[2021] IEHC 497

THE HIGH COURT

[2020/1634 SS]

Between

Dermot Kelleher

Claimant

and

The Electricity Supply Board

Respondent

Case stated – Unconditional offer – Acquisition of Land (Assessment) of Compensation Act 1919 s. 5(1) – Property Arbitrator directed to state a special case on a question of law – Whether a letter constituted a valid unconditional offer for the purposes of s. 5(1) of the Acquisition of Land (Assessment) of Compensation Act 1919

Digest

Facts: The respondent, the Electricity Supply Board (the ESB), on the 16th of August 2016, served a wayleave notice on the claimant, Mr Kelleher, pursuant to s. 53 of the Electricity (Supply) Act 1927. On the 30th of August 2016, Mr Kelleher submitted a claim for compensation to the ESB. On the 5th of October 2016, Mr Boyle was nominated as Property Arbitrator in this dispute. On the 8th of February 2017 the ESB made an offer to Mr Kelleher, in writing. On the 21st of June 2017, the ESB made a further offer to Mr Kelleher. Neither of these offers were accepted by Mr Kelleher. On the 28th of June 2017, Mr Boyle recused himself from acting as Property Arbitrator. On the 26th of July 2017, Mr Good was nominated to act as Property Arbitrator. The hearing before Mr Good commenced on the 17th of October 2017. The ESB brought judicial review proceedings to compel Mr Good to state a case to the High Court on three questions. The three questions posed by Mr Good, as directed by Quinn J, were as follows: (i) Does the letter dated 8th February 2017 constitute a valid unconditional offer for the purposes of s. 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919? (ii) Does the letter dated 21st June 2017 constitute a valid unconditional offer for the purposes of s. 5(1) of the 1919 Act? (iii) If either or both of the letters of 8th February 2017 and 21st June 2017 constitute valid unconditional offers for the purposes of s. 5(1) of the 1919 Act, can such offer or offers be accepted at any time prior to the making of an award by the Property Arbitrator?

Held by O'Moore J that the letter of the 8th of February 2017 did not have the required clarity and certainty to qualify as an unconditional offer within the meaning of s. 5(1) of the 1919 Act. O'Moore J concluded that the letter of the 21st of June 2017 was an unconditional offer within the meaning of s. 5(1). O'Moore J came to the view that an unconditional offer can be accepted at any time prior to the making of an award by the Property Arbitrator.

O'Moore J answered question one in the negative, question two in the affirmative, and question three in the affirmative.

Case stated.

16th 07 2021

JUDGMENT of Mr. Justice Brian O'Moore **delivered on the 16th day of July, 2021**.

1.

The issues in this case are very similar to those which I decided in McCarthy v. Electricity Supply Board. Indeed, in some instances, the issues are identical. This is not surprising, as the two cases originated in a judgment of Quinn J. of the 14th of December 2018. The two cases travelled together, and were heard together by me over a two day period in May 2021.

2.

Indeed, so closely entwined are the two proceedings that the form of the hearing involved Counsel for the ESB making a single speech in respect of both cases stated to me, Counsel for the Claimant landowners making a single speech in respect of both matters, and Counsel for the ESB making a single address in reply.

3.

My judgment in McCarthy sets out the relevant legislation and the relevant portion of the judgment of the Supreme Court (Keane J.) in Manning v. Shackleton [1996] 3 IR 85. I do not intend to replicate those authorities here. Equally, I do not intend to repeat slavishly in this judgment the rationale for my decisions in McCarthy.

4.

For all these reasons, this judgment should be read in conjunction with my decision in McCarthy. Having said that, the facts of this case differ from those in McCarthy, though not materially so. The questions posed in this case are broader than those posed in McCarthy. Finally, some limited further arguments were made in this case stated on behalf of the landowner, which were not deployed in McCarthy and I will consider those in this decision; to be specific the view taken by the Property Arbitrator in this case (Mr. Paul Good) is one which I will analyse for the purpose of my decision on the second question posed to me by him.

A. The Facts

5.

On the 16th of August 2016 the ESB served a wayleave notice on Mr Kelleher pursuant to Section 53 of Electricity (Supply) Act 1927. On the 30th of August 2016 Mr. Kelleher submitted a claim for compensation to the ESB. On the 5th of October 2016 Mr. Desmond Boyle was nominated to as Property Arbitrator in this dispute.

