THE HIGH COURT

1984 No. 11 SP

IN THE MATTER OF THE ARBITRATION ACTS 1954 TO 1980 AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 35 OF THE ARBITRATION ACT, 1954

BETWEEN/

POWER SECURITIES LIMITED

Plaintiff

- and -

EOIN C. DALY
AND
CLARE INVESTMENTS LIMITED

Defendants

Judgment of Mr. Justice Murphy delivered the 27th day of February, 1984.

This is a claim by the Plaintiff Power Securities Limited ("Powers") against the Defendant Mr. Eoin C. Daly (Mr. Daly) in his capacity as arbitrator appointed under an agreement in writing dated the 8th day of December 1983 made between Clare Investments Limited (Clare) of the one part and Powers of the other part. It is the contention of Powers that the Court should pursuant to Section 35 of

the Arbitration Act, 1954 direct Mr. Daly, as such arbitrator, to seek the decision of the Court on the true construction of the written submission to arbitration. In the Affidavit sworn by Mr. Basil Hegarty the Solicitor on behalf of Powers the question on which it was suggested that the arbitrator should be directed to seek the decision of the Court is expressed as follows:-

> "Whether on the true construction of the said arbitration agreement in writing dated the 8th December 1983 and made between Clare Investments of the one part and Power Securities of the other part, the said Power Securities Limited are entitled to adduce evidence and require the determination as to the liability (if any) of Clare Investments to compensate Power Securities Limited for the continuing loss and damage (if any) sustained by Power Securities Limited as a result of the alleged breach by Clare Investments of the said joint venture agreement or whether the said arbitrator is limited to awarding such sum as may be found due

"pursuant to the clauses in the said agreement providing for the avoidance thereof."

The problem arises in this way. Powers and Clare had been involved together in a joint venture concerning a major development in the city of Cork. Apparently this venture was governed by an agreement between the parties dated the 27th day of August 1979 and two further agreements each dated the 10th of March 1981 (hereinafter referred to as 'the development agreements').

The development agreements, or some of them, contained express provisions providing that disputes arising thereunder should be referred to arbitration.

Whilst a considerable amount of work was done in pursuance of the agreements the development did not proceed to completion. The consequences of the failure to proceed and the reason for the change of plans are apparently matters in dispute between Powers and Clare. With a view to resolving the matters in dispute between them the parties entered into an agreement on the 8th December, 1983

submitting the claims which Power and Clare had each against the other and specified in the first and second schedules of the arbitration agreement to the award and final determination of Mr. Eoin Cormac Daly the first named Defendant.

It appears that the hearing of the arbitration commenced on the 12th December, 1983, Each of the parties to the arbitration was represented by Counsel. The first day of the hearing was taken up with the direct examination and cross-examination of Mr. Robin Power. At the re-commencement of the hearing on the second day Counsel for Powers indicated that there was a difference between him and the Counsel on behalf of Clare as to the construction of the arbitration agreement. Apparently Counsel on behalf of Powers was contending that the submission to arbitration extended to losses which were not covered by the development agreements. That some such difference of opinion existed apparently emerged as a result of the line of cross-examination of Mr. Robin Power which was pursued by Counsel on behalf of Clare. However it seems to me material to bear in mind

first that the submission to arbitration provided that in the first instance the arbitrator would not quantify the losses to which either party was entitled and secondly that Counsel for Clare had not objected to, less still had the arbitrator excluded, any evidence tendered on behalf of Powers.

In those circumstances it is difficult to see why either party - but more particularly Powers - should have described the situation as having reached an impass. In any event a short adjournment was requested early in the second day and that was granted. The adjournment did not resolve the difficulty and Counsel on behalf of Powers sought a preliminary ruling from the arbitrator as to the proper construction of the submission to arbitration. It was contended on behalf of Powers, as Mr. Hegarty recalls the facts, that "it would be pointless to proceed with the evidence unless or until a ruling was given as to the scope of the arbitration agreement and the ambit of the arbitrator's jurisdiction". It was made clear to the arbitrator that in the absence of a preliminary ruling from him that Powers

would have to consider proceedings in the High Court for a declaration that the arbitration agreement was null and void. It was further pointed out that it would be pointless for Counsel to introduce witnesses to adduce evidence over a period of days without knowing in advance if any of the evidence was either relevant or admissible. Apparently the arbitrator would have been willing to allow a further adjournment to enable the matter to be referred to the Court but only with the consent of Clare. When Clare opposed such an application the arbitrator proceeded with the hearing and thereupon Counsel on behalf of Powers withdrew from the arbitration. The hearing by the arbitrator continued in the absence of the representives of Powers but concluded later on the same day.

Whilst there is a substantial divergence in the relevant facts as deposed to by Mr. Francis O'Flynn Solicitor on behalf of Clare and the facts as recollected by Mr. Hegarty, the Solicitor on behalf of Powers both of those witnesses seem to be in agreement that the arbitrator was in fact requested by Counsel on behalf of Powers to make a ruling on

the scope of the submission and that he declined to do so. Whilst this does not accord with Mr. Daly's recollection as expressed in the affidavit sworn by him in as much as he states positively that he was not required "to make any formal ruling of any kind" I feel I must accept, at any rate for the purposes of the present proceedings, that some such application was made and refused. I should like to make it clear, however, that in preferring the recollection of the other parties I am not in any way casting doubt upon the integrity of the arbitrator. Indeed the apparent conflict may be explained by reference to some misunderstanding as to the form rather than the substance of the ruling sought.

