

GERAGHTY

Record No. 1984 616Sp

THE HIGH COURT

IN THE MATTER OF THE ARBITRATION ACTS 1954 AND 1980 AND
IN THE MATTER OF THE ARBITRATION PROCEEDINGS BETWEEN:-
ROHAN INDUSTRIAL ESTATES LIMITED APPLICANT AND MALACHY GERAGHTY
RESPONDENT AND IN THE MATTER OF AN ARBITRATION AWARD MADE ON
THE 24TH DAY OF AUGUST 1984

BETWEEN:-

MALACHY GERAGHTY

PLAINTIFF

AND

JOHN F. BUCKLEY AND ROHAN INDUSTRIAL ESTATES LIMITED

DEFENDANT

Judgement of Miss Justice Carroll delivered the 6th day of October
1986.

This is an application to set aside an arbitrator's award pursuant to Section 38 of the Arbitration Act 1954. The arbitrator was joined as a Defendant but the action was subsequently discontinued against him. The arbitration arose out of a contract under seal made between the Plaintiff as vendor and the second-named Defendant (referred to herein as the Defendant) as purchaser dated the 31st of March 1978 for the sale of lands described as:

- (a) Part of the lands of Turnapin Little containing 7 acres, 3 roods and 21½ perches statute measure being the property described in Folio 754 of the Register of Freeholders Co. Dublin.
- (b) Part of the lands of Santry containing 46 acres, 3 roods and 27 perches statute measure being the property described in Folio 882 of the Register of Freeholders Co. Dublin.

The purchase price was £2,026,000 payable as to £10,000 as deposit on the execution of the Deed, and, subject to satisfactory title being shown, £490,000 within three months (the second deposit) and the residue not later than the 31st of May 1999. On payment of the second deposit, sixteen and two-third acres were to be transferred, the land to be chosen by the purchaser. There was further provision to execute transfer of "sites", the acreage of which was to be established by agreement or in default by a surveyor to be appointed, at the rate of £40,000 per acre.

Under Clause 10, the word "site" means part of the site being sold and in addition a proportional part of lands used or developed as roads so that the vendor should receive the full purchase price of £2,026,000.

Under Clause 3, the General Conditions of Sale of the Incorporated Law Society of Ireland (1976 Edition) were deemed to be incorporated in the Deed to the extent that the same related to sale by private treaty and were not inconsistent with the specific provisions of the Deed.

By Clause 21 of the General Conditions of Sale (1976 Edition) it is provided as follows:

1. "Measurements and quantities which are substantially correctly stated shall not be the subject of compensation for any errors therein nor shall compensation be payable in respect of any mistake or discrepancy in any sale plan furnished for the purpose of identity, but where an incorrect statement, error or omission, whether as to measurement, quantities or otherwise, materially affects the description of the property nothing herein shall prevent the payment or allowance of compensation under sub-clause 2 of this condition

2. Subject as aforesaid, any error, omission or misstatement in the particulars of these conditions or in the course of any representations or negotiations leading up to the sale shall not annul the sale or entitle the purchaser to be discharged from his purchase but shall entitle the purchaser or the vendor (as the case may require) to compensation in respect thereof. If any dispute shall arise as to the applicability of this sub-clause or the amount of compensation, it shall be settled by arbitration by a sole arbitrator to be appointed, in default of agreement, by the President for the time being of the Incorporated Law Society of Ireland and the Arbitration Act 1954 shall apply accordingly.

3. Nothing herein shall however:-

(i) Entitle the vendor to require the purchaser to accept or entitle the purchaser to require the vendor to convey (with or without compensation) property which differs substantially from the property agreed to be sold, whether in quantity, quality, tenure or otherwise, if the purchaser or the vendor (as the case may be) would be prejudiced by reason of such difference, or

(ii) Affect the right of the purchaser to rescind or repudiate the contract where compensation for a claim attributable to a material error, omission or misstatement cannot be reasonably assessed."

