

THE CHARTERED INSTITUTE OF ARBITRATORS

Irish Branch

NEWSLETTER

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EDITORIAL

Later on in the newsletter there is a report from the Mediation sub-committee which was set up recently to examine the situation with regard to mediation as it is developing in this country and to make some recommendations to the Branch Committee as to how any developments in this area might be treated.

There is no doubt that the concept of mediation is receiving more and more consideration in areas where more formal methods of dispute resolution might be usual. Some years ago mediation was seen as being related only to areas of family relationships and employment relationships to name but two, but this is changing at a considerable speed.

The inclusion of a conciliation clause in the Standard RIAI Form of Building Contract in 1996, together with the adoption of a similar procedure into the Institution of Engineers of Ireland Standard Contracts is an indication of the overall trend and it is now generally accepted that these forms of alternative dispute resolution will continue to grow in this jurisdiction as they have in many other common law jurisdictions. If this happens it will in most, but not all, cases be at the expense of arbitration and it is for this reason that the Branch Committee has decided to examine the position and to ensure that whatever steps might be available will be taken to safeguard the interests of the Branch and its members in this changing area.

David Keane

SCHEMES SUB-COMMITTEE

The number of holiday related disputes referred to arbitration continues to rise; travel scheme arbitrations generating much of the income necessary to fund our Secretariat via licence and application fees.

In an effort to assist our Chairman in the nomination of suitable experienced arbitrators, the Schemes sub-committee have commissioned a questionnaire; completed forms will enable us to draw up an experienced Panel of Holiday Arbitrators. It is

planned to hold a Holiday Colloquium for all Panel members later this year.

The Committee continue in their efforts to diversify via the introduction of new schemes, e.g. within the motor industry and for several professional trade associations.

Sub-committee member, Vincent Martin, is examining the possibility of introducing arbitration in the field of education related disputes, and Wendy Jane Catherwood has proposed that we examine ways of getting involved in 'millennium' related disputes.

If any members have contacts within organisations that could be interested in using arbitration as a means of resolving their disputes, or if members merely have ideas with regard to areas we should be researching, please let me know. The more schemes we can get up and running, the more chance there is for us all to gain arbitration experience.

Roy Sherlock

TRANSFER COURSE

Members will be aware that a very successful Transfer Course was held on the 5th December to facilitate those members who wished to make the transition from Associate Grade to Member Grade. Seventy three members attended.

Because of the delay in having the new transition arrangements approved by the Privy Council, it now appears as if these arrangements will not be finally in place until the 1st July, 1999 and it may well be that further courses would be held by the Irish Branch if the demand is sufficient. Any such course would be approved by the Institute as fulfilling the requirements for transition as indeed the course on the 5th December was likewise approved.

A recent circular from the Institute (which was circulated to all Branches of the Institute) advising on some transitional courses to be organised directly from the Institute offices in London can be ignored by the Irish Branch.

MEDIATION SUB-COMMITTEE

This sub-committee feels whatever overall policy views there might be, that mediation can generally expand only at the expense of litigation and arbitration and that the Branch should adopt a proactive rather than reactive attitude towards any developments.

This sub-committee also feels that it would be important to define and identify more precisely the differences between the word 'mediation' and 'conciliation'. It is noted that the Institution of Engineers of Ireland and the Royal Institute of the Architects of Ireland use the word 'conciliation' for a process that combines elements of both conciliation and mediation.

Finally, this sub-committee feels that the Branch committee should determine the appropriate relationships with any other organisations which would have an interest in this area such as the Mediation Institute of Ireland, the Centre for Dispute Resolution, etc.

LEGAL BRIEF: NOTES ON CASES AND MATERIALS, WINTER 1998/99

ANTHONY P. QUINN,

Barrister, FCI Arb, Dip. Arb. Law; Dip. Intl. Arb.

Thanks to colleagues for their continued co-operation.

Arbitration Clauses and the Void or Terminated Contract, article by Garret Simons, Barrister, at page 247 of the Bar Review, volume 3, issue 6, Bar Council of Ireland, March 1998.

