[2009] IEHC 391

THE HIGH COURT

[2009 No. 139 MCA]

IN THE MATTER OF THE ARBITRATION ACTS, 1954 TO 1998

AND IN THE MATTER OF ORDER 56, RULE 4 OF THE RULES OF THE SUPERIOR COURTS

AND IN MATTER OF AN ARBITRATION

BETWEEN

KATHLEEN MOOHAN

AND

JOHN BRADLEY TRADING AS BRADLEY CONSTRUCTION

APPLICANTS

AND

S. & R. MOTORS (DONEGAL) LIMITED

RESPONDENT

AND

KEVIN BRADY

NOTICE PARTY

JUDGMENT of Mr. Justice Clarke delivered the 31st July, 2009

1. Introduction

1.1 This is yet another judgment in a long running dispute between the applicants ("Bradley Construction") and the respondent ("S. & R. Motors"). On 14th December, 2007 I gave judgment in proceedings (*Moohan and Another v. S. & R. Motors (Donegal) Limited* (2007) IEHC 435) in which Bradley Construction sued for money said to be due on foot of a construction contract for S. & R. Motors relating to a

Volkswagen car showroom at Drumlonagher in Donegal town. For the reasons set out in that judgment I allowed the claim made by Bradley Construction but placed a stay on a portion of that claim pending a referral to arbitration of certain issues concerning an allegation of defective work, delay and a minor issue concerning safety.

1.2 Those issues, therefore, went to arbitration before the notice party ("the arbitrator"). Subsequent to the arbitrator making his award, S. & R. Motors challenged that award in proceedings before this court. For the reasons set out in a judgment in those proceedings delivered on 12th December, 2008 (*S. & R. Motors (Donegal) Limited v. Moohan and Another*, [2008] IEHC 383) I remitted back certain aspects of the award concerned to the arbitrator.

1.3 In substance only two matters were remitted back. The first matter concerned the way in which the arbitrator had structured his award. The arbitrator found against S. & R. Motors in respect of its allegations relating to delay and the safety issue. The arbitrator found in favour of S. & R. Motors, to some extent, in relation to its allegations concerning defects and measured the amount found to be due in respect of those defects. While a challenge was mounted to the substance of some of the findings of the arbitrator I was not persuaded, for the reasons set out in the judgment to which I have referred, that any basis for such a challenge had been made out. However, the way in which the arbitrator had structured his award was to take into account the sums due by S. & R. Motors to Bradley Construction and reduce those sums by the amount found to represent the defects identified so as to award Bradley Construction the net balance.

1.4 For the reasons set out in the judgment to which I have referred, I came to the view that it was not open to the arbitrator to make an award in respect of the sums

undoubtedly due under the contract by S. & R. Motors to Bradley Construction because those sums had already been dealt with by the court. The matter was remitted back to the arbitrator to allow him to correct that matter. However, in addition, the award by the arbitrator of costs (which was, necessarily, influenced by the way in which he had structured his award) was also remitted back. In the course of the relevant judgment I drew attention to jurisprudence identified in cases such as *Veolia Water UK plc and Ors v. Fingal County Council* [2007] 2 I.R. 81 concerning the proper approach to costs.

1.5 The matter was then reconsidered by the arbitrator who made a revised award (described by the arbitrator as a corrected award) in which full costs were given to S.& R. Motors on the basis that S.& R. Motors had succeeded in the arbitration, albeit for a sum significantly below the amount claimed and notwithstanding the fact that S. & R. Motors' claim in respect of delay had not been allowed at all.

1.6 This further challenge is brought by Bradley Construction against the corrected award made by the arbitrator arising out of the remittal back to which I have referred ("the corrected award"). The arbitrator, while served with these proceedings, did not participate.

1.7 Against that background it is necessary to touch briefly on the issues which arise.

2. The Issues

2.1 In substance two issues arose at the hearing before me. The first concerned whether Bradley Construction are out of time to bring this challenge.

2.2 The second issue concerned the substantive challenge to the corrected award so far as costs are concerned. In that context it is said that the corrected award in respect of costs contains an error on the face of the award such that the award should

be set aside and/or remitted back to the arbitrator. It is appropriate to turn to the time in question first.

3. Is this application in time

3.1 An initial question under this heading arose as to the appropriate characterisation of this arbitration in relation to whether it is properly described as an international arbitration governed by the Arbitration (International Commercial) Act, 1998 ("the 1998 Act") or whether it is a purely domestic arbitration.