6.

On the 8th of February 2017 the ESB wrote to Mr. Kelleher in the following terms:-

> "We refer to this claim in which the Arbitration was due to commence on the 14th of February 2017 although the Arbitrator has now proposed moving the hearing to the 21st of February.
>
> "Pursuant to Section 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 cost to cover the taking of advice in respect of this offer, those costs to be taxed in default of agreement."

7.

On the 21st of June 2017 the ESB wrote again, this time in these terms:-

> "We refer to the above reference to arbitration, which is listed for hearing on 28th to 30th June 2017.
>
> "Pursuant to Section 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:-

(1) The amount as directed by the Property Arbitrator 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
(2) 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
(3) The reasonable costs incurred by your client in taking advice in relation to this offer."

8.

Neither of these offers were accepted by Mr. Kelleher.

9.

While the hearing before Mr. Boyle commenced on the 28th of June 2017, he recused himself that day from acting as Property Arbitrator. On the 26th of July 2017 the current Arbitrator, Paul Good, was nominated to act as Property Arbitrator in this dispute.

10.

The hearing before Mr. Good commenced on the 17th of October 2017. On that day, Mr. Kelleher applied for a preliminary ruling on the issue of whether either the letter of 8th of February 2017 or the letter of 21st of June 2017 constituted a "unconditional offer" within the meaning of Section 5 of the Acquisition of Land (Assessment of Compensation) Act 1919.

11.

On that date, Mr. Good made a ruling that neither letter constituted a valid unconditional offer within the meaning of Section 5 of the 1919 Act. I will return to his reasons in due course.

12.

After deciding the issue raised by Mr. Kelleher, the Property Arbitrator was asked by the ESB to state a case for the opinion of this Court pursuant to the provisions of Section 6 of the 1919 Act. He refused to do so, as he felt the issue was a matter of fact and not one of law, and therefore could not properly be the subject of a case stated to this Court.

13.

The ESB brought judicial review proceedings to compel Mr. Good to state a case to this Court on three questions. Mr. Good did not participate in the hearing before Quinn J. and Mr. Kelleher did not oppose the relief sought by the ESB. Peculiarly, despite the fact that the third question directed by Quinn J. was originally one that Mr. Kelleher's legal team felt should be asked, it is now submitted to me by Mr. Kelleher that this is a moot and it should not be answered by me.

B. The Questions

14.

The three questions posed by Mr. Good, as directed by this Court, are as follows:-

(i) Does the letter dated 8th February 2017 constitute a valid unconditional offer for the purposes of subsection 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919?
(ii) Does the letter dated 21st June 2017 constitute a valid unconditional offer for the purposes of subsection 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919?
(iii) If either or both of the letters of 8th February 2017 and 21st June 2017 constitute valid unconditional offers for the purposes 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?

C. Question (i)

15.

As I have set out in McCarthy, pre-reference costs are considered to be part of the compensation awarded by the Property Arbitrator. This is so despite the fact that they include such matters as might ordinarily be captured by an award of legal costs; so, for example, they involve the preparation of the claim, which is ultimately heard by the Property Arbitrator.

16.

The first offer made by the ESB is unclear as to whether or not the pre-reference costs are included in the redacted amount offered in compensation,

or whether they are caught by the offer by the ESB to pay “the reasonable costs incurred by [Mr. Kelleher] up to the date of” the letter. In this regard, the letter of the 8th of February 2017 is markedly different to the letter of the 21st of June 2017, which makes it plain that the sum offered in compensation does not include the pre-reference costs. It is not simply that the second letter is more precise than the first, though it clearly is; in my view, the first letter is fatally flawed in that it leaves Mr. Kelleher and his advisers at a loss to understand whether or not the sum offered in compensation includes the pre-reference costs. The pre-reference costs could equally fall under the rubric of the amount paid in compensation or under the rubric of “the reasonable costs incurred by [Mr. Kelleher] […]”. For this reason, the letter of the 8th of February 2017 does not have the required clarity and certainty to qualify as an unconditional offer within the meaning of Section 5(1) of the 1919 Act. Before the question posed by Buckley L.J., in Fisher v. Great Western Railway Company [1911] 1 KB 551 can be answered (“Is the Claimant being offered all he can get?”) the Claimant has to understand what he is getting. That information is simply not provided by the ESB in its letter of the 8th of February 2017.

