# Arbitration & Rent Reviews

## *A View from the High Court*

The decision of the High Court in *McCarrick v The Gaiety (Sligo) Ltd, High Court, 2nd April 2001*, provides a comprehensive review of arbitration practice and procedure, specifically in relation to rent reviews. Not only does the decision examine previous case law from this jurisdiction and the UK, it also qualifies them. The result is that the ability to remit an arbitrators decision for reconsideration is broadened, albeit slightly. Nonetheless, the opinion of the Court should be noted by any valuer operating in this area.

The case involved the rent review for a premises in Wine Street, Sligo. The rent fell for review 20th July 1999 under the provisions of a 35 year lease. The lease contained a five-year rent review clause. The notice of review was served and the parties, unable to agree on the revised rent, exercised the arbitration provisions in the lease. The Arbitrator was appointed. He set out his procedures at a preliminary meeting on 1st June 2000 at which both landlord and tenant were represented by their respective Solicitors. The Arbitrator directed that submissions were to be in writing and to be received by him along with agreed schedules of facts by 23rd June. The Arbitrator wrote to the tenants Solicitor on 25th July stating that he had not received a submission on behalf of the tenant. He supplied a copy of the landlords submission and informed the tenants solicitor that he had inspected the premises and that he would proceed to make his award in the absence of a submission from the tenant, during the week commencing 31st July.

On the 2nd August, the Arbitrator notified both parties that he had prepared his final award (it was dated 1st August) and that it would be released on payment of his fees and costs. On 4th August, the Arbitrator received a submission dated 27th July, on behalf of the tenant.

It was accepted in court that the delay by the tenant's advisors was due to a "*procedural mishap"* and not because of any deliberate or conscious decision on the part of the tenant or her advisors not to furnish written submissions.

The tenant sought assistance from the Court to have the Arbitrators decision remitted for reconsideration under the provisions of Section 36(1) of the Arbitration Act 1954. It was argued on her behalf that the failure to comply with the Arbitrators directions was as a result of inaction on the part of her advisors. The result of which was that her submission was not heard and that it would be unjust to the tenant if the Award was permitted to stand.

The Court considered previous cases both in Ireland and the UK. *In King and Anor v Thomas McKenna Limited and Anor (1991) 1AER, 653* the Court of Appeal stated;

*"Parties to arbitration like parties to litigation, are entitled to expect that the arbitration will be conducted without mishap or misunderstanding and that, subject to the wide discretion enjoyed by the Arbitrator, the procedure adopted will be fair and appropriate. What they are not entitled to expect of the Arbitrator any more than a judge is that he will necessarily and in all circumstances arrive at the "right" answer as a matter of fact or law. That is why there are rights of appeal in litigation and no doubt would be in arbitration were it not for the fact that in English law it is left to the parties, if they so wish, to build a system of appeal into their arbitration agreements and few wish to do so, preferring "finality" to "legality"."*

That is in itself an interesting statement on the "choice" of arbitration rather than litigation

and the resulting restrictions on appeals. Arbitration however is not always by choice. Under current compulsory purchase legislation the parties must arbitrate. Would the statement from the Court of Appeal provide fertile ground for a challenge to the current system? Although this point was put to the Court in *Thomas & Elaine Doyle v Kildare County Council & John Shackleton, Supreme Court (1995)*, it appears to remain unanswered.

The McCarrick case also considered the decision of the Supreme Court in *Keenan v Shield Insurance Co Ltd (1988) IR 89 at 96* where that Court stated *"it would ill- become the Court to show any readiness to interfere"* in an arbitration decision.

In the Keenan decision the Supreme Court set out four grounds under which a Court could interfere in an arbitrator's award, as follows;

1) That there is some defect or error patent on the face of the Award.
2) That the Arbitrator has admittedly made some mistake and desires the Award to be remitted to him in order that he may correct it.
3) That material evidence that could not with reasonable diligence have been discovered before the Award was made, has since been obtained.
4) That there has been misconduct on the part of the Arbitrator.

The Court in the McCarrick decision considered that these four tests were not exhaustive and that there were other reasons whereby a Court could exercise the wide powers granted to them by the Oireachtas under Section (36) of the Arbitration Act 1954 *"for the obvious purpose of ensuring justice and fairness between parties within the arbitration framework"*.

The Court in McCarrick said further that

"*the occasions upon which this Court exercises its discretion to remit matters referred or any of them to the reconsideration of the Arbitrator remain open, but very limited".*

The Court went on to consider the role of the Arbitrator and referred to the decision of Lord Denning M.R. in *Fox v P.G. Welfare Ltd (1981) 2 Lloyd's Reports 514 at 22*;

"*He can and should use his special knowledge so as to understand the evidence that is given, the ledgers of the clerks, the usage of the trade, the dealings in the markets and to appreciate the worth of all that he sees upon a view, but he cannot use his special knowledge, or at any rate he should not use it, so as to provide evidence on behalf of the defendants which they have not chosen to provide for themselves, for then he would be discarding the role of an impartial arbitrator and assuming the role of advocate for the defaulting side. At any rate, he should not use his own knowledge to derogate from the evidence of the plaintiffs' experts without putting his own knowledge to him and giving them a chance of answering it and showing that his own view is wrong... ...so in assessing rents, an expert arbitrator can rely on his general knowledge of comparable rents in the district. But if he knows of a particular comparable case, then he should disclose details of it before relying on it for his award".*

In relation to the 'fault' of the tenant's advisor to meet the deadline, as directed by the Arbitrator, the Court referred to the decision in *Sokratis Rokopoulos v Esperia S.P.A. (1987) 1 Lloyd's Reports 456*. Accordingly the Court will not necessarily refuse to assist a party because he got into difficulty due to his own fault. Although in these circumstances it may impose strict terms with respect to costs or other matters. The crucial question in this regard is whether the "procedural mishap" would lead to an injustice.

In the present case, the Court stated that through no fault of the Arbitrator or the landlord,

the tenant failed to get a fair hearing and as a consequence the possible injustice that the tenant may suffer *"now and into the future"* as a result exceeds any risk of detriment to the landlord caused by remitting the Award to the Arbitrator. The Court pointed out that the revised rent's impact on the viability of the business may be the basis for future rent reviews and is relevant to the sale value of the leasehold interest. Significantly the Court noted that according to the lease the landlord is entitled to the "market value" and not to a "windfall". Obviously the Court was concerned that any "windfall" arising from an unchallenged rent review could amount to an injustice.

The decision of the Court was to remit the Award to the Arbitrator. However the tenant was liable for a proportion of the costs of the original award and for all the costs of the remission and the High Court proceedings.

What then are the lessons from the McCarrick decision? Firstly, that the grounds for a challenge to an award are somewhat less restricted that was commonly accepted under the Keenan decision. Secondly, that the Court will look to the potential injustice that might arise if a Section (36) application was refused and thirdly, a windfall gain in a rent review may be difficult to support in a challenge through the Courts.

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