3.2 The importance of the distinction stems from the adoption, by virtue of s. 4 of the 1998 Act, of the Model Law of the United Nations Commission on International Trade Law ("UNCITRAL Model Law") into Ireland for the purposes of international arbitration.

3.3 Article 34(3) of the UNCITRAL Model Law provides as follows:-

> "An application for setting aside may not be made after three months have elapsed from the date in which the party making that application has received the award or, if a request had been made under Article 33, from the date on which that request has been disposed by the Arbitral Tribunal."

3.4 Thus, it would appear that there is a strict three month limit contained in the UNCITRAL Model Law in respect of which no possibility for an extension of time exists. It is also important to note that, in accordance with the terms of Article 34(3) of the UNCITRAL Model Law, time begins to run when the party seeking to set aside "has received the award".

3.5 The time limits in respect of purely domestic arbitration challenges are to be found in Order 56(4)(e) of the Rules of the Superior Courts. That rule provides that an application to remit or set aside an award "shall be made within six weeks after the award has been made and published to the parties or within such further time as may

be allowed by the court". In *Kelcar Developments Limited v. M.F. Irish Golf Design Limited,* [2007] IEHC 468, Kelly J. adopted a passage from Russell on Arbitration in following terms as setting out correctly the position in this jurisdiction relating to when an arbitral award can be said to have been published to the parties:-

> "Publication to the parties of an award (as distinct from "publication" of it simply) entails both completion of the award so that the arbitrator has finally adjudicated and retains no power of altering it, and also notice to the parties that this has been done. It is immaterial, however, whether or not the parties are then made acquainted with the contents of the award or received copies of it."

3.6 However, as noted by Kelly J., the position under the Rules of the Superior Courts permits an extension of time in an appropriate case. As to the criteria to be applied, Kelly J. adopted the test identified by Blayney J. in *Bord Na Mona v. John Sisk and Son Limited,* (The High Court, Unreported, Blayney J., 31st May, 1990). While noting that there is no rigid test because the only overall criteria is as to whether the interest of justice require that time should be enlarged, Blayney J. nonetheless quoted, as of assistance, the factors identified by Mustill J. in *Commercial Arbitration* (2nd Ed.) which Mustill J. co-authored with Boyd. The relevant list is to be found at p. 568 of that book and is as follows:-

> "1. The desirability of adhering to time limits prescribed by Rules of Court.
>
> 2. The likelihood of prejudice to the party opposing the application if time is extended.
>
> 3. The length of delay by the applicant.

4. Whether the applicant has been guilty of unreasonable or culpable delay.

5. Whether the applicant has a good arguable case on the merits."

3.7 Laffoy J in *Clancy and Anor v Nevin* (2008) IEHC 121, followed the test identified by Kelly J in *Kelcar* both in respect of when time runs and the criteria for adjudicating on an application to enlarge time.

3.8 Thus, the position in respect of purely domestic arbitration is that there is a six week time limit, with time beginning to run when the arbitrator communicates to the parties that his award is available (and not when the parties actually receive the award itself). However, that time is capable of being extended when the interests of justice require it. The factors identified by Mustill J., to which I have referred, are a useful guide to the factors which might well be taken into account on the facts of any individual case.

3.9 The first issue of dispute between the parties under this heading concerned the question of when time might be said to begin to run in the case of an international arbitration governed by the UNCITRAL Model Law. It seems to me that the wording of the UNCITRAL Model Law is clear. It speaks of time beginning to run when the person challenging the award has "received the award". It seems to me that the use of the term "received" in respect of an award means just that. The party has to physically receive the award. The language used in the UNCITRAL Model Law is in total distinction to the phrase used in the Rules of the Superior Courts which speaks of award being "published to the parties", which, for the reasons analysed by Kelly J., occurs when the parties are told by an arbitrator that his or her award is available.

3.10 It seems to me, therefore, that time does not begin to run in respect of the three month period specified in the UNCITRAL Model Law until the party concerned has

actually received the relevant award. However, time begins to run in respect of the Rules of the Superior Courts (because of the different wording used in those Rules) when the parties are notified that the award concerned is available.

3.11 On that basis it is clear that, so far as the UNCITRAL Model Law (if it applies) is concerned, this challenge is within time as it is common case that this challenge was commenced within three months of the time when the arbitrator's award was actually received by the parties. On the other hand it is equally clear that the six week time limit provided for in the Rules of the Superior Courts was not met so that, if this be properly characterised as a domestic arbitration, this challenge can only proceed if it would be appropriate to extend time.