On the 5th January, 1984, some weeks after the conclusion of the oral hearing the Solicitors on behalf of Powers telephoned the arbitrator formally requesting him to state a case for the High Court pursuant to Section 35 of the Arbitration Act, 1954. In the nature of the communication that application was of course made in the absence of any representation by Clare who were only informed of the application by letter dated the 5th of January, 1984.

In any event the application was refused.

On the 6th of January, 1984 proceedings were instituted by Powers against the arbitrator claiming (inter alia) an interlocutory injunction to restrain the arbitrator from publishing his award. In those proceedings an interim injunction to that effect was granted on the 11th of January, 1984. In addition Powers commenced proceedings by way of special Summons against the arbitrator alone seeking an Order pursuant to Section 35 of the Arbitration Act, 1954 compelling the arbitrator to state a case for the opinion of the High Court as to the legal construction and interpretation of the arbitration agreement aforesaid. By consent Clare Investments were joined as Defendants in each of the proceedings.

In my opinion the relief sought by Powers in the special Summons should not be granted and it would follow from that that the interlocutory injunction would not be continued.

Counsel on behalf of Powers emphasised the difference which had emerged between the parties in the course of the arbitration as to the scope of the submissions. The

extent of this difference was demonstrated, or so Counsel contended, by the request for the adjournment which was granted and then of course the subsequent decision by Powers legal advisers to withdraw from the hearing. It was urged on me that the failure at this stage to secure a clarification as to the terms of the submission to arbitration would lead to a profusion of litigation in respect of and parallel to the present arbitration and result in injustice, delay and unnecessary expense.

It may well be that it would be desirable in the interests of both parties that they should take steps to avoid unnecessary expense or delay but it does not seem to me that the prospect of these unfortunate consequences would necessarily warrant the Court in making the Order sought. There appears to be little authority dealing with the circumstances in which or the principles on which the Court should exercise its discretion to direct an arbitrator to state a case. I would find it difficult to accept (although the proposition appears to have commended itself to Bray J. in Lobitos Oil Fields Limited -v- The Admiralty Commissioners

1917 86 L.J.K.B. 1444) that a case stated should be directed on the grounds that the Court (or more particularly a divisional Court) would be more competent to decide a question of law than the lay arbitrator. It seems to me that in principle one should recognise that a submission to arbitration involves the parties thereto selecting their own tribunal to obtain the personal and professional qualities of the particular arbitrator and no doubt other supposed advantages in regard perhaps to expedition, finality, privacy or costs. In those circumstances it seems to me that without abdicating its statutory functions or inherent powers the Courts should be slow to usurp the functions of the chosen Tribunal by intervening whether by way of setting aside an award, remitting an award or directing a case to be stated. Some authority for a similar view point is to be found in the decision in Re Gray, Laurier & Co. and Boustead 1892 8 T.L.R. 703. In Russell on Arbitration (1979 Edition) it is suggested that the Court will not intervene by way of directing a case stated at any rate unless there exists "a question of law, real, substantial,

relevant and such as ought to be decided by the High Court".

There is authority for the proposition that the Court may direct an arbitrator to state a case even where he has not expressed an opinion adverse to the party making the application (see Spillers and Baker Limited and H. Leetham and Sons 1897 1 Q.P.D. 312). However I would accept as correct the statement in Halsbury's Laws of England fourth edition Vol. 2 paragraph 602 to the effect that the Court will not direct such a case unless the arbitrator was requested in the first instance to state a case and that such request had been refused. It is difficult to say that such a request was made at all in the present case in as much as no request was made in the course of the oral hearing and the request which was made some two weeks thereafter was made in the absence of the other party to the arbitration.

It seems to me that no case has been made out for a decision by the Court as to the scope of the submission to arbitration. The high water mark of the claim by Powers, - and indeed the original demand, was for a ruling by the arbitrator. There is nothing to indicate that the

arbitrator was not fully competent to deal with such problems of law as did or might arise. Indeed it was not suggested in the hearing before me that the question of law, such as it is, involved anything more than a careful reading of the principal clauses of the arbitration agreement. It was not suggested and I can see no reason to suppose that any legal problem existed which would require reference to legal authorities of the application of abstruse legal principles. The breakdown or impass as it was described in Mr. Hegarty's affidavit was simply a decision by the legal advisers on behalf of Powers not to proceed without an assurance from the arbitrator that the submission to arbitration would be interpreted by him as relating to the wider rather than the narrower range of losses which might flow from the failure to implement the development programme. Whilst it can be appreciated readily that Counsel conducting the case would prefer to be reassured that his interpretion of the submission would prevail against a contrary view for which his opponent apparently contended it is difficult to see that this conflict presented any insuperable barrier to proceeding with the hearing. At best it would seem that

Counsel's concern was premature for, as I have already pointed out, no objection had been taken to the evidence which he had tendered: less still had it been excluded. Even if I was to assume that the Arbitrator had erred in refusing to define the scope of the arbitration it would not necessarily follow that the legal issue as to the true construction of the submission was one "such as ought to be decided by the Court." The assumption merely involves the conclusion that the issue should have been determined by the Arbitrator.

In these circumstances I am not satisfied that the Applicant's have made out a case for the relief claimed.

25/5/84