The above article analyses the arbitrator's jurisdiction and the arbitration clause's status where the underlying contract may have been terminated, or may have been void *ab initio*.

That article deals with the High Court decision (Kelly J) of 30 January 1998 upholding an arbitration clause although the contract was rescinded due to misrepresentation: Doyle v. Irish National Insurance Co plc, (see notes to Branch members, Winter 1998 and now reported at [1998] 1 IR 89). A comparison is made with Superwood v. Sun Alliance & ors, [1995] 3 Irish Reports (IR) 303, mentioned in previous case notes. The article also refers to other important cases, including Parkarran Ltd v. M & P Construction Ltd [1996] 1 IR 83, in Branch notes of Winter 1997/8, following the principles in the English case, Heyman v. Darwins Ltd, regarding an arbitration clause's survival even if the purposes of a contract had failed.

The High Court, Morris P, in an *ex tempore* decision on 9 November 1998 in R & W Technical Services Ltd. v Irish National Insurance Company, plc, reaffirmed

that the Irish courts should follow the principles in Heyman v Darwins Ltd [1942] AC 356, House of Lords, distinguishing between an arbitration clause and the other parts of a contract.

The High Court in the R & W case, took a line similar to that of Kelly, J in Doyle v Irish National Insurance Company plc in his judgment of 30 January 1998 included in notes for members, Winter 1997/98, and referred to above, deciding that an arbitration clause survived the avoidance of an insurance contract.

The interpretation of the clauses may differ depending on the wording of the specific contracts. In general, however, the above two judgments which arose in sect. 5 cases provide further support for the arbitral process and for mandatory stays on parallel litigation.

Lynch Roofing Systems (Ballaghaderreen) Ltd., Plaintiff v. Christopher Bennett and Sor (Construction) Ltd., Defendant.

Mr. Justice Morris, President of the High Court, 26 June 1998.

Defendant's motion under s. 5 of the Arbitration Act 1980 sought to stay litigation pending arbitration. The issue was: were the terms of the RIAI standard contract, including a standard arbitration clause, incorporated into the construction contract? Defendant claimed that it was perfectly clear from negotiations and meetings that the contract conditions would be according to the main RIAI contract, included an arbitration clause.

The defendant, Bennett, relied on British Crane Hire Corporation Ltd., v Ipswich Plant Hire Ltd., 1975 1 QB 303 to support the case that the plaintiff was bound by the terms of the agreement requiring relief under arbitration. In the British Crane Hire case, Lord Denning said that "it was clear that both parties knew quite well that conditions were habitually imposed... and both parties knew the substance of those conditions."

In Lynch Roofing Systems v Bennett Construction, Morris P. was satisfied that each party was sufficiently familiar with the trade so as to lead a court to conclude, that as Lord Denning said in British Crane Hire, the defendants would be understood and presumed to say "of course that is quite understood". Morris P found it hard to believe that a large roofing contractor would undertake the works without the benefit of a building contract.

Morris P. also referred to meetings between representatives of both parties. Having agreed the terms for awarding the roofing subcontract, it would be extremely unlikely that experienced contractors would contemplate that such a contract would be performed otherwise than being governed by the appropriate building contract.

Held The contract between the parties provided for an arbitration clause. A stay on parallel court proceedings under s. 5 of the 1980 Act was granted.

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Vogelaar, Plaintiffs (owners) v Callaghan, Defendant (builder)

Supreme Court, ex tempore judgment, 13 July 1998, Keane J;

Murphy J and Lynch J, did not dissent. Keane J said that the Court hearing was the penultimate act in a very long, unfortunate and protracted saga arising out of a building contract which went to arbitration. (Earlier proceedings in this complex case were reported in previous Branch notes.)