3.12 There is a dispute between the parties as to whether the arbitration with which I am concerned is properly characterised as an international or a domestic one. However, it seems to me to be appropriate firstly to address the question of whether, if it is proper to characterise the arbitration as a domestic one, it would be appropriate to extend time. If this is a case where it would be appropriate to extend time then the question of whether the challenge is to a domestic or to an international arbitration does not arise because time would not be a barrier is either case.

3.13 Having considered all the facts and having regard to the criteria to which I have referred it seems to me that this is a case in which it would be appropriate to extend time. There was a particular problem in relation to the parties obtaining the arbitrator's corrected award in this case. When the matter generally was for mention before the court at a time just after the arbitrator had indicated that his corrected award was available, a question arose as to whether it was appropriate for the arbitrator to seek to charge fees in respect of the hearing necessitated by the referral back of issues to him and the making of the corrected award on foot that hearing. The

arbitrator, quite properly, on being informed of that issue indicated that he did not wish to receive a fee in respect of those matters until the question of his entitlement to charge such a fee had been clarified by the court. Having considered the matter and heard the submissions of the parties I ultimately came to the view that there was no reason in principle why an arbitrator, to whom a matter had been referred back, should not be entitled to charge an appropriate fee for the additional work necessitated by the referral back in circumstances where the error which caused the referral back in the fist place was caused by the arbitrator accepting the argument of one party rather than the other on a point in question.

3.14 In those circumstances there was an unusually long delay between the time when the arbitrator indicated that the corrected award was available and that award actually being received by the parties. In those circumstances it does not seem to me that it can be said that Bradley Construction was guilty of any unreasonable or culpable delay. Neither is there any evidence of any prejudice to S.& R. Motors. In those circumstances it seems to me that, if this arbitration is properly characterised as a domestic arbitration, while the challenge with which I am concerned is out of time, it would be an appropriate case in which to enlarge time. I should also note that one of the criteria identified in *Kelcar* was the merits of the case (*i.e.* whether the applicant concerned had a good arguable case). However, as the question of there being a time bar and the substantive issues were argued together, it seemed to me to be appropriate to consider the question of an enlargement of time independently of the merits as those merits would have to be considered in any event and there would have been no saving of time or costs by a separate decision on time enlargement based on a preliminary view of the argument of the "merits" question.

3.15 In those circumstances it is not necessary, for the reasons which I have set out, to determine whether this arbitration is properly characterised as international or domestic as the proceedings are not barred by time limits in either event.

3.16 In those circumstances it is next necessary to turn to the substance of the challenge. I propose dealing briefly (for there was no contention on the matter) with the test to be applied.

4. The Test

4.1 It is clear from decisions such as *Limerick County Council v. Uniform Construction* [2005] I.E.H.C. 347 and *Uniform Construction Limited v. Cappawhite Contractors Limited* [2007] I.E.H.C. 295, that it is only appropriate for a court to interfere with an arbitral award on the grounds of an error on the face of the award where that error is so fundamental that the court cannot stand aside and allow it to remain unchallenged.

4.2. That is the test which I propose to apply in this case. On that basis it is next appropriate to turn to the nature of the challenge raised by Bradley Construction.

5. The Challenge

5.1 Bradley Construction's point it relatively straightforward. It is said that it is clear from the face of the award that the arbitrator did not have proper regard to relevant legal principles applicable to the award of costs. For the reasons which I set out in my judgment of the 12th December, 2008, in the previous arbitral challenge between these parties, it is clear that an arbitrator has a discretion in relation to costs but that, in exercising that discretion, the arbitrator concerned must apply the same principles as are applied by the courts (see para. 4.6. of the judgment). It follows that an award in respect of costs can be remitted back to an arbitrator for reconsideration where it is clear that appropriate principles have not been followed.

5.2 However, in addition, having regard to the general jurisprudence in respect of remittal to which I have referred and having regard to the fact that an arbitrator does enjoy a discretion in relation to costs, it is clear that an award in respect of costs can only be remitted back where the way in which the arbitrator deals with costs is so clearly contrary to proper principles that the award in respect of costs cannot be allowed to stand.

5.3 In substance Bradley Construction draws attention to the fact that there were three main issues before the arbitrator. One concerned defects, a second concerned delay, and a third (albeit a minor) issue concerned a safety file. It is said, correctly, that it was only in respect of the defects' aspect of the claim that the arbitrator found in favour of S. & R Motors. On that basis it is said that the award of full costs to S. & R. Motors, in circumstances where it failed on a significant aspect of its claim (that based on delay) and another minor aspect (that based on the safety file), is in clear breach of appropriate principles and justifies a remittal of the costs issue to the arbitrator.