17.

I am conscious of the submission made by the ESB both in this case and in McCarthy to the effect that an offer meets the requirements of Section 5(1) if an unconditional sum is offered in respect of compensation, and that it is not necessary to make any proposal with regard to costs in the correspondence. As I said in McCarthy, I have some sympathy for this position. However, even if the ESB is right in this argument (and I am not deciding the matter one way or the other) the fact remains that the ESB, by offering to pay a sum in compensation and to pay a sum in respect of costs incurred without clarifying under which heading one finds the pre-reference costs, has made a proposal which is unclear in a very important respect. It has therefore failed even to make a sufficiently intelligible proposition with regard to the payment of compensation, and for that reason the letter of the 8th of February 2017 cannot qualify as an unconditional offer in accordance with the terms of the legislation.

D. Question (ii)

18.

The letter of the 21st of June 2017 is, in all material respects, identical to the letter of the same date in McCarthy. I have come to the same conclusion with regard to this letter, namely that it does qualify as an unconditional offer.

19.

I should say that in this case I have considered with care the specific reasons why Mr. Good as to why he felt this letter was not an unconditional offer. Mr. Good had four reasons for this view.

20.

Firstly, the fact that the first offer had not been withdrawn created “confusion/uncertainty as to which offer should be given priority”. Even if there are two offers available simultaneously to a party, they do not have to be ranked by the party deciding which to accept. The question of giving “priority” to one or other of the offer is therefore not an issue. As the first offer was not withdrawn, it was open to Mr. Kelleher to accept either of them. However, given that I am told that the redacted figure in the second offer was higher than the redacted figure in the first, and given that the second offer made plain that the pre-reference costs will be paid in addition to the redacted figure, I do not know what sort of confusion or uncertainty could have visited the mind of Mr. Kelleher and his team of advisers as to which to accept (if he was tempted by either proposal). I therefore find that this reason on the part of Mr. Good is unconvincing. In addition, it does not involve any analysis of the provisions of the legislation, possibly because of Mr. Good's view that this was not a matter of law, but rather one of fact.

21.

Secondly, Mr. Good, felt that the letter of the 21st of June 2017 did not satisfy the statutory criteria as it specified “that costs will only be paid as directed by the Arbitrator, with no provision for the possibility that the parties might agree them without recourse to the Arbitrator”. With genuine respect to Mr. Good, this is an even less convincing reason for finding that the requirements of Section 5(1) were not met. It was always open to the parties to agree matters which otherwise can be determined by an Arbitrator or a Court. The offer is not rendered conditional because it does not expressly provide for such a development.

22.

Thirdly, Mr. Good felt that there was an inherent contradiction in the second bullet point of the letter, dealing with costs. The contradiction identified by Mr. Good is put in the following way:-

> "[…] why, if the amount of costs is to be directed by the Arbitrator, it is necessary for the Arbitrator to tax costs which he measured."

23.

I do not see the contradiction identified by Mr. Good as arising at all in the proposal made by the ESB.

24.

Fourthly, Mr. Good was unhappy with the provision made in the offer for the payment by the ESB of the "reasonable costs" which Mr. Kelleher would incur in taking advice on the offer. I have already dealt with this concern in McCarthy, and I do not believe it is a well-founded one.

25.

I therefore conclude, as I did in McCarthy, that the letter of the 21st of June 2017 is an unconditional offer within the meaning of Section 5(1).

E. Question (iii)

26.

In written submissions on behalf of Mr. Kelleher dated the 13th of November 2017, and made to Mr. Good on the issue as to whether he should state a case to this Court, the following was stated:-

> "2.7 Furthermore, it is respectfully submitted that this process will be benefited if the High Court was also asked to resolve the following question:
>
> "If either or both of the letters of the 8th of February and the 21st of June 2017 constitute valid unconditional offers for the purposes 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?
>
> "The Respondent has requested the Property Arbitrators nominated to hear claims against it to state cases to the High Court in every possible opportunity, and it would be prudent to have this question addressed on the occasion when the High Court addresses the validity of the two offers."

27.