The total acreage of the lands described in the contract was 54.804 acres. This was the total area shown on the face of the folios. In 1980 the Defendant alleged that the Plaintiff as vendor could only transfer 52.255 acres because the Land Registry had

transferred from the two folios to other folios the area to the centre of the roads bounding the lands so that the total area remaining in the folios was 52.255 acres. A dispute arose and the Plaintiff instituted proceedings for rescission of the contract or specific performance. The Defendant applied to stay the proceedings under Section 12 of the Arbitration Act 1954. By Order dated the 17th of June 1981 Mr. Justice McWilliam stayed all further proceedings pending the decision of the arbitrator to determine the total area to which the contract related. This Order was appealed to the Supreme Court and was ultimately upheld by Order dated the 16th of March 1983. An arbitrator was appointed by mutual agreement but agreement could not be reached on a joint submission to arbitration. The Defendant, as applicant in the arbitration, submitted points of claim on the 25th of October 1983 and the Plaintiff as respondent furnished points of defence on the 27th of January 1984.

By 15th of May 1984 all relevant documents had been furnished to the arbitrator.

An arbitration hearing took place on the 21st of May 1984. Both the Plaintiff and Defendant were represented by their respective Solicitors and by Senior and Junior Counsel.

On the 8th of June 1984 the arbitrator wrote to both Solicitors as follows:

"I have now reviewed the evidence given at the hearing of the arbitration in this matter on the 21st of May 1984 together with the submissions made by Counsel on that occasion. The Respondents pleaded at paragraph 2 of their points of defence that "the said agreement was an agreement for the sale of all the property comprised in the said folio, being a sale by reference to the said folios rather than (sic) the alleged

acreage thereof. The applicants at the time of the said agreement had examined and surveyed the said lands and were well aware of the nature and extent thereof.

Before I proceed further with the arbitration I would like to give the Respondents an opportunity to adduce evidence in support of the statement contained in the second sentence of that paragraph and the applicants an opportunity of adducing evidence in relation to the same statement.

I would therefore propose to hold a further hearing of the arbitration."

He then went on to suggest possible arrangements for the date.

The resumed hearing of the arbitration was held on the 1st of August 1984.

On the 24th of August 1984 the arbitrator made his award. It appears from the recitals that the arbitrator was satisfied:-

that the Official Land Registry map relating to Folios 882 and 754 Co. Dublin did not comprise a total area of 54 acres, 3 roods 8½ perches (54.884 acres) which was the total of the areas appearing on the face of the folios;

that part of Turnapin Lane which was formerly part of Folio 754 is now comprised in Folios 17697, 12825 and 12826;

that no formal transfers of these lands by the registered owner of Folio 754 were completed;

that part of the lands in Folio 882 (being portion of the Dublin/Swords roadway) were transferred to Folio 2440 (registered owner: Dublin County Council) under Instrument 885/3/40;

that there was no formal transfer by the registered owner of

Folio 882;

that the Land Registry did not put a note on the parent folios showing a deduction;

that the Plaintiff believed Folios 882 and 754 to contain 54 acres, 3 roods, and 8½ perches and was unaware of the transfer to the County Council;

that the explanation given by the Land Registry official in evidence was that the transfer of land as carried out was in accordance with normal Land Registry practice.

The arbitrator said that he was not satisfied that the land was surveyed and measured by the Defendant at the time of the agreement. His award was as follows:

- "1. That General Condition 21 of the Conditions annexed to the agreement of the 31st of March 1978 made between the Respondent of the first part the applicants of the second part and the Industrial Credit Company Limited of the third part does apply to this dispute and that the applicants were entitled to invoke the provisions of this clause.
- 2. That there was an error or mistake in the agreement in that the total of the lands comprised in Folios 754 and 882 of the Register of Freeholders at the date of the agreement and as evidenced by the Land Registry map of those folios produced at the time of the agreement did not amount to 54 acres, 3 roods, and 8½ perches (54.804 acres) and that the Respondents were not in a position to enter into a valid contract to sell and give vacant possession of so much of the lands as formerly formed part of Folios 754 and 882 but which were now included in Folios 17697, 12825 and 12826 and 2440 of the register

County Dublin and that the difference in acreage amounted to 2.104 acres.

