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THE HIGH COURT

1989 No. 126 Sp Court 6

IN THE MATTER OF THE ARBITRATION ACTS 1955 AND 1980
AND IN THE MATTER OF SECTION 38 OF THE ARBITRATION ACT 1954

BETWEEN

BORD NA MONA

PLAINTIFFS

AND

JOHN SISK AND SON LIMITED, SAMUEL STEPHENSON AND MERCURY ENGINEERING COMPANY LIMITED

DEFENDANTS

Judgment of Mr. Justice Blayney delivered the 31st day of May 1990.

This is a Motion under Order 56 Rule 4 of the Rules of the Superior Courts seeking an extension of time for an application to set aside an award made in an arbitration between the Plaintiffs and the Defendants.

The arbitration was held pursuant to a clause contained in a building contract dated the 14th January 1977 and made between the Plaintiffs of the one part and the first named Defendant (to whom I shall refer as "Sisks") of the other part. The arbitrator, John E. O'Reilly, architect, had been appointed by the President of the Royal Institute of Architects in Ireland. Initially, the arbitration was to be held between the Plaintiffs and Sisks only, but by agreement between all the parties the second named Defendant (to whom I shall refer as Mr. Stephenson) and the third named Defendants (to whom I shall refer as Mercury) were added as parties also.

The subject matter of the building contract was an office building and ancillary works at 79 Lower Baggot Street. Mr. Stephenson was the architect and Mercury was the sub-contractor for the air conditioning and mechanical services.

Three separate issues arose in the arbitraton: the first related to the air conditioning and mechanical services; the second to the "curtain walling", and the third to a counterclaim submitted by Sisks.

Practical completion of the work to be carried out under the contract took place on the 17th November 1978; Mr. O'Reilly was appointed arbitrator on the 30th December 1985, and the arbitration was held on the 30th November 1987 and subsequent days. At the request of the parties Mr. O'Reilly made separate interim awards in respect of each of the issues. They were as follows:

1. By interim award dated the 8th January 1988, he dismissed the Plaintiffs' claim in relation to the "air conditioning and mechanical services".

2. By interim award dated the 21st January 1988, he held that the Plaintiffs had sustained loss damage and expense, which he measured at £752,500, because of defects in the curtain walling system; that Mr. Stephenson was liable for the entire of the said loss damage and expense, and that Sisks were not liable for any part of the said loss damage and expense.

3. By interim award dated the 7th March 1988, he awarded by consent of the Plaintiffs and Sisks that the Plaintiffs should pay Sisks the sums of £94,563.14 and £5,160; and he further determined that Sisks were not entitled to be paid interest on the said sum of £5,160.

In a final award made in two parts on the 8th June 1988 Mr. O'Reilly dealt with the costs of all the parties consequential upon his interim awards.

The Plaintiffs instituted proceedings in Engalnd with a view to having executed there the award obtained against Mr. Stephenson and in those proceedings they ascertained on the 15th December 1989 that Mr. O'Reilly, in the course of his professional practice as an architect, had carried out work for Sisk Properties Limited, an associate company of Sisks. They claimed that this entitled them to have the awards made in the arbitration set aside on the ground that Mr. O'Reilly had misconducted himself in not disclosing to the Plaintiffs his connection with Sisk Properties Limited. On the 23rd February 1989 the Plaintiffs issued a special summons seeking an Order setting aside all the awards on this ground, and on the 4th September 1989 served the Notice of Motion which is the subject matter of this judgment seeking an extension of time for bringing these proceedings.

Order 56 Rule 4 of the Rules of the Superior Courts provides that an application to "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." The Plaintiffs' application is accordingly well out of time, and the difficult issue that I have to determine is whether further time should be allowed so that the application may be brought. It is difficult because the criterion to be applied is very general. In Citland Limited .v. Kanchan Oil Industries PVT Limited 1980 2 Lloyds Reports Part III, Mustill J., the co-author of Mustill and Boyd on "Commerical Arbitration" said in his judgment with reference to the extension of time for setting aside awards:

> "The reported cases show that the period can in appropriate circumstances be enlarged. It is often convenient, for the purposes of discussion, to extract from these decisions a list of factors which are relevant to the question whether an extension should be granted. Such a list does not lay down a rigid test. The only criterion is whether the interests of justice require that the time should be enlarged, and the weight to be given to each factor will depend on the circumstances of the case."