This is, ultimately, the third question directed by Quinn J. to be posed by the Property Arbitrator to this Court. Surprisingly, the written submissions on behalf of Mr. Kelleher for the hearing of this case stated contain the following paragraph:-

> "8.5 Neither offer has been accepted to date. The question could only be addressed in the abstract, and as such it cannot be determined as a Case Stated is not a forum for hypothetical issues."

28.

Paragraph 9.3 of the same written submission suggests that the answer to the third question is:-

> "(c) Does not arise."

29.

This peculiarity aside, I think there is some force in the current position adopted on behalf of Mr. Kelleher. Question three is not a question which the ESB felt needed to be asked in the context of this arbitration. It was proposed by Mr. Kelleher's side, who have now very trenchantly resiled from that position. The reason given by Quinn J. for directing this third question is as follows:-

> "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."

30.

As one would expect, the judgment of Quinn J. reflects the fact that it was the Kelleher side who suggested this third question needed to be answered, rather than the ESB.

31.

I am also conscious of the fact that, as is mentioned in the judgment of Quinn J. there has been no decision on this issue by the courts in this jurisdiction or (as I understand it) in other courts, where the 1919 Act (or equivalent codes) apply. While both in McCarthy and in this case there were numerous informed and occasionally entertaining references to decisions elsewhere, in almost all instances I was referred to passages which involved assumptions that the law had a certain meaning, rather than decisions to the effect that it did. For example, I was referred to decisions where it is assumed without comment that a number of different offers could be made, without a decision of the effect that this was so. Equally, on this point I was referred to authority which suggested that an offer should be taken up within a reasonable time, otherwise cost consequences would flow; this does not, however, address the question as to whether an offer can be withdrawn.

32.

I have come to the view that I should answer the question posed. I do so because given that I have decided that the letter of the 21st of June 2017 constitutes an unconditional offer within the meaning of the legislation, Mr. Kelleher may well wish to accept it. However, while the offer has not been withdrawn so far, the ESB could purport to withdraw it at any time. If it does so, and Mr. Kelleher wants to accept it, then this issue is going to come back to this Court. It is, in any event, an issue which will arise in further property arbitrations, if my limited but intense exposure to this form of dispute is anything to go by.

33.

Untrammelled as I am by authority, I have come to the view that an unconditional offer can be accepted at any time prior to the making of an award by the Property Arbitrator. I have come to this decision for the following reasons:-

(i) In McCarthy I have set out what I believe was the legislature's purpose in enacting Section 5 of the 1919 Act. It is to facilitate and encourage the settlement of these disputes. Had it wished to ensure that minds were focuses within a specific period it would have provided (as was done in the case of lodgements) that an offer be taken up within a specific time. It did not do so. Instead, consistent with what no doubt was hoped to be a flexible and speedy way of resolving disputes about compensation, it provided for the making of offers of a rather fluid nature. The essential requirement was that the offer be "unconditional". I do not think that this requirement is consistent with the ability of the person making the offer to limit the time for its acceptance or, by the same token, to withdraw the offer at the time of its choosing.
(ii) In McCarthy, I have explained (at paragraph 58) why I found the proposal with regard to the Claimant's costs of the reference to Arbitration made by the ESB in its letter of the 21st of June 2017) to be acceptable. Consistent with that reasoning, as I point out in McCarthy, is the irrevocable nature of the unconditional offer made by the acquiring authority. It will be remembered that the ESB's offer in respect of these

costs is that it will pay "the amount as directed by the Property Arbitrator to be paid in respect of […]" those costs, as subsequently measured through a taxation process. I accept that this was an appropriate way for the ESB to approach the formulation of its offer in the June 2017 correspondence precisely because of the possibility that the offer might not be accepted for some considerable time after it was made and may be incapable of being withdrawn. That possibility justified what I described as the *"wriggle room"* that the ESB reserved to itself in respect of the costs of the reference to Arbitration which would be understood by the recipient of the letter.

34.