3. That the applicants are entitled to compensation for the said error or misstatement and that such compensation should be calculated by reference to the overall price per acre payable under the said agreement namely £36,968.105.
4. That the amount of the said compensation amounts to £77,781."

As to the costs of the arbitration and of the award he directed that the costs of the award should be payable by the parties in equal shares and that each party should bear their own costs of the arbitration.

Section 38 (1) of the Arbitration Act 1954 provides:

(1) Where-

- (a) an arbitrator or umpire has misconducted himself or the proceedings, or
 - (b) an arbitration or award has been improperly procured
- the Court may set the award aside.

The Plaintiff claims that the award should be set aside under Section 38(1)(a) of the Arbitration Act 1954 as misconduct of the proceedings on the grounds:-

1. There is an error of law on the face of the award because the arbitrator found that the practice of the Land Registry had effectively reduced the area comprised in the folios. Accordingly the decision on the question directed by the Supreme Court is based on an error of law.

Alternatively

2. If there is no error of law and there is an incorrect statement in the area described in the contract, the arbitrator did not find that this materially affected the

description of the property as required by the General Conditions, Clause 21 (1).

Alternatively

3. If the arbitrator did find that an incorrect statement of the area materially affected the description, he reached that decision without giving the Plaintiff an opportunity to advance arguments directed to materiality.

Alternatively

4. If there was a material misdescription, the arbitrator did not give the Plaintiff an opportunity to adduce evidence or advance arguments as to the method of calculating compensation as he had intimated that he was going to make an interim award and instead made a final award.

Alternatively

5. The arbitrator went beyond the single matter referred by Order of the Supreme Court.

1. Whether there is an error of law on the face of the award

The arbitrator found that the Land Registry had effectively removed lands from the two Folios 754 and 882 County Dublin by altering the official Land Registry map and opening new folios without a transfer from the registered owners and without noting any removal of lands from the folios. The effectiveness of the Land Registry action is a finding of law not a finding of fact.

Under Section 31 of the Registration of Title Act 1964, the register is conclusive evidence of the title of the owner of the land as appearing on the register. There is provision for the rectification of the register by the Court on the grounds of actual fraud or mistake. By contrast, Section 85 of the same Act provides

that the description of the lands on the registry map is not conclusive as to the boundaries or extent of the land, except as provided by the Act (none of which exceptions are applicable).

Under Section 32 of the same Act, where any error originating in the Land Registry (whether of misstatement, misdescription, omission or otherwise and whether in a register or in a registry map) occurs in registration, the registrar may with the consent of the registered owner and of such other parties as may appear to be interested rectify the error upon such terms as may be agreed to in writing by the parties, or the Court, if it is of opinion that the error can be rectified without injustice to any person, may order the error to be rectified upon such terms as to costs or otherwise as it thinks just.

Therefore the registrar's power to alter the register or the registry map only arises where a mistake occurs on registration originating in the Land Registry, and then only to the extent that all interested parties agree in writing.

It is not clear to me what exactly was the title position at first registration and whether the road areas subsequently purported to be vested in the Dublin County Council, were included in Folios 754 and 882 in error on first registration. But even if that were the case, the registrar had no power to alter the Land Registry map without the consent in writing of the registered owner. Since the registrar did not have power to transfer land unilaterally, the only way title could be transferred, in the absence of the registration of a transfer by the registered owner, was by Order of the Court.

Therefore the purported alteration of the Land Registry map and the purported opening of new folios showing Dublin County Council as registered owner appear to have been ineffective to remove

any lands from Folios 754 and 882. This however can only be a preliminary opinion. As this is a question affecting title to land it is not possible to make a final decision without giving the Registrar of Titles and the Dublin County Council as interested parties an opportunity to make submissions. If they do not wish to contest my opinion on this point or if having heard their submissions I am still of the same opinion, then the arbitrator has erred in law on the face of the award, and the award should be set aside.

