the validity and status of these letters for the purposes of s. 5(1) was a live issue governing the determination of liability for costs.

24. By letter dated 13th of February, 2018, the Board requested that the Arbitrator state a case for the Opinion of the High Court as to whether the offer contained in the letter dated 21st of June, 2017, was an "unconditional offer" within the meaning of s. 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919.

25. By later dated 16th of February, 2018, the Arbitrator indicated that he was not prepared to state a case as to what constitutes a valid unconditional offer, being of the view that this question constituted a matter of fact and not of law. These proceedings were issued on 7th of March, 2018, and on 12th of March, 2018, the Board applied for and was granted leave to bring an application for judicial review. The Board submitted that the point of law in the case had considerable implications not just on this Reference to Arbitration, but also on other References that property arbitrators will have to determine given the increasing volume of such References. The substantive relief now sought is a decision is as follows:

1. An order of *certiorari*, by way of judicial review, quashing the decision made by the Respondent dated 16 February 2018, to refuse to state a special case for the opinion of the High Court on a question of law (in relation to the nature of a letter of offer made on a Reference to Arbitration pursuant to the provisions of s. 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919).

2. A declaration, by way of judicial review, that in purporting to make the decision, dated 16 February 2018, to refuse to state a special case for the opinion of the High Court on a question of law (in relation to the nature of a letter of offer made on a Reference to Arbitration pursuant to the provisions of s. 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919), the Respondent erred fundamentally in law, and/or acted irrationally, such as that his decision is void and of no legal effect.
3. An order of *mandamus* by way of judicial review, directing the Respondent to state a special case for the opinion of the High Court, pursuant to the provisions of s. 6(1) of the Acquisition of Land (Assessment of Compensation) Act 1919, on asserting questions of law *viz.*:–

> "Does the letter dated 21 June 2017 constitute a valid unconditional offer for the purposes of subsection 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919?"

Although appearances were initially entered on behalf of Mr. Boyle, neither Mr. Boyle or Mr. McCarthy have participated in the hearing of this application for judicial review.

Judicial Review of Property Arbitrations

26. It is well established that the exercise of powers of a property arbitrator are amenable to judicial review. In *Cork County Council v Shackleton* [2011] I.R. 443 Clarke J. (as he then was) stated (at para. 107) as follows:–

> "It should be recalled that a property arbitrator exercising the powers of such an arbitrator under statute is carrying out a public law function. The court should, of course, exercise significant deference to the decisions of such an arbitrator. However, it seems to me that it follows from the fact that a property

arbitrator is carrying out a public law function and thus is amenable to judicial review, that the ordinary rules of judicial review apply."

Case Stated

27. The circumstances and conditions in which an arbitrator should exercise his discretion to state a case to the High Court have been considered in a number of judgments. Murphy J., in *Hogan v St. Kevin's Company &* Purcell [1986] I.R. 80, and Finlay Geoghegan J. in *Re J.J. Jennings v O'Leary & Midland Construction and Engineering Limited* [2004] IEHC 318 each adopted, with approval, the seminal judgment of Lord Denning M.R. in *Halfdan Greig and Co. v Sterling Coal Ltd., ("The Lysland")* [1973] Q.B. 843 where he stated as follows:–

> "When one party asks an arbitrator or umpire to state his award in the form of a special case, it is matter for his discretion. If the issues are on matters of fact and not of law, he should refuse to state a case. If they raise a point of law, it depends on what the point of law is. He should agree to state a case whenever the facts, as proved or admitted before him, give rise to a point of law which fulfils these requisites:
>
> > The point of law should be real and substantial and such as to be open to serious argument and appropriate for a decision by a court of law…as distinct from a point which is dependent on the special expertise of the arbitrator or umpire…
> >
> > The point of law should be clear cut and capable of being accurately stated as a point of law – as distinct from the dressing up of a matter of fact as if it were a point of law.

> The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case – as distinct from a side issue of little importance.
>
> If those three requisites are satisfied, the arbitrator or umpire should state a case."

28. Later in his judgment, Lord Denning continued as follows:–

> "Whilst setting out those guidelines, I would give a word of warning: the arbitrator or umpire should be watchful to see that that the procedure by special case is not abused. The *Commercial Court Users Conference Report*, over which Pearson J. presided in 1962 (Cmnd. 1616) drew attention to abuses such as a special case on "whether upon the facts found by the umpire his ultimate decision is correct." That is why I said the point of law should be clear cut."

29. It has also been said that the principles that inform the discretion of an arbitrator in deciding whether to state a case to the Court should also inform this Court in the exercise of its discretion as to whether to direct the arbitrator to state a case. However, this is a judicial review and accordingly it is necessary to consider whether the refusal to state a case constituted, in of itself, an error of law or, as the Board submits, an act so irrational that it ought to be quashed.

Errors of Law

30. The Board submits that the Respondent, Mr. Boyle, failed to lawfully and properly interpret the requirements of s. 5(1) of the 1919 Act. In particular, it is said, that his finding that the offer letter dated 21st of June, 2017, was based on a supposition as to whether the matter was proceeding to arbitration is not a relevant consideration as to the validity of the unconditional offer, having regard to the

requirements of s. 5(1) itself. The Board say that of necessity, every unconditional offer must be based on the premise that if it is not accepted the matter will proceed to full hearing.

31. In *Manning v Shackleton* [1996] 3 I.R. 85, Keane J. found that an offer which provided for the payment of a sum including costs and for the carrying out of certain works on the applicant's land was not an unconditional offer for the purposes of Section 5. He quoted:–

> "The law is also stated in McDermott and Woulfe, *Compulsory Purchase and Compensation in Ireland: Law and Practice*, at p. 191 as follows:–
>
> > "The unconditional offer must be in writing, be unconditional, and it must specify a certain sum as compensation only. It should not be a sum including costs nor a sum as compensation together with the execution of works."
>
> That is clearly a correct statement of the law."