That " *wriggle room*" is set out by me, and by Counsel for the ESB in the following exchange:-

> "MR. JUSTICE O'MOORE: Yes. But are you not reserving some wriggle room to argue what costs should be awarded?
>
> MR. SREENAN: We are reserving wriggle room to argue only to the extent of saying that costs should only run to a limited period —
>
> MR. JUSTICE O'MOORE: Hmm.
>
> MR. SREENAN:- after the date of the offer, a reasonable period for acceptance, and that by reason of the failure to accept in those circumstances, the arbitrator's discretion as to costs ought to be exercised, indeed in our favour in relation to the costs incurred by the acquiring authority after the expiry of such a reasonable period of time.
>
> MR. JUSTICE O'MOORE: But it's not quite as clear as that, is it, Mr. Sreenan, the letter?
>
> MR. SREENAN: Well, Judge, the letter, I suppose, doesn't spell out the fact that there can be an argument as to costs in that way and you could say in that regard the letter is unclear. But it doesn't mean that the letter is not unconditional. The letter does make an unconditional offer of paying whatever costs are awarded by the arbitrator and it is clear that those costs, at the very least, would cover the costs up to the date of the offer."

35.

In both McCarthy and this case, the ESB are proceeding on the basis that the offer will not be withdrawn.

36.

In fact, the focus of the ESB on this third question was that acceptance or an unconditional offer after a reasonable period could carry cost consequences. These are the sort of consequences described by Counsel in the extract of the hearing which I just set out. While it is the case that, in the reply, Counsel for the ESB submitted that "as a matter of first principles any offer which is made may be withdrawn or revoked before it is accepted […]" greater emphasis was made in the submissions on behalf of the ESB on what would happen if a Claimant was tardy in accepting an offer. Indeed, it was specifically submitted on behalf of the acquiring authority that a five day period would be a reasonable one for an offer to be accepted.

37.

I have decided that, consistent with the purpose of the legislature in facilitating the settlement of claims for compensation, an unconditional offer is open for acceptance until the Property Arbitrator makes his or her award. If an unconditional offer is framed in the way in which the ESB offer of June 2017 was structured, the costs of the reference to Arbitration should be dealt with in the following way:-

(i) The costs of the Claimant, up to the date of the letter of offer, would be discharged by the ESB. The costs will be measured by a taxation process conducted either by the Property Arbitrator or by a body directed by him to do so.
(ii) If there are other costs which must necessarily be incurred on foot of the offer, then these will also be paid by the ESB. In this regard, I have in mind the submission made on behalf of both Mr. McCarthy and Mr. Kelleher that an award must be made in order to allow the taxation of costs to occur. I do not know whether or not that is the case, but if it is, the ESB would have to pay those costs as an inevitable consequence of the acceptance of its offer.
(iii) If the offer is accepted within a reasonable time, I cannot see circumstances in which the property arbitrator would not award to the

Claimant his own costs in the arbitration incurred over that period. This is accepted by the ESB.

(iv) If an offer is not accepted within a reasonable time by a Claimant, then the Claimant is always at risk that the Property Arbitrator will form the view that costs incurred by the ESB as a result of the failure of the Claimant to react promptly to the unconditional offer should be borne by the Claimant, as opposed to the ESB.

(v) hat is reasonable depends on all the circumstances.

(vi) In deciding what may be a reasonable period for accepting an unconditional offer, the Property Arbitrator will probably want to take into account the personal circumstances of the Claimant, the availability to him or her of advice on the proposal, the complexity of the issues involved in the claim, and the proximity of the hearing of the arbitration. It is likely that the Property Arbitrator will take the view that, if a hearing of the arbitration is imminent, both the Claimant and their advisers will be focused on the issues and the advisers will be available to the Claimant in a way that may not be the case if, for example, the hearing of the Arbitration is some way off and the advisers are engaged in other work. It is very unlikely, for example, that a Claimant could reasonably be expected to accept an offer made on the morning of the Arbitration hearing; see, by way of analogy in the case of a Calderbank letter, Murnaghan v. Markland [2004] IEHC 406.

38.

No doubt, other factors will arise in different cases. I should, however, make the general observation that five days seems to me a pretty short period of time within which a Claimant should be expected to make a decision (which may be a decision of some magnitude) on an offer no matter how imminent an arbitration hearing may be.

F. Conclusion

39.

I therefore answer question one in the negative, question two in the affirmative, and question three in the affirmative.

40.

I will list the matter for mention on the 27th of July 2020 at 10am to deal with any outstanding matters, including the question of costs.