The list of factors to which he refers are detailed in the second edition of his text book at page 568:

"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 the time is extended.

3. The length of the delay by the applicant.

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

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

In the present case it seems to me that the weight to be given to each of these factors varies greatly, with the most weight being given to the last factor, whether the applicant has a good arguable case on the merits. I will start with brief comments on the other four.

In Citland v. Kanchan Oil, Mustill J., said in his Judgment in regard to the six weeks' time limit prescribed by the corresponding English rule:

> "The period is a limit which must be strictly observed. There is good reason for this. The utility of arbitration demands that a final award, once made, should be speedily honoured. If the validity of the award is challenged, the merits of the challenge should be promptly investigated, whilst memories are fresh, and promptly disposed of, so that if the award is found to be valid the successful party suffers no undue delay."

I would respectfully agree, but it seems to me that these remarks are directed to a case where the ground for setting aside the award was known, or ought to have been known, at the time the award was published, which is not the case here. I accept that the Plaintiffs did not become aware of Mr. O'Reilly's connection with Sisk Properties Limited until the 15th December 1988, six months after the final awards had been published, so the application could not

have been brought within the period prescribed by the rules. For this reason I attach little weight to the first factor.

The next factor is the likelihood of prejudice to Sisks if the time is extended. Kevin Callan, a director of Sisks, said in his Affidavit that prejudice would be caused to Sisks in three respects:

1. They would be obliged to put the Plaintiffs' claim back into their accounts as a contingent liability.
2. The recollection of their witnesses would have diminished because of the time lapse.
3. Notes of evidence taken at the hearing of the arbitration had been destroyed in the belief that the case was at an end.

There would also be the inevitable prejudice of having to devote time and effort to defending a claim arising out of work which was completed over eleven years ago, even if they should again be successful in defeating it. So in my opinion there is a likelihood of prejudice to Sisks in these respects.

I will deal together with the length of the delay by the Plaintiffs and whether they were guilty of unreasonable or culpable delay. The length of the delay is clearly substantial. The first interim award was published on the 8th January 1988, and the two parts of the final award on the 6th June 1988, but the present proceedings were not initiated until the 23rd February 1989, more than a year after the first interim award, and eight months after the final award. As to unreasonable or culpable delay after the Plaintiffs had become aware on the 15th December 1988 of the ground on which they are relying, while there was some, I do

not think it was significant. Mr. John Gallagher, the Assistant Secretary of the Plaintiffs, was informed of Mr. O'Reilly's connection with Sisk Properties Limited by the Plaintiffs' London Solicitors, by telephone, on the 15th December, 1988. Copies of Affidavits filed on behalf of Mr. Stephenson in the proceedings against him in the United Kingdom, and which contained this information, were sent to Mr. Gallagher by post on the 30th December 1988 and received by him on the 4th January 1989. On the following day he wrote to the Plaintiffs' Solicitors, Messrs. Arthur Cox & Co., seeking advice, and this he received on the 19th January 1989, whereupon he immediately advised Messrs Arthur Cox & Co., to initiate proceedings, which they did on the 23rd February 1989. I consider there was unreasonable delay on the part of the Plaintiffs' English Solicitors in waiting until the 30th December to send Mr. Gallagher copies of Affidavits which they had on the 15th December. In addition, in view of the urgency of issuing proceedings, if a decision to do so were taken, the copy Affidavits should have been sent by FAX and not by ordinary post. However, even if this had been done, because of Christmas intervening, the amount of time saved would probably have been about only two weeks, and an unreasonable delay of this duration could not be considered to be significant.

Finally, I come to consider whether the Plaintiffs have a good arguable case on the merits, that is to say, a good arguable case on the merits to set aside the interim and final awards of the arbitrator.