32. *Manning v Shackleton* [1996] 3 I.R. 85 is clear authority for the proposition that the Court will regard the matter of the construction of an unconditional offer and consideration of its validity for the purposes of Section 5 as a real and substantial question of law appropriate for the determination by the Court.

33. The existence of a letter and its contents are, themselves, matters of fact, at least, which may require evidence, but these facts are not in dispute. On the other hand, the question as to whether the letter in its terms constitutes an offer meeting the requirements of s. 5(1) of the Act is a matter of law. Therefore, the ruling of the arbitrator that this question was a question of fact was, in itself, an error of law.

Irrationality

34. During the hearing the Mr. Boyle indicated that it would be "presumably open to the [*ESB*] to ask the courts for, depending on the amount of the award, to ask the courts for a view on that [*question i.e. the validity of the second offer*]." When later formally requested in correspondence to do so, he decided that it was not an appropriate question of law – or a question of law at all – to refer. It is submitted that this was, at least, inconsistent and therefore the respondent acted irrationally.

35. Whether it is fair to characterise the conduct of the Respondent as generally irrational is questionable because an arbitrator is entitled, when making his reasoned award, to have reflected on submissions during the hearing or, as in this case, in later written submissions. However, in as much as he indicated during the hearing that the Board could, if necessary, take the question to "the courts", the subsequent refusal to state a case was at least inconsistent and has, at least, the appearance of irrationality.

The Case Stated Requirements

36. S. 6(1) of the Act of 1919 states that an official arbitrator may and shall, if the High Court so directs, state a special case for the opinion of the High Court, at any stage in the proceedings, on any question of law arising in the course of the proceedings. Obviously, this is a discretionary power, but the discretion must be exercised in accordance with the correct principles of law. Furthermore, s. 6(1), through the use of the words "shall, if the High Court so directs" reserves, to the High Court, the right to require that a question of law be stated.

37. This Court is persuaded by the submissions of the Board that the question of the validity of the letter of 21st of June, 2017, is a real and substantial question of point of law.

38. The Court also finds that the question is also sufficiently clear-cut to meet the test in *Halfdan Greig and Co. v Sterling Coal Ltd ("The Lysland")* [1973] Q.B. 843,

as approved by Murphy J. in *Noel Hogan & Ors v St Kevin's Co and Owen Purcell* [1986] I.R. 80 and endorsed by Finlay Geoghegan J. in *J.J. Jennings v O'Leary & Midland Construction & Engineering Ltd* [2004] IEHC 318.

39. As to whether the question is of such importance that its resolution is necessary for proper determination of the case, in this case the amount of the award issued by the respondent was higher than the amount proposed in the first offer and lower than the amount contained in the second offer. Therefore, it is clear that, as the Board has put it, there is a "live issue as to the validity of the ESB's second offer dated 21st of June, 2017 and the consequences which flow from the determination as to its validity."

40. For all of these reasons, the Court will make the orders sought by the applicant as follows:

1. An order of *certiorari*, by way of judicial review, quashing the decision made by the Respondent, dated 16 February 2018, to refuse to state a special case for the opinion of the High Court on a question of law (in relation to the nature of a letter of offer made on a Reference to Arbitration pursuant to the provisions of s. 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919).
2. A declaration, by way of judicial review, that in purporting to make the decision, dated 16 of February 2018, to refuse to state a special case for the opinion of the High Court on a question of law (in relation to the nature of a letter of offer made on a Reference to Arbitration pursuant to the provisions of s. 5(1) in the Acquisition of Land (Assessment of Compensation) Act 1919, the Respondent erred fundamentally in law and acted irrationally such that his decision is void and of no legal effect.

3. An order of *mandamus* by way of judicial review, directing the Respondent to state a special case for the opinion of the High Court, pursuant to the provisions of s. 6(1) of the Acquisition of Land (Assessment of Compensation) Act 1919 as to whether the letter dated 21st of June, 2017, constitutes a valid unconditional offer for the purposes of s. 5(1) of the Act. Before making this order, I shall hear the Applicant as to the precise form of the question of law directed to be stated.

Electricity Supply Board v Paul Good

41. The initial facts in this case, at least in the first instance, are broadly similar to those of that in *ESB v Boyle*. Neither Mr. Good or Mr. Kelleher have objected to the application to state a case in these proceedings.

42. On 16th of August, 2016, the Board served a Wayleave Notice on Mr. Kelleher notifying it of its intention to place an electric line above ground across his lands at Clashbredane, Co. Cork.

43. On 30th of August, 2016, Mr. Kelleher's advisers, Land and Utility Compensation Consultants Limited, submitted a claim for compensation by reference to the Wayleave Notice dated 16th of August, 2016.

44. On 13th of September, 2016 Mr. Kelleher applied to the Land Value Reference Committee for the nomination of a Property Arbitrator. Mr. Desmond Boyle was appointed.

45. On 8th of February, 2017, the Board made what it described as an "unconditional offer" to Mr. Kelleher's solicitors:–

"Dermot Kelleher v ESB

Unconditional Offer

Dear Sirs,

We refer to this claim in which the Arbitration was due to commence on 14 February 2017 although the Arbitrator has now proposed moving the hearing to 21 February.

Pursuant to s. 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919, the Electricity Supply Board hereby makes an unconditional offer to pay the sum of [>*redacted*<] in full and final settlement of your client's claim for compensation, and to pay the reasonable costs incurred by your client up to the date of this letter plus reasonable costs to cover the taking of advice in respect of this offer, those costs to be taxed in default of agreement.

Yours faithfully,

Ray Clarke,

Solicitor."