The judgment arose from an appeal to the Supreme Court from an order of the High Court (O'Sullivan J) given on 28 July 1997. The crucial part of that judgment was : " I make an order remitting (to the arbitrator), so much of the award of the arbitrator as granted costs to the builder because of the High Court judgment delivered by Mr. Justice Barron on 30th April 1996* which has in my view determined the matter and held that, an open offer of £20,000 having been made by the owners, it is not open to the arbitrator to treat the offer as withdrawn. I therefore order that such part of the said award as determined that the owners should pay 9/15ths of the builders' taxed costs in the arbitration including the costs of the preliminary hearings in the amended counterclaim on a party and party basis and that the owners (Vogelaar) should pay 9/15ths of the costs of the award of £29,137.82 inclusive of VAT in the arbitration be and the same are set aside so that this matter be remitted to the arbitrator to make such award as he considers proper having regard to the court's findings herein."

The High Court judgment of Barron J was reported at [1996] 1 IR 88; [1996] 2 ILRM 226.)

Counsel for Mr. Callaghan, the builder, submitted that the finding on costs was the arbitrator's exercise of discretion and the court should not interfere with it. The Supreme Court was solely concerned with whether the High Court judge was right in setting aside so much of the award as actually awarded costs of the nine days to the builder.

Held by the Supreme Court in dismissing the appeal:

- (1) Under no circumstances could the court act as an appeal from an arbitrator's findings.
- (2) The court could set aside awards only in limited and defined circumstances. Therefore, parties must take an award as they find it and can only ask the High Court to interfere where it appears that the arbitrator in some way misconducted himself or made an error as to his jurisdiction or an error of law which is patent on the face of the award.

(3) The Supreme Court was satisfied that the arbitrator was in error but it might be going too far to describe it as misconduct. The arbitrator apparently did not appreciate the significance of the High Court finding that the open offer was unconditional. Generally costs follow the event subject to any discretion on the extent of the costs or any penalty due to a protracted hearing.

(4) Therefore and as the court should not interfere lightly with an arbitrator's award, the Supreme Court was satisfied that the High Court was correct in finding that the provision in the award that the owners, **Vogelaar**, should pay 9/15ths of the costs to the builder, **Callaghan**, and that the owners should bear that very significant burden of costs, was clearly an error on the face of the award.

(5) It was inconsistent with justice that a party should end up paying a significant part of the other party's costs of the arbitration which effectively wiped out the limited costs in his favour. The High Court was correct in setting aside that part of the award; the High Court order in that respect was affirmed.

(6) When a court is setting aside part of an award and confirming it in other respects, there should be finality as far as possible.

(7) The High Court judgment of O'Sullivan J should be varied so as to delete so much of it as remitted the matter to the arbitrator for further hearing. (There was a consensus that there was no point in remission to the arbitrator and incurring more costs.)

Reporter's Comments

The apparent reason for the arbitrator's award that the owners should pay 9/15ths of the builder's costs was a claim that the owners' (Vogelaar) representatives had been responsible for delay as the counter-claim was changed. Press comment criticised the arbitration procedures because of delays and costs.

Points (1) and (2) above of what the Supreme Court held in the **Vogelaar** case are important supports for the arbitral process. Point (3) reaffirms a basic general principle of costs following the event, put simply - the losing party pays the costs of both sides including the costs incurred by the opposing party.

To illustrate the above: An offer is made to settle a case which then proceeds to a court or arbitration hearing. If the relevant party does not beat the offer, (an award is for a sum less than the offer), that party would be liable for costs from the date of the offer which they could have accepted in settlement. Unless the parties agree otherwise, s. 29 (1) of the 1954 Act gives arbitrators discretion regarding which party shall bear the costs of the award and the reference.

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Tobin & Twomey Services Ltd., Plaintiff v. Kerry Foods Ltd., and Timothy C. Sullivan, Defendants.

The High Court judgment of Laffoy J on 22 April 1998, consists of 63 pages and points of special interest are outlined below. Other proceedings in this complex case were reported in previous notes. The Supreme Court judgment of Blayney J dated 6 March 1996 was reported also at [1996] 2 ILRM 1.

The background briefly was that after electrical works including extras were completed, a dispute arose between the plaintiff- electrical contractors- and **Kerry Foods** as to the amount due to the plaintiff in respect of the works. Mr. T.C. Sullivan, the second named defendant, was appointed arbitrator. Were the electrical services contract covered the additional works? An interim award found that certain categories of work were excluded from the original contract.