The ground on which the Plaintiffs rely, as set out in the Special Indorsement of Claim, is that the "arbitrator

misconducted himself in failing to disclose to the parties to the said arbitration that on a date prior to the said arbitration he had accepted instructions from and acted for Sisk Properties Limited, a company associated with the first named Defendant".

The relevant facts alleged to support this ground I find to be as follows. Mr. O'Reilly was retained by Sisk Properties Limited in May 1975 in connection with a proposed development in Rathmines which subsequently became known as the Swan Centre. He prepared the application for planning permission and later, in 1980, he designed the centre and subsequently supervised its construction. On the 4th January 1982 Sisk Properties Limited entered into an agreement with Sisks for the latter to construct the centre. Mr. O'Reilly was named as the architect for the purpose of this agreement. The work on the Swan Centre was to be carried out in four phases: phases one to three consisted of a shopping centre and eleven apartments; phase four consisted of development of housing on a part of the site known as "the Homeville site".

Phases one and three were practically completed on the 30th April 1984 and a certificate of practical completion was issued by Mr. O'Reilly on that date. Mr. O'Reilly had not at the date of the arbitration issued the final certificate as he was not satisfied that Sisks had completed their obligations under the contract. A sum in excess of £100,000 will become due to Sisks when they obtain the final certificate.

In August 1987 Sisk Properties Limited decided to extend the Swan Shopping Centre into the Homeville site and

they instructed Mr. O'Reilly to apply for planning permission for 14,000 square feet of retail space. Mr. O'Reilly duly submitted a planning application on the 30th October 1987 and this was refused on the 18th December 1987. An appeal was then lodged against this refusal.

Both Sisks and Sisk Properties Limited are wholly owned subsidiaries of Capwell Investments Limited the equity in which, consisting of 50,000 shares, is owned, except for eight shares (which are owned by four Sisk brothers) by a Company called Sicon Limited. The entire equity in Sicon Limited is owned by members of the Sisk family.

Sisks and Sisk Properties Limited have separate boards of directors and separate managements independent of each other. The two companies at all times dealt with each other on an arms length basis. There are altogether 64 companies in the Sisk group.

The Swan Centre attracted a significant degree of public attention in the national press and architectural journals. Articles about it appeared in the Irish Press on the 25th September 1981, and in the Irish Times on the 18th November 1981, 12th May 1982, 28th January 1983, 7th February 1986, and the 9th July 1986. In each of these articles there was reference to the fact that the architects who had designed the centre were John E. O'Reilly and Partners.

On the basis of these facts have the Plaintiffs a good arguable case on the merits? In other words, have the Plaintiffs a good arguable case to establish that Mr. O'Reilly was guilty of misconduct in not disclosing to the parties to the arbitration that he had been retained by Sisk Properties Limited to design the Swan Centre and that

his connection with that project had not terminated?

If the question as so phrased, which is the question raised in the special summons, was the sole question to be considered, I would have little difficulty in answering it. Since Mr. O'Reilly's connection with Sisk Properties Limited, through the Swan Centre, had been referred to in the newspaper articles mentioned earlier, which appeared between 1981 and 1986, one of which, that on the 7th February 1986, appeared within six weeks of Mr. O'Reilly's appointment as arbitrator on the 30th December 1985 I consider that Mr. O'Reilly was entitled to take the view that the fact that he had been the architect retained by Sisk Properties Limited for the Swan Centre was well known, and accordingly that the question of its having to be disclosed did not arise. In the circumstances, how could a failure to disclose have constituted misconduct?

But the misconduct alleged in the special summons raises by implication another question, that of bias, and it seems to me that the real question that I have to consider in determining whether the Plaintiffs have a good arguable case on the merits is whether they have such a case to set aside the awards on the ground of bias. So this is the case that I propose to examine.