5.4 In addition, counsel for Bradley Construction drew attention to the fact that amongst the costs which an unsuccessful party to an arbitration process must bear are the costs of the arbitrator him or herself. Thus, the costs of an arbitration are somewhat different from a court case. Counsel drew attention to the fact that it is possible that the costs attributable to the arbitrator him or herself will be increased by the arbitrator having to consider and rule on issues raised by an otherwise successful party. Thus, the possibility that the costs of the arbitrator (as opposed to the costs of the parties) may have been increased by the raising of unmeritorious issues also, it is said, needs to be considered.

5.5 I now propose to consider the merits of that challenge.

6. Application to Facts of this Case

6.1 I should first say that I agree with the submission made by counsel for Bradley Construction to the effect that amongst the matters that an arbitrator needs to consider in the awards of costs is the fact that the costs that will be awarded will include the costs of the arbitrator, him or herself. The arbitrator will best know the extent to which the arbitrator's own costs have been increased by having to consider additional unmeritorious issues raised an otherwise successful party. However, it is a factor to be taken into account.

6.2 There certainly is a case to be made for the suggestion that the arbitrator in this case could have approached the question of costs in the proceedings before him on a different basis. As pointed out in *Veolia*, the starting point in any consideration of an order for costs has to be that costs, *prima facie*, followed the event. It is clear that the event in this case was an award in favour of S. & R. Motors. Without going to arbitration, S. & R. Motors would not have received any reduction in the amount due to Bradley Construction.

S. & R. Motors had to go to arbitration to achieve what was achieved. There was no Calderbank letter or other similar device by which a formal offer to make an allowance in favour of S. & R. Motors in the sum awarded or a greater sum had been put on the table in advance of the hearing. Therefore, in awarding costs to S. & R. Motors, the arbitrator was simply following the rule that costs follow the event.

6.3 It would also appear that the arbitrator was of the view that the hearing before him was not materially lengthened by the fact that the delay issue was raised (albeit unsuccessfully). In my view the arbitrator is best placed to form a judgment on that question. It would only be in a case where there was very clear evidence that a conclusion of that type reached by an arbitrator was wrong that a court could possibly

intervene. It is important to note that it is unlikely that there will be a significant difference in the costs of a somewhat longer or somewhat shorter hearing provided that the hearing concerned can be completed within one day. The necessity for witnesses to be present remains. The necessity for legal teams to commit themselves to be present for the arbitration (and thus the fees which they are likely to legitimately charge) also remains and such fees are unlikely to be significantly greater just because the hearing takes somewhat longer while finishing within the day. In those circumstances it does not seem to me that the arbitrator was bound to attempt a "fine" analysis of the amount of time spent on one issue or the other.

6.4 I am not, therefore, satisfied that there is any basis for going behind the view taken by the arbitrator that there was a single hearing which was not made, to any material extent, more expensive by the raising of the delay issue.

6.5 In addition Bradley Construction did place reliance on the fact that it would have been necessary for Bradley Construction, in preparing for the hearing, to have devoted time, resources and, therefore, expense to preparing to defend the delay allegation. While that proposition is undoubtedly true in principle, it does not seem to me to be a sufficiently weighty factor that would have required (as opposed to have entitled) the arbitrator to deviate from the basic rule of costs following the event. It is far from sufficient for me to be satisfied that I might have made a different costs order myself. To apply such a test would be to usurp the discretion which is undoubtedly conferred on the arbitrator and to impose an "error on the face of the record" jurisdiction which would fall far short of the undoubtedly high standard that needs to met before an arbitral award can be set aside or remitted.

6.6. While a case can be made, therefore, for the assertion that the arbitrator should have given some allowance to Bradley Construction for having to prepare a delay

case which was ultimately unsuccessful, it does not seem to me that a failure to make such an allowance amounts to the type of error which is so fundamental that the arbitral award concerned cannot be allowed to stand.

6.7 I am not, therefore, satisfied that a sufficient case has been made out to the effect that the arbitrator was guilty of the sort of error which allows the court to intervene.

7. Conclusions

7.1 For the reasons which I have already sought to analyse I am not satisfied that these proceedings are out of time whether viewed as an international or a domestic arbitration.

7.2 For the reasons which I have also sought to analyse I am not satisfied that Bradley Construction have made out a case to the effect that the arbitrator was guilty of any sufficient error such as would justify setting aside or remitting his corrected award in respect of costs.

7.3 It follows that I must dismiss these proceedings.

Approved
31st - VII - 09