46. On 21st of June, 2017, a second letter of offer was made by the Board:–

"Dermot Kelleher v ESB

Unconditional Offer

Dear Sirs,

We refer to the above Reference to Arbitration, which is listed for hearing on 28 – 30 June 2017.

Pursuant to s. 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919 the Electricity Supply Board hereby makes an unconditional offer to pay the sum of [>*redacted*<] in full and final settlement of your client's claim for compensation.

In addition, the Electricity Supply Board hereby makes an unconditional offer to pay:

- the amount as directed by the Property Administrator to be paid in respect of your client's costs of, and incidental to, the preparation of the claim (i.e., the pre–reference costs); and
- the amount as directed by the Property Arbitrator to be paid in respect of your client's costs of the Reference to Arbitration, whether as taxed by the Property Arbitrator or as taxed in the manner directed by the Property Arbitrator; and
- the reasonable costs incurred by your client in taking advice in relation to this offer.

Yours faithfully,

Ray Clarke,

Solicitor"

47. It appears that at the first hearing of the Reference which commenced on the 28th of June, 2017, Mr. Boyle was inadvertently given sight of an un-redacted copy of the letter of offer dated 8th of February, 2017. Accordingly, he recused himself and the matter was referred back to the Land Value Reference Committee and Mr. Good was appointed. The hearing before Mr. Good was listed on 17th of October, 2017.

48. At the hearing on 17th of October, 2017, counsel for Mr. Kelleher applied to the Arbitrator for a preliminary ruling as to the validity of the two letters of offer. It was submitted on behalf of Mr. Kelleher that the letters of offer were not unconditional offers for the purposes of s. 5 of the 1919 Act. Mr. Kelleher submitted also that there cannot be more than one offer and the first unconditional offer cannot be withdrawn. At that hearing, the Arbitrator made an initial ruling to the effect that neither of the letters of offer were a valid unconditional offer for the purpose of s. 5 of the Act. The Board requested that the Arbitrator state a special case for the Opinion of

the High Court, pursuant to s. 6 of the 1919 Act as to the validity of the unconditional offers. The Arbitrator directed the exchange of submissions between the parties on the matter of the application to him to state a case. Submissions were exchanged and ultimately by letter dated 24th of January, 2018, the Arbitrator refused to state a case. In his letter of 24th of January, 2018 the Arbitrator made the following rulings:–

> "…[*On*] the basis of the evidence and arguments made at the Hearing in October…there is no apparent relationship between the first Offer and the second Offer and…the two Offers are completely separate independent entities…
>
> …[*As to whether it is possible to make a second offer*] it should be possible, but only if the first offer is explicitly withdrawn in writing, prior to the making of the second offer, be it either by way of a simple notice of withdrawal or by stating with the second offer letter, by way of an opening statement, that the second offer is in substitution of the original one…
>
> …[*An*] unconditional offer should not be capable of withdrawal…unless an alternative offer is made."

49. As regards the substance of the letters themselves, he found the following:–

> "In the Offers, the adjective "reasonable" is used to describe all costs in the first Offer and a third item of costs in the second Offer. This can only be interpreted, in my opinion, as meaning "reasonable" in the eyes of the author of the Offer letters, in this case the Respondents who will only pay what they consider "reasonable". I find the inclusion of this word – "reasonable" – therefore places a condition or qualification on the question on the amount of costs that the Respondents are willing to

pay. In the circumstances, I must rule that both offers are invalid in that they include a condition.

As this subject concerns a matter of Fact only and not a "Point of Law" requiring clarification it is my opinion that I have no alternative but to find that it is not a suitable subject for a Case Stated."

50. The submissions of the parties to the Arbitrator as to the form of a case stated addressed different forms of questions. However, the parties were not in disagreement that a case should be stated to the Court. The Board now submits that the questions which should be stated in the case are as follows:

1. Does the letter dated the 8th of February, 2017, constitute a valid unconditional offer for the purpose of s. 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919?
2. Does the letter dated 21st of June, 2017, constitute a valid unconditional offer for the payment s. 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919?
3. If either or both of the letters of 8th of February, 2017 and 21st of June, 2017 constitute valid unconditional offers for the purposes of s. 5 of the Acquisition of Land (Assessment of Compensation) Act 1919, can such offer or offers be accepted at any time prior to the making of an award by the Property Arbitrator?

51. In relation to the question as to the validity of the offer letters for the purpose of s. 5 of the Act of 1919, I have concluded in the context of the *Boyle* case that whilst the existence and content of a letter are clearly matters of fact, the question as to whether they contain the ingredients of unconditionality to qualify as valid for the purpose of s. 5(1) is a question of law and accordingly, I find that the respondent erred

in law in making the finding that this was a question of a fact and, accordingly, will grant the orders sought in respect to the first two questions.

52. The third question, in respect of which the applicant seeks an order directing that a case be stated is as follows:–

> "If either or both of the letters of the 8th of February, 2017 and 21st of June, 2017, constitute valid unconditional offers for the purpose of Subsection 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919, can such offer or offers be accepted at any time prior to the making of an award by the Property Arbitrator?"

53. This was not one of the questions as formulated by the applicant to the Arbitrator as to the form of a case stated. However, the Respondent, Mr. Good, proposed that should the matter be referred to the Court by way of case stated, then this question properly arises as a result of the controversy which occurred in the oral hearing before the Arbitrator on 17th of October, 2017.

54. In its submissions to this Court, the Applicant refers to extensive case law: principally, English case law concerning the question of the time for the acceptance of an unconditional offer, principally cases under the Land Compensation Act 1961.