The first matter to be determined is the test to be applied. This was considered recently by Murphy J. in Dublin and County Broadcasting Limited .v. Independent Radio and T.V. Commission, Radio 2,000 and Capital Radio Productions (unreported 12th May 1989). Having referred to some of the authorities, and in particular to the following passage from the Judgment of Griffin J. in Corrigan .v. The

Irish Land Commission 1977 I.R. at page 327:

"A person in a judicial or quasi-judicial capacity in a matter which is otherwise within his jurisdiction may be disqualified from hearing that matter by reason of actual or presumed bias on his part. However, before such disqualification can take place, there must be a "real likelihood" of bias: see per Blackburn J. in Rex .v. Rand (1866) L.R. 1 QB 230, 233. Lord O'Brien L.C.J. in Rex (Taverner) .v. Justices of County Tyrone (1909) 2 I.R. 763, 768, in regard to the necessary bias, said:- "By bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias".

Murphy J. said at page 13 of his judgment:

"Certainly it does seem to me the question of bias must be determined on the basis of what a right minded person would think of the likelihood, of the real likelihood of the prejudice, and not on the basis of a suspicion which might dwell in the mind of a person who is ill informed and did not seek to direct his mind properly to the facts. It seems to me the crucial part of the test would be the approach of a right minded person to the facts and the circumstances of the case, and the view which he would form as to the likelihood of bias not to the fact of the bias being operative in fact, and I entirely accept it would be irrelevant and immaterial if in a case such as the present it was established as a matter of fact

> the bias was non-operative, or that the particular person accused of the bias was out-voted or whatever. If it shown that there is on the facts circumstances which would lead a right minded person to conclude that there was a real likelihood of bias, that this would be sufficient to invalidate the proceedings of the tribunal".

I respectfully agree with and adopt this statement of the law, and I propose to apply the test laid down in the final sentence. Accordingly, the question that has to be answered is this: have the Plaintiffs a good arguable case on the merits to establish that a right minded person with full knowledge of the facts would have been led to conclude that there was a real likelihood of bias in Mr. O'Reilly's acting in the arbitration between the Plaintiffs and Sisks? I omit Mr. Stephenson and Mercury as Mr. O'Reilly had no connection with either of those parties.

The Plaintiffs' case rests on Sisks being an associate company of Sisk Properties Limited and on Mr. O'Reilly still having work on hands for the latter at the time of the arbitration. It is suggested that this gives rise to a real likelihood of bias on the part of Mr. O'Reilly. So two matters would have to be taken into account by the hypothetical right minded person looking at all the facts: the nature of the association between the two companies, and Mr. O'Reilly's relationship with Sisk Properties Limited.

As to the association between the two companies, I find that they are both subsidiaries of Capwell Investments Limited but that they have separate boards of directors and are separately and independently managed. I find that Sisk

Properties Limited does from time to time employ Sisks to carry out some of its developments and that when this occurs the companies deal with each other at arms length as in the Swan Centre development.

Mr. O'Reilly's relationship with Sisk Properties Limited is that of an independent professional man with his client. He provides his professional services in return for a fee. His position is very different from that of an employee of the company, or of a director or shareholder. He owes no general duty to the company and has no pecuniary interest in it. His relationship with it is temporary. It will terminate once the professional work for which his services have been retained has been completed.

On these facts, while accepting that at first sight there might be a suspicion of bias, I do not think that any right minded person would be led to conclude that there was a real likelihood of bias on the part of Mr. O'Reilly. There was no reason why he should have had a bias in favour of Sisks simply because one of his professional clients at the time happened to be Sisk Properties Limited. Mr. O'Reilly would have been well aware of the relationship between Sisks and Sisk Properties Limited since he was the architect for the building contract between these two companies. He would have known that each had a separate board of directors and was separately managed so that even though they were associate companies they dealt with each other at arms length. Furthermore, at the time of the arbitration, Mr. O'Reilly and Sisks were actually antagonists since he was withholding from Sisks the final certificate under the contract, and this was preventing them from getting paid a

balance of over £100,000 which was still due to them.

In my opinion no right minded person, knowing all these facts, would be led to conclude that there was a real likelihood of bias on the part of Mr. O'Reilly. It is not possible to point to any reason why he should have favoured Sisks.