The High Court, Carroll J, on 6 October 1995, refused reliefs to the plaintiff, including an order under s. 39 of the 1954 Act that the agreement should cease to have effect or alternatively that the arbitrator's authority should be revoked; alternatively an order under s. 36 remitting the matters to the arbitrator for reconsideration; and a Mareva injunction freezing the assets.

The plaintiff's appeal to the Supreme Court was confined to two issues: the refusal to grant an order under s.36 and the refusal of a Mareva injunction. In the Supreme Court, Blayney J held that there was a patent error on the face of the interim award because the arbitrator had concluded that as additional works did not form part of the contract, the dispute regarding them had not been referred to him for decision. The refusal of a Mareva injunction was upheld but the arbitration aspects of the appeal were allowed and the matter was remitted to the arbitrator.

After the Supreme Court judgment and order, the arbitrator made and published an amended interim award, repeating his findings that categories of works specified in the interim award did not form part of the contract but holding that the whole works were within his jurisdiction. The plaintiff withdrew from arbitration on 7 July 1997 and there were various other legal proceedings.

The High Court judgment of Laffoy J on 22 April 1998 arose from the plaintiff's claims: to have the arbitrator removed under s.24 of the 1954 Act (failure to use due dispatch) and/or s.37 of 1954 Act (misconduct); an order that the arbitration agreement should cease to have effect and an order revoking the arbitrator's authority, under s. 40 and s.39 (2) of the 1954 Act; alternatively an order remitting to the arbitrator his order of 7 July 1997 pursuant to s.36 of the 1954 Act.

Sealed Offer

During the High Court hearing before Laffoy J, correspondence opened included a "letter of offer made on a no prejudice basis" but the amount of the offer was not masked. Contending that the amount of the sealed offer had been communicated to the arbitrator (without the relevant party's consent) and that he had actual or constructive knowledge of the amount of the offer, the plaintiff sought an order that the arbitration agreement should cease to have effect and that the arbitrator's authority should be revoked.

Held by the High Court, Laffoy J, dismissing the proceedings and clearing the way for resumption of the arbitration, that:

(1) There was no basis for removing the arbitrator under s.24 or s.37 of the 1954 Act and the plaintiff was not entitled to invoke s.39 (2), relief under s.40. Therefore, revoking the arbitrator's authority did not arise.

(2) Remission was not pursued at the hearing and nothing emerged at the hearing which gave rise to the necessity to remit any matter to the arbitrator for reconsideration under s.36.

(3) Sealed offer: the letter of 24 February 1995 should not have been exhibited in an affidavit in court proceedings without masking the amount. Its inadvertent exhibition without being masked was not a basis for the court could to order that the arbitration agreement should cease to be effective and the arbitrator's authority revoked.

Regarding arbitrators who have "without prejudice" privileged material placed before them, Laffoy J referred to suggested guidelines from the Handbook of Arbitration Practice, Bernstein and Mees, 2nd ed, page 121 and Brown v CBS (Contractors) [1987] 1 Lloyd's Law Reports 279, Hawser J. Those guidelines, which agree in principle with the policy considerations in Keenan v Shield [1988] IR 89 regarding the courts support for arbitration, include: giving the parties opportunity of making submissions and also considering whether the disclosed information, especially in assessing damages, created such a serious risk that it would be impossible for the arbitrator not to be influenced when assessing the quantum of damages.

(4) The plaintiff's contentions on bias and delay should be rejected. The Court considered that an allegation that a claim was exaggerated or inflated or based on contrived calculations was not an allegation that a party was guilty of fraud under section 39 of the 1954 Act.

Reporter's Comments

The judgment of Laffoy J, outlined above, is very informative as many vital issues arose including grounds for removing an arbitrator. It reaffirmed support for the arbitral process on the basis of leading cases such as Keenan v Shield and also rejected allegations of bias by reference to cases such as Bord na Mona v. Sisk, 1990.