55. S. 5(1) of the 1919 Act does not provide for the imposition of a time limit for the acceptance of an unconditional offer. Therefore, the Applicant submits that a question of law arises in these cases as to whether such offers can be accepted at any time, or whether it is reasonable to require that they be accepted by a particular date in any given case if the claimant is not to be fixed with liability for costs thereafter. Whilst extensive English law on this subject is cited, it is said that there has never been a decided case on this issue in this jurisdiction. Accordingly, this question also satisfies the test as to the identification of a clear-cut question of law, which is real

and substantial and is necessary for the determination of the matters that is at issue between the parties. The latter requirement is addressed by the fact the notice party Mr. Kelleher claims that unless and until a determination is made on the validity of the respective offer letters, he is unable to accept the offer in full and final satisfaction of his claims, or alternatively, incur the risk of proceeding with the hearing.

56. As to the precise formulation of the third question, I shall hear the Applicant further, and this links directly to the formulation of a similar question in the third case considered below.

Rossmore Properties Limited v Donal ffrench – O'Carroll & The Electricity Supply Board

57. This case differs from the first two in a number of respects.

58. Firstly, as a procedural matter, the issue comes before the Court by way of a hearing of the issues on a Plenary Summons, on which the plaintiff seeks an order directing Mr. ffrench – O'Carroll to state a special case for the Opinion of the High Court on questions of law formulated in the endorsement of claim to the Summons. The facts also differ in that in this case an unconditional offer was accepted, and questions arise as to whether it was accepted outside a period of time which was reasonable to do so and if so, what costs consequences follow.

Background

59. On 10th of April, 2015, the Board served a Wayleave Notice pursuant to s. 53 of the Electricity (Supply) Act of 1927, on the Plaintiff, Rossmore Properties Limited.

60. On 4th of July, 2016, the Plaintiff made a claim for compensation and, on 21st of July, 2016, the Plaintiff applied to the Land Value Reference Committee for the nomination of a Property Arbitrator.

61. On 29th of July, 2016, Mr. ffrench – O'Carroll was nominated as Property Arbitrator by the Land Value Reference Committee.

62. The Arbitrator gave initial directions as to the conduct of the reference, exchanges of pleadings, witness statements and reports and the hearing of the arbitration was fixed for 27th of November, 2017.

63. On 2nd of November, 2017, the Board made an offer to the Plaintiff's solicitors in the following terms:–

> "*Rossmore Properties Limited v ESB*
>
> Unconditional Offer
>
> Dear Sirs,
>
> We refer to the above Reference to Arbitration, which is listed for hearing on 27 November, 2017.
>
> Pursuant to s. 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919, the Electricity Supply Board hereby makes an unconditional offer to pay the sum of €25,007 as compensation.
>
> The Electricity Supply Board will also pay:
>
> - An additional sum in respect of your client's costs of and incidental to the preparation and submission of the claim and negotiations (i.e. the pre-reference costs) to be determined by the Property Arbitrator in default of agreement.
> - An additional sum in respect of your client's costs to the reference to arbitration, whether as taxed by the Property Arbitrator or as taxed in the manner directed by the Property Arbitrator in default of agreement.
>
> Yours faithfully,
>
> Ray Clarke,

Solicitor."

64. On 24th of November, 2017 (being the Friday before the Monday on which the arbitration was scheduled for hearing), the plaintiff's solicitor wrote to the arbitrator (copied to the Board) in the following terms:–

"Dear Sir,

Further to the above arbitration, I wish to advise you that the claim has been compromised and accordingly, the only matter that requires to be dealt with on Monday is the ruling of the award.

I trust that the foregoing is in order and look forward to attending before you on Monday.

Yours faithfully,

Ray Clarke,

Solicitor"

65. Where such a claim is settled, the arbitrator will commonly be requested to make an award for the purpose of rendering the compensation and costs recoverable. He may also tax the *quantum* of costs himself or direct taxation by the Taxing Master of the High Court.

66. At the sitting of the Arbitrator held on 27th of November, 2017, Counsel for the Board submitted that the Plaintiff's costs should be granted only up to the date which the Board says was a reasonable period within which the offer ought to have been accepted. The Board submitted that in this case a reasonable period was five working days from the making of the unconditional offer. It submitted that costs thereafter were incurred by unnecessary delay in the acceptance of the unconditional offer and that the Board had incurred costs since that date including the costs of the submissions and costs of finalising expert reports and preparing for the hearing. The

Board submitted that there was extensive case-law, notably English case-law in relation to equivalent schemes, to the effect that a reasonable period was five days in all of the circumstances of this case.

67. Counsel for the Plaintiff submitted to the Arbitrator, that as the offer made on 2nd of November, 2017, was not conditional upon its acceptance within any particular period of time, it could be accepted at any time up to the making of an Order in the Arbitration.

68. Counsel for the Plaintiff submitted that the unconditional offer had been made late in the day on 2nd of November, 2017 where a hearing had been set for the arbitration and in circumstances where no previous offer had been made and none of the necessary engagement between valuers had occurred etc.

69. The Plaintiff submitted to the Arbitrator that he had no jurisdiction to look behind the terms of the settlement – that the only function of the Arbitrator on the 27th of November, 2017, was to enter a consent award in the terms of the settlement which had been made and accepted. As Counsel for the Plaintiff put it:–

> "[*The Arbitrator's*] discretion is absolute…save for the fact that it is governed within this letter [*of settlement*]."

70. On 30th November, 2017, the Plaintiff's solicitor wrote to the Arbitrator, referring to the ruling hearing, which took place on 27th of November, 2017. Reference was made to the possibility of parties wishing to appeal against the Arbitrators Determination "and, in particular, the opportunity to appeal by way of case stated." It was suggested that it would be appropriate that the Arbitrator publish a draft award to allow the parties to take whatever steps arising therefrom.