An error of law appearing on the face of the award has long been considered a reason for setting it aside (see Kelantan Government .v. Duff Development Company Ltd. - 1923 Appeal Cases 395 and Champsey Bhara and Co., .v. Jivraj Balloo Spinning and Weaving Co., Ltd., 1923 A.C. 480; British Westinghouse Electric and Manufacturing Co., Ltd., .v. Underground Electric Railways Company of London Ltd., 1912 A.C. 673). If the outcome is that the award is set aside the appropriate course would be to remit the matter to the arbitrator for a finding in the light of the question of law determined by the Court.

2. Whether the arbitrator found there was a material misdescription

This question only arises if there is no error of law and that the action of the Land Registry was effective to remove lands from the two folios. For the purpose of dealing with the point, I am assuming there was no error of law.

The Plaintiff claims that if there was a misdescription of the lands, the arbitrator did not find that the misdescription was material, which is a condition precedent to the payment or allowance of compensation under Clause 21 of the General Conditions.

In my opinion while it is true the arbitrator does not say expressly that the difference in acreage was material, the award cannot be read in any other way. The finding in paragraph 1 of

the award that Clause 21 does apply and that the applicant (the Defendant) was entitled to invoke the provisions of the Clause, together with an award of compensation, must be interpreted as a finding by implication that the error mentioned in paragraph 2 of the award materially affects the description of the property.

3. Whether the arbitrator gave the Plaintiff an opportunity to advance arguments directed to materiality and

4. Whether the arbitrator gave the Plaintiff an opportunity to adduce evidence or advance arguments as to the method of calculating compensation

I am assuming for the purpose of deciding these points, which I shall take together, that there was no error of law.

The Plaintiff relies on the letter of the 8th of June 1984 from the arbitrator (already quoted) and in particular to the statement therein to the effect that before proceeding further with the arbitration the arbitrator wanted to give both parties an opportunity to adduce evidence in relation to the statement by the respondent (the Plaintiff) in his points of defence that the applicant (the Defendant) at the time of the agreement had examined and surveyed the lands and was well aware of the nature and extent thereof.

The Plaintiff also relied on Affidavits by Counsel relative to the hearing.

Senior Counsel's recollection does not claim to be clear in many respects but he does say that the arbitrator said on the 21st of May (the first hearing) that he proposed to make an interim award. He also says that his recollection was that the second hearing was convened because the arbitrator wished to have further evidence in relation to what surveys were carried out prior to the date of contract. He says he was clear it was agreed there

should be an interim award but was not clear on the issues to be included.

Junior Counsel is clear that before the resumed hearing he understood it was to determine the area included in the contract for sale and whether there was misdescription by reason of shortfall in acreage. He said he believed that if it was found there was a shortfall, the arbitration would be reconvened to enable arguments to be made as to materiality and amount of compensation, if any. He was present from just before lunch on the day of the first hearing to the end of that hearing and for the entire of the hearing on the 1st of August and has no recollection of any argument being made relating to the amount of compensation payable (if any), or the materiality of any shortfall or the arbitrator indicating he was going to determine all issues. He says if such indication had been given he feels sure he would have remembered it.

In a replying Affidavit the Defendant's Solicitor says that he has not the slightest doubt that the arbitrator was to deal not only with the right to compensation but also the amount of such compensation if found to be payable. He said that his conviction and his clear recollection are shared by the principal of his firm and his counsel. He exhibits his notes taken at both hearings and also the notes of his Senior Counsel. None of them purport to be a verbatim account of the proceedings, but Senior Counsel's note of the first hearing includes the following:-

"Arbitrator; I propose to make interim award re whether shortfall and if so is it material and if so is applicant entitled to compensation."