Counsel for the Plaintiffs cited the State (Hegarty) .v. Winters 1956 I.R. 320, O'Donoghue .v. The Veterinary Council 1975 I.R. 398 and Corrigan .v. The Irish Land Commission 1977 I.R. 317, but each of these cases is distinguishable on its facts. In the State (Hegarty) .v. Winters, the arbitrator, in an arbitration concerning the value of certain lands, had inspected the lands in the company of one of the parties without the other being present or represented; in O'Donoghue .v. The Veterinary Council, the party who brought a complaint against a veterinary surgeon sat on the Council which determined the complaint, and in Corrigan .v. Irish Land Commission, the two lay commissioners who signed the certificate initiating the compulsory acquistion of lands by the Land Commission also heard the objection to the acquisition. In view of their very different facts none of the three could be considered a binding authority.

The case which seems to be closest on the facts is in re An Arbitration Between Haigh and the London and North Western and Great Western Railway Companies 1896 1 Q.B. 649. The Railway Companies were acquiring Haigh's land. Each side appointed an arbitrator and the arbitrators agreed on a Mr. Cross as umpire. Before the arbitration hearing, Mr. Cross was retained by the Railway Companies as a witness

for them in another inquiry concerning other land also being acquired by them. Between the date of the arbitration hearing and the date of the award Mr. Cross gave evidence on behalf of the Railway Companies at the second inquiry. A motion to set aside the award on the ground that Mr. Cross was not an indifferent and disinterested person with regard to the subject matter of the reference was dismissed. Day J. said in his Judgment at page 650:-

> "I am of opinion that this application, in which there are no merits, must be dismissed. I cannot suppose that the mind of the arbitrator was substantially affected by the fact that he gave evidence on behalf of one of the parties in a somewhat similar matter. It is within the knowledge of us all that surveyors are constantly acting either as umpires or as witnesses in cases of this description, and I am satisfied that if the parties to such an arbitration require a qualified umpire in Liverpool who is also a surveyor they will not be able to avoid choosing a man who is frequently a witness in these cases. It is necessary that the umpire should be acquainted with the value of land, and the necessity of the case leads to the employment of surveyors as umpires."
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> And Wright J. said in his Judgment at page 651:
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> "I am of the same opinion, although I own to feeling more doubt than my brother Day upon the matter; on the whole, however, I think that the objection on the ground of bias is not made out. The case is not put as one in which the umpire was disqualified by reason of interest, but merely as one of bias; and the only

> ground suggested for the charge is that he was a witness for the railway companies in another arbitration as to the value of some land which appears to have been about a mile and a half away. I do not think that the applicant has sufficiently made out that because of this fact the umpire was likely to be biassed in this arbitration, he being a man of the highest standing, against whom personally no attack is made. I think that there is no such necessary incompatibility between his position as a witness and an umpire as would justify us in saying that he could not act in the latter capacity in a different inquiry to that in which he appeared as a witness, although he obviously could not act in both capacities in the same inquiry."

It seems to me that the facts there were much stronger in favour of the applicant than in the present case. The umpire, prior to the arbitration hearing, had agreed to act as an expert witness on behalf of one of the parties in another inquiry, and had actually given evidence on behalf of that party in that inquiry before making his award. In the present case Mr. O'Reilly never acted on behalf of Sisks, but only on behalf of a company associated with Sisks to the extent I have indicated, so that the risk of there being a likelihood of bias would have been reduced.

Taking into account the factors I enumerated at the beginning of this Judgment, I am not satisfied that the interests of justice require that the time should be enlarged for the Plaintiffs to seek to set aside the awards. I consider that the Plaintiffs have not got a good arguable

case on the merits and, in addition, that Sisks would necessarily be prejudiced in having to defend a claim arising out of a contract which was completed in November 1978, and which they had good reason to believe had been disposed of when Mr. O'Reilly made his final awards in June 1988.

The Plaintiffs' motion to extend the time is refused.

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