71. On 4th of December, 2017, the Arbitrator replied to the Plaintiff indicating that he was continuing to draft his award and inviting the Plaintiff to indicate "in

propositional form the case stated question you have in mind." On 18th of December, 2017, the Plaintiff's solicitors replied to the Arbitrator, repeating a number of submissions which had been made at the hearing of 27th of November, 2017, concerning its entitlement to costs and in particular referring to the question of a case stated. The letter states as follows:–

> "[*In*] the event that you are minded to make an award to the effect that the Claimant is not entitled to its cost in the terms of the settlement of the claim between the parties as set out in the terms recorded in the letter of 2nd of November, 2017, or that the Respondent is entitled to any extent of its costs, notwithstanding the settlement of the claim in the terms recorded in the letter of the 2nd of November, 2017, we suggest that you state a consultative case to the High Court in the following terms:
>
> > 'In circumstances where the parties inform me that the claim was settled in the terms recorded in the letter of the 2nd of November, 2017, am I confined in the exercise of my discretion as to costs, to award the Claimant his costs up to the 7th of November, 2017, and to pay the Respondent its costs from that date, to include the costs of the ruling of the award and the taxation of costs?'"

72. On 21st of December, 2017, Mr. Clarke, solicitor for the Board replied, responding to the substantive submissions made by the plaintiff regarding its entitlement to costs; in that letter the Board stated as follows:–

> "The Respondent accepts that the Claimant is entitled to these costs. The cost of pre-reference and costs of the reference in the term of the particular time and level of costs, for example, are at the Property Arbitrator's discretion and it is in relation to the costs of the reference only that the Respondent submitted

to you in its written submissions and at the hearing that the costs should run only up to the expiry of five working days after the date of the offer and that thereafter the Respondent should be awarded its costs against the Claimant."

73. The Board then responded to submissions which have been made by reference to English case-law in particular, concerning the question of what would be a reasonable time within which a claimant should be expected to consider and accept an offer. The Board repeated its position as to the implications of these issues as follows:–

"The authority cited by the Claimants in fact supports the Respondent's submission that costs should be granted only up to the date which is a reasonable period after the date which is after the unconditional offer. The Respondent submitted that a reasonable period is five working days.

74. The Board submitted that the delay on the part of the plaintiff in accepting the offer was "unreasonable conduct", having regard to considerable costs incurred thereafter, and submitted that the Board should be awarded its costs between 9th of November, 2017, and 24th of November, 2017.

75. Mr. Clarke did not agree that the question proposed by the Plaintiff in its letter of 18th of December, 2017, arose based on the arguments had before the Arbitrator.

76. Further correspondence was exchanged between the parties regarding the question of what would be a reasonable time within which an unconditional offer ought to be accepted and concerning the discretion of an arbitrator to take such factors into account in making his award even in circumstances where an unconditional offer was accepted. The plaintiff contended that the arbitrator had no jurisdiction or discretion to deviate from doing other than recording the settlement terms as an award and without embarking on a discretionary consideration as to the limitations on costs

sought by the ESB. In his letter of 22nd of December, 2017, the plaintiff requested of the Arbitrator as follows:–

> "[*If*] you are minded to accede to the Respondent's application to penalise the claimant as to costs when ruling a settlement that expressly provides for cost to be awarded by the Property Arbitrator and determined by him in default of agreement, a case be stated to the High Court [*due to the background facts of the matter*]."

77. On 10th of January, 2018, the Arbitrator issued his draft "Arbitrators Agreed Final Award and Award of Costs." In the covering e-mail he referred to the Plaintiff's request for a case stated in respect to entitlement of costs and stated that there is "ample authority available to me in making my decision in that regard and I do not need to trouble the High Court."

78. In the award the Arbitrator addressed the question raised by the Board and the submission made by it that if the offer was to be accepted that it be accepted in a reasonable time. He found that in order to make a decision on liability for costs, it was necessary to deal with the material issues that arose between the parties. He stated as follows:–

> "Essentially, it is the Claimant's case that the unconditional offer in compulsory purchase compensation claims, is traditionally open to being accepted up until the making of the arbitrator's award; whereas it is the Respondent's case that if the offer is to be accepted, it must be accepted in a reasonable time. In order to come to a decision on liability for costs, it is necessary to deal with the material issues which arose between the parties."

79. In doing so, the Arbitrator concluded that as a matter of law the claim for market value of the "burden" was misconceived in law and he made certain findings allowing for the costs of certain witnesses and counsel.

80. Having considered the submissions made regarding case law as to the reasonable as to whether there was a time limit within which offers should be accepted, he found as follows:–

> "It seems to me what is to be taken from all these cases is that Claimants are generally entitled to their costs where an offer has been accepted but that is not an absolute rule. Further, it seems to me that a claimant is bound to accept an offer if they intend to do so, within a reasonable period in the circumstances of the particular case. To allow otherwise would be to foster a moral hazard…
>
> In summary, in the circumstances of this case where the hearing date was fast approaching; where the Claimant had the assistance of both Senior and Junior Counsel; where the costs are potentially disproportionate to the offer accepted; at least one 'head of claim' failed; and where the offer as accepted was hardly 10% of the claim, it seems to me that five working days is a reasonable period in which to accept the unconditional offer. However, I will allow the Claimants a clear week in which to consider the unconditional offer (while noting also that the Claimant received the Respondent's Statement of Reply (otherwise Points of Defence) at 2:30pm on Thursday the 9th November, and I determine that the unconditional offer should have been accepted by the morning of Monday, 13th November 2017.
>
> The claimant has requested that I make 'consultative case stated' to the High Court on the issue, but it seems to me that there is ample authority to hold that the entitlement to costs up to the making of an award by a Property Arbitrator,

following the acceptance of an unconditional offer, is not an absolute rule and is subject to the circumstances in each case and to allow otherwise would foster a moral hazard."