There was no cross-examination of any deponent.

I have drawn the following conclusions from the evidence before me I am satisfied that the arbitrator at the first hearing indicated

that he was going to make an interim award. This is borne out by the Affidavits of Senior and Junior Counsel for the Plaintiff and the notes of Senior Counsel for the Defendant.

The letter of the 8th of June 1984 gives the impression that the resumed hearing is to deal with the allegation that the applicant (Defendant) had examined and surveyed the lands at the time of the agreement and was aware of the extent.

Both Senior and Junior Counsel for the Plaintiff were under the impression at the second hearing that an interim award was all that was being involved.

Even though I accept the Defendant's Solicitor's averment that he was in no doubt that the amount of the compensation was to be dealt with at the resumed hearing, nevertheless, since I am told by experienced and responsible Counsel acting for the Plaintiff that they were unaware all issues were to be dealt with, I can only conclude that there was a complete misunderstanding between the representatives of the Plaintiff and the arbitrator.

I am satisfied that Counsel for the Plaintiff did not make submissions directed to the materiality of any shortfall and did not adduce evidence or make submissions relating to the amount of compensation (if any) because they believed the arbitrator was going to make an interim award based on his statement to that effect at the first hearing and the letter of the 8th of June 1984. I am satisfied that they were reasonable in holding this belief.

That being so, the issue is whether there has been misconduct by the arbitrator within the meaning of Section 38 of the Arbitration Act 1954.

It appears to me to be essential to the requirements of justice that all parties be given a reasonable opportunity to adduce evidence considered necessary and to make submissions relevant to the issues

to be decided. There was no overt act by the arbitrator preventing the giving of evidence or the making of submissions but the arbitrator having stated that he would make an interim award at the first hearing, failed to make it clear to the Solicitor or Counsel for the Plaintiff that he intended to deal with all issues at the second hearing. In my opinion the failure on the part of the arbitrator to conduct the arbitration in such a manner so that both parties might reasonably be aware that he had abandoned the idea of an interim award and intended to deal with all issues, amounted to misconduct of the proceedings within the meaning of Section 38(1) (a). The case of the State (Hegarty) .v. Winter 1956 IR 320 is authority for the proposition that want of fairness alone even though there is no partiality on the part of the arbitrator, is grounds for setting aside an award.

5. Whether the arbitrator was confined to the single issue referred to him by Order of the Supreme Court

The Order of McWilliam J. on the 17th of June 1981 stayed all further proceedings "pending the decision of the arbitrator appointed in accordance with the terms of the contract dated the 31st day of March 1978 to determine the total areas to which said contract relates." That Order was affirmed by the Supreme Court.

The Defendant submitted points of claim which claimed (inter alia) a finding as to what was the actual area comprised in the folios, a finding that the Defendant was entitled to compensation for the discrepancy and specifying the amount of compensation.

The Plaintiff in his points of defence rebutted the Defendant's points of claim and claimed (inter alia) that the arbitration clause was not applicable but that if the arbitrator found it was applicable

he claimed "such further and other declarations as may be open to the arbitrator and necessary to resolve the disputes and difference which have arisen between the parties with if necessary liberty to apply and amend pleadings in this regard."

At no stage in the points of defence or in the proceedings before the arbitrator did the Plaintiff make the case that the arbitrator had no jurisdiction to decide any question other than the single issue referred to in the Court Order. Instead all issues arising under Clause 21 were put before that arbitrator by the parties themselves. In my opinion the Plaintiff is estopped from making a case on this ground which was not made before the arbitrator. (See Macaura .v. Northern Assurance Company Ltd., 1925 A.C. 619).

The matter should now be relisted for argument by the Registrar of Titles and Dublin County Council on whether the action of the Land Registry in opening new folios and altering the Official Land Registry map was effective to transfer lands from Folios 754 and 882 County Dublin in the absence of transfers from the registered owner.

Mella O'Connell,

*Approved
4-11-86,*