81. In his award the Arbitrator then determined as follows:–

a) The Respondent shall pay to the Claimant compensation in the sum of €25,007 (Twenty-five thousand and seven euro).

b) The Respondent do pay the Claimant its costs up until the morning of 13th of November, 2017, including its pre–reference and its reference costs in that time, to be taxed by the Arbitrator in default of agreement; and thereafter,

c) The Claimant should be responsible for the Respondent's pre–reference and reference costs to be taxed by the Arbitrator in default of agreement, save the Respondent shall be responsible for the costs of this award under S.I 115, Acquisition of Land (Assessment of Compensation) Fees, Rules 1999 and for the provision of the hearing venue and the stenographer.

82. On 18th January, 2018 the Plaintiff's solicitor wrote to the Arbitrator acknowledging the draft award and informed him that the Plaintiff had instructed them to apply to the High Court for an order directing a consultative case stated and requesting that no final step be taken to allow this and the arbitration stands adjourned to allow this application to be made.

83. On 20th February, 2018, the Plaintiff issued these proceedings seeking an order directing the Arbitrator to state a special case for the opinion of the High Court on the following nine questions:–

"(a) Where in respect of a claim made pursuant to s. 53 of the Electricity (Supply) Act 1927 an offer is made by the Second Named Defendant which

provides for the payment of compensation together with proposals in respect of costs to be paid to the Plaintiff, and where that offer is accepted by the Plaintiff, does the First Named Defendant have jurisdiction to depart from the terms of that offer, the acceptance of the terms of which have already been communicated to him and to the Second Named Defendant, and substitute different terms in his Award to that which was offered by the Second Named Defendant and accepted by the plaintiff?

(b) Where a claim has been compromised, has a Property Arbitrator Jurisdiction to make an award in terms other than those agreed by the parties?

(c) Does the First Named Defendant Property Arbitrator have jurisdiction in the absence of any term relating to a date by which any particular offer is required to be accepted to impose a period of five days within which the aforesaid offer must be accepted, in circumstances where it is well established both as a matter of law and practice that such an offer can be accepted at any time up to the date upon which the Property Arbitrator gives his award?

(d) Does the First Named Defendant Property Arbitrator have jurisdiction to determine issues of fact and law in a claim which has been settled and/or to have regard to such determinations in awarding costs (notwithstanding that the settlement of the parties had expressly provided for such costs)?

(e) Does the First Named Defendant have jurisdiction to purport to determine issues of fact and law without hearing any evidence and without affording to the Plaintiff the opportunity to be heard on such issues?

(f) Does the First Named Defendant have jurisdiction to award to the Second Named Defendant pre–reference costs in a manner provided for at Paragraph C of his Draft award or at all in circumstances where the Second Named

Defendant made an offer that it would pay the Plaintiff's pre–reference costs and the costs of the reference and did so without limitation or condition on the face of the offer made?

(g) Does the First Named Defendant have jurisdiction to rule that an offer made on 2nd November, 2017, was required to be accepted within a "clear week" by the morning of the 13th November, 2017, and that its acceptance on the 24th November, 2017, was such as to entitle the Second Named Defendant to its pre–reference costs and the costs of the reference to be taxed by the Property Arbitrator in default of agreement except insofar as is otherwise provided for in paragraph C of the draft award?

(h) Whether in circumstances where the claim had been settled by way of an offer in respect of compensation and costs which the Plaintiff accepted, the First Named Defendant was correct in concluding that he claims for market value of the burden was misconceived in law at a time when the claim for compensation had been settled and the terms of the settlement had been communicated to the First Named Defendant whose jurisdiction was limited to reflecting such terms in his award?

(i) Whether the jurisdiction of the First Named Defendant on the settlement of a claim was limited to making an agreed award in the terms of the settlement?"

84. Although appearances were entered initially by the Chief State Solicitor on behalf of the arbitrator and ESB, the arbitrator has not participated in these proceedings.

85. It was agreed and has been so directed by the court that these proceedings would be determined without exchange of full pleadings but by reference to the

affidavits exchanged. The Board's opposition to the statement of a case is, whilst addressed more extensively in later submissions, encapsulated in the affidavit of Mr. Clarke dated 15th April, 2018, where he states as follows:–

> "The Second Named Defendant opposes the within application on two grounds. First, the First Named Defendant was never asked to refer the eight additional questions for the opinion of the High Court. Secondly, the question proposed by the Plaintiff in its letter dated 18th December, 2017, and upon which the First Named Defendant refused to state a case was not a question of law. The cost of pre–reference and costs of the reference in terms of the particular time and level of costs are at the Property Arbitrator's Discretion. The Second Named Defendant referred to five working days as a reasonable time for the acceptance of the unconditional offer but it was never argued that the First Named Defendant was "confined in the exercise of (his) discretion as to costs to award the Claimant costs up to the 7th of November, 2017, and to pay the Respondent its costs from that date…""

86. The Board nonetheless accepted in this affidavit that an issue is capable of being formulated in these proceedings and it proffered its own formulation of an appropriate question as follows:–

> "Whether when an unconditional offer under the Acquisition of Land (Assessment of Compensation) Act 1919 has been accepted, I as property arbitrator have a discretion when it comes to costs to fix a date by which the said unconditional offer ought reasonably to have been accepted and accordingly (a) to award and or tax the Claimant's costs up to that date only and or (b) to award the Respondent its costs

against the Claimant insofar as those costs were incurred after that date?"

87. In its written legal submissions and at the hearing the Board submits that the court should exercise its discretion against directing the arbitrator to state a case on any of the many questions proposed by the Plaintiff. It also states that without prejudice to this position, it acknowledges that issues surrounding the making and acceptance of unconditional offers under the 1919 Act have led to differing decisions being made by arbitrators and submits that if the court is minded to direct the arbitrator to state a case it should do so in the terms of the question put in the affidavit of Mr. Clarke.

88. One of the requirements before the court will order a property arbitrator to state a case is that the party seeking the order directing the arbitrator to state a case must have applied formally to the arbitrator to state the case which the arbitrator has then refused or declined to do so (see *Stillorgan Orchard Ltd. v. McLoughlin and Harvey Ltd.* [1978] I.L.R.M. 128, *per* Hamilton J. (as he then was)). The Board says that none of the nine questions referred to in the indorsement of claim or in the notice of motion were submitted to the arbitrator in the request to state a case, either at the hearing on the 27th of November, 2017, or in the submissions thereafter.

89. The Plaintiff contends that whilst the authorities require that a request must have been made and declined, they do not go so far as to require that the precise formulation of the question must have been submitted. They submit that in the majority of cases the formulation of the question will require to be finessed between the parties before the case can be properly stated and therefore that in practice it would not be feasible to require that in every case before the court would exercise the jurisdiction to order an arbitrator to state a case the formulation now put before the

court on these proceedings would have been in its exact form requested and refused by the arbitrator.

90. The Board submits that the matter of what orders a property arbitrator can make in respect of costs in cases where an unconditional offer has been accepted is fundamentally still a matter within the discretion of such an arbitrator. In this regard, the Board disputes the formulation of the question submitted by the plaintiff both in its letter of the 18th December, 2017 and the different formulation in the plaintiff's proceedings. The Board say that its submission to the Arbitrator was not that an arbitrator was confined in his discretion to award the costs up to 7th November, 2017 and to pay the Board's costs and that the plaintiff should pay the Board's costs thereafter. It says that its submission was that under s. 5(4), the arbitrator's treatment of pre-reference costs and reference costs is entirely discretionary in all cases and therefore that in this case the Arbitrator was doing no more than exercising that general discretion to award the plaintiff's its costs only up to the date which it was reasonable for the claimant to have accepted the unconditional offer, in this case they say five days.

91. The Board accepts that a question of law does arise in circumstances where an unconditional offer has been accepted as to whether the arbitrator has any discretion when it comes to awarding costs to consider and fix a date by which the offer ought reasonably to have been accepted and make an award of costs and/or tax the costs accordingly.

92. The plaintiff submits that an arbitrator has no discretion and that where an unconditional offer has been accepted the Arbitrator has no authority to do more than enter an award for the plaintiff together with its costs, such costs not being restricted in a manner now proposed by the Board. It submits that the Arbitrator in this case

went wholly outside his jurisdiction in making findings, touching on the substance in question of the compensation claim itself, which informed him in the making of his draft award.

93. At the hearing before the Arbitrator on 27th November, 2017, and in the submissions made by the parties to the arbitrator following that hearing and in this hearing, both parties canvassed extensive case law and debated the application of such case law to property arbitrators appointed for the purpose of the Act of 1919. Reference was made to English case law in which findings were made as to reasonable time periods for the acceptance and offers. It seems clear that although there has been some extensive authority on this subject in the U.K. and although it has been held in Re *Deansrath Investments Ltd.* [1974] I.R. 228 that such authority is persuasive, there are no clear binding cases on this question in this jurisdiction, and that it raises a real and substantial point of law.

94. It is also clear on the facts of this case that the resolution of this question is necessary for the proper determination of the case between the parties because the draft award of the arbitrator clearly reflects that his order as to costs is grounded on having formed a view as to a date by which it was reasonable to expect that the offer would have been accepted, if it was being accepted.

95. The Board has submitted that in declining to state a case the arbitrator in this matter acted judicially in that he received submissions both at the hearing on 27th November, 2017 and in subsequent correspondence and considered those submissions before deciding to refuse to state a case. Even allowing for the fact that he gave due consideration to the submissions, this would not of itself be a bar to this Court considering whether the tests in *Halfdan* have been met. I have concluded that those tents have been met in this case. Nor can it be said that this is a case such as arose in

the case of *Power Securities v. Daly* (Unreported, High Court, Murphy J., 27th February, 1984) and *Hogan & Ors v. St. Kevin's Company and Purcell* [1986] I.R. 80, where the court considered that it was not proper to direct the arbitrator to state a case on issues which were the very subject of the reference to the arbitrator in the first place, albeit that these authorities may be more appropriate to private arbitrations.

96. It is not in dispute that there was put to the arbitrator a request that he state a case on the fundamental question of whether an arbitrator has any discretion as regards his costs award in cases where an unconditional offer had been accepted. Accordingly, I am not persuaded that the court should refuse to direct a case to be stated by reason of a failure to have put to the arbitrator the precise formulation now before this court.

97. The next question for consideration is whether the point of law proposed to be put by way of case stated is clear cut and capable of being accurately stated as a point of law. This will bring us to a consideration of the nine questions put in the Indorsement of Claim. It is acknowledged that before the precise form of the case stated can be finalised it will be necessary for the parties to assist the arbitrator in the full formulation of the case stated, including a proper recital of agreed facts for the purpose of putting the question. This discussion will also inform the form of the order to be made by this Court.

98. As to the Board's submission that none of the nine questions are in a form which had ever been put to the arbitrator, either at hearing or in the submissions in correspondence, the Plaintiff submits that certain of those nine questions are a necessary expansion of the core question and that the plaintiff was now taking the opportunity to assist the court in ensuring that a formulation was available which would address all aspects of the question. In saying this, the Plaintiff's Counsel

acknowledges that it may not be necessary to state all nine questions and that a concise formulation of the core questions should be possible.

99. The Board also says that a number of these questions are tendentious in that they represent a particular characterisation of the draft award which the Board say is not justified.

100. At least one of the questions, namely question (f), does not now arise at all in that the Board accepts that there was a typographical error in the award and the arbitrator did not intend to award the board all of its pre-reference and reference costs and the Board is not maintaining that position.

101. It seems to this Court that the core, or "principal" question is whether, in circumstances where an unconditional offer is made pursuant to s. 5(1) of the Act of 1919 and accepted, the arbitrator has jurisdiction to determine a date by which he considers that the offer ought reasonably to have been accepted and, if so, has discretion, having made such a determination, to limit the costs awarded to a claimant by reference to that date and award the respondent costs against the claimant insofar as those costs were incurred after that date.

The Nine Questions

102. Questions (a), (c), and (g) are as follows:–

> "(a) Where in respect of a claim made pursuant to s. 53 of the Electricity (Supply) Act 1927 an offer is made by the Second Named Defendant which provides for the payment of compensation together with proposals in respect of costs to be paid to the Plaintiff, and where that offer is accepted by the Plaintiff, does the First Named Defendant have jurisdiction to depart from the terms of that offer, the acceptance of the terms of which have already been communicated to him and to

the Second Named Defendant, and substitute different terms in his Award to that which was offered by the Second Named Defendant and accepted by the plaintiff?

(c) Does the First Named Defendant Property Arbitrator have jurisdiction in the absence of any term relating to a date by which any particular offer is required to be accepted to impose a period of five days within which the aforesaid offer must be accepted, in circumstances where it is well established both as a matter of law and practice that such an offer can be accepted at any time up to the date upon which the Property Arbitrator gives his award?

(g) Does the First Named Defendant have jurisdiction to rule that an offer made on 2nd November, 2017, was required to be accepted within a "clear week" by the morning of the 13th November, 2017, and that its acceptance on the 24th November, 2017, was such as to entitle the Second Named Defendant to its pre–reference costs and the costs of the reference to be taxed by the Property Arbitrator in default of agreement except insofar as is otherwise provided for in paragraph C of the draft award?"

103. 1 (a), (c), and (g) are all variations on the principal question. They appear, at first reading, to present different issues, but if this Court is to direct a case stated it must be concise and concurrent. In my view, the Board's formulation of the question in the following paragraph of Mr. Clarke's affidavit is such a concise statement of the question:–

"Whether, when an unconditional offer under the Acquisition of Land (Assessment of Compensation) Act 1919 has been accepted, I as property

arbitrator have a discretion when it comes to costs to fix a date by which the said unconditional offer ought reasonably to have been accepted and accordingly (a) to award and/or tax the Claimant's costs up to that date only and/or (b) to award the Respondent its costs against the Claimant insofar as those costs were incurred after that date?"

104. I propose to direct the arbitrator to state this case in those terms but will hear the parties before finalising the order.

105. Question (b) is as follows:–

> (b) Where a claim has been compromised, has a Property Arbitrator jurisdiction to make an award in terms other than those agreed by the parties?

106. This question in its formulation appears to beg a question as to whether the terms of the unconditional offer which was accepted in fact limit the discretion and jurisdiction of the arbitrator in the first place. This could further lead to debate even at this stage as to the full meaning and effect of the letter of offer. Having regard to the formulation of the principle question it seems to me that it is not necessary for this question to be put in the case stated in order to determine the issues between the parties.

107. Question (d) is as follows:–

> "(d) Does the First Named Defendant Property Arbitrator have jurisdiction to determine issues of fact and law in a claim which has been settled and/or to have regard to such determinations in awarding costs (notwithstanding that the settlement of the parties had expressly provided for such costs)?"

108. This question is substantively wider that the "principal" question and if the principal question is decided by this Court it will be sufficient to resolve the issues between these parties.

109. Question (e) is as follows:–

> "(e) Does the First Named Defendant have jurisdiction to purport to determine issues of fact and law without hearing any evidence and without affording to the Plaintiff the opportunity to be heard on such issues?"

110. This appears to be a subset of question (d). Furthermore, as the Board has submitted, it is tendentious in that it would require a finding by this court or agreement by the parties that the arbitrator in fact deprived the plaintiff of the opportunity to be heard on such questions. It is not clear to this Court that this occurred in circumstances where certain submissions were made on these questions at the hearing on 27th November, 2017 and in the correspondence which followed that hearing.

111. Question (f) is as follows:–

> "(f) Does the First Named Defendant have jurisdiction to award to the Second Named Defendant pre–reference costs in a manner provided for at Paragraph C of his Draft award or at all in circumstances where the Second Named Defendant made an offer that it would pay the Plaintiff's pre–reference costs and the costs of the reference and did so without limitation or condition on the face of the offer made?"

112. The parties are agreed that this question does not arise and the Board is not maintaining that this part of the draft award should stand.

113. Question (h) is as follows:–

> "(h) Whether in circumstances where the claim had been settled by way of an offer in respect of compensation and costs which the Plaintiff accepted, the First Named Defendant was correct in concluding that he claims for market value of the burden was misconceived in law at a time when the claim for compensation had been settled and the terms of the settlement had been communicated to the First Named Defendant whose jurisdiction was limited to reflecting such terms in his award?"

114. This is also a subset of question (d) and will not need to be put if the principal question is determined.

115. Question (i) is as follows:–

> "(i) Whether the jurisdiction of the First Named Defendant on the settlement of a claim was limited to making an agreed award in the terms of the settlement?"

116. This is a variation of question (b) and resolution of the issues between the parties will not require it to be put if the principal question is determined.

117. In circumstances where there will now be a case stated, none of these findings should be taken as limiting or restricting the parties and the arbitrator from reaching agreement as to a modified formulation of certain of the questions which this Court is not directing, in these proceedings, to be stated, should that be possible.

118. I shall hear the parties as to the precise formulation of the order to be made having regard to these findings.

Michael Peart

14 December 2018