Neutral citation No: [2013] NIQB 17 | *Ref:* **WEA8766**

Judgment: approved by the Court for handing down | *Delivered:* **14/02/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN:

McKENZIES (NI) LIMITED

and

ALUCRA DEVELOPMENTS LIMITED

Applicant

v

DAVID GRAHAM STRUCTURES

Respondent

WEATHERUP J

[1] This is an application under section 68 of the Arbitration Act 1996 challenging a part of an Arbitrator's award in the sum of £77,000, which award was released by the Arbitrator on 18 September 2012. Mr Coyle appeared on behalf of the applicant and Mr O'Donaghue QC on behalf of the respondent.

[2] The grounding affidavit sworn by Sergio McKenzie, a director of the applicant, states that the applicant and the respondent contracted in connection with the provision of steelwork for the construction by the applicant of an Asda store in Larne, Co Antrim, for a contract price of £550,000. After the work was completed the respondent submitted an additional invoice in the sum of £266,000 which the

applicant refused to pay. Accordingly, the respondent issued High Court proceedings against the applicant and it was agreed between the parties that the dispute would be referred to arbitration. R E Moody of Banbridge, was appointed as Arbitrator.

[3] The arbitration proceeded by way of exchange of documents with no oral submissions. The Arbitrator's award was dated 13 September 2012 and on the payment of the Arbitrator's fees it was released on the 18th of September 2012. Mr Moody made an award in favour of the respondent in the sum of £147,000. This award included the sum which is the subject matter of this application, namely the £77,000. This sum was found due to the respondent in respect of the supply of steel cladding. The applicant claimed in the arbitration that payment had already been made by the applicant to Abbey Roofing Specialists Limited and that no payment was due to the respondent. However the Arbitrator stated in his award that the applicant had not produced any evidence in respect of the alleged payment by the applicant and awarded the sum to the respondent. The applicant accepts that in the arbitration the proof of payment was not produced. However the applicant contends that the respondent did not in the course of the arbitration produce any evidence of any payment either by it to anyone else, or any invoices or other documentation to support the claim.

[4] The Arbitrator's award deals with this issue as 'Sub-issue No.11 - Supply of Horizontal Cladding Material' at paragraphs 5.47 to 5.56. I summarise as follows. Flat panels for external wall cladding were required for the contract works but the Architect specified the wrong type of panel and these were delivered. This error was acknowledged by the Architect. The respondent claimed for the total cost of what was described as the redundant materials in the sum of £107,000. The award recites that an agreement was reached between the applicant, the respondent, the Architect, Abbey Roofing Specialists Ltd as supplier and the manufacturer of the cladding, Kingsan Limited. The agreement was that in return for receiving an order for the correct materials the manufacturer would give a discount of 30% on the price of the redundant materials, the applicant would then use the redundant materials on a future restaurant and cinema development on the site and four parties would each make a payment of 25% of the discounted price of the redundant materials to the respondent.

[5] This practical attempt to deal with the redundant material did not proceed as it is said that neither the Architect nor the applicant honoured the agreement and no payment had been received by the respondent in respect of the redundant materials. The applicant's statement lodged in the arbitration stated that the applicant subsequently purchased the redundant materials and paid in full for the materials. The Arbitrator examined the issue of the applicant paying for the materials. The Arbitrator concluded that the amount charged by the manufacturer, Kingspan, for the redundant materials after the 30% discount that had been agreed was the sum of £77,000. By a letter of 11 August 2010 the applicant had agreed that the redundant materials were stored in their premises and they alleged that the materials had been

paid for in full and were no longer the property of the respondent. The Arbitrator's conclusion was stated at paragraphs 5.55 and 5.56 as follows:

> "It is unclear from the [applicant's] submissions and correspondence if they are alleging that they actually paid some third party, such as Abbey or Kingspan, directly for the redundant materials but as they have failed to adduce any of the documentary evidence to which they refer in their letter of 11 August 2010 I am reluctant to put this interpretation on their allegations.
>
> I find that the [respondent] is entitled to payment in the sum of £77,477.62 in respect of the redundant materials."

[6] Thus in failing to prove their case in the arbitration the award was made against the applicant.

[7] A replying affidavit was filed on this application by David Graham of the respondent steelwork and cladding contractor. He refers to the issue of payment for the redundant materials having been addressed in the arbitration and to the simple fact that the applicant did not prove his case in the arbitration. Reference is made to the issue having been raised in the statements submitted to the Arbitrator, to a reply having been furnished in the arbitration, to a letter dated 5 November 2009 from the project architect addressed to Mr Graham, to an account dated 19 June 2010 in which he claimed full costs in respect of the cladding and to the report of the expert witness, Mr Kirkpatrick, who addressed the issue.

[8] There was a further round of affidavits which included an affidavit from the applicant of 1st February 2013 where Mr McKenzie states that as the respondent was the person seeking payment of the amount that he should have been the one to provide the necessary proof that the amount claimed remained due and outstanding. He exhibited to the affidavit the proof of payment being an invoice dated 28 June 2010 and a cheque in settlement dated 7 July 2010. Thus the proof of payment did not appear until the 1st of February 2013.

[9] The application is made under section 68 of the Act which provides –

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2)(alternative remedies) and (3)(28 day time limit).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

(nine headings are set out including)

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy.

(3) if there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may –

(a) remit the award to the tribunal, in whole or in part, for reconsideration,
(b) set the award aside in whole or in part, or
(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare the award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

[10] The applicant relies on the second part of (g), namely the award or the way in which it was produced being contrary to public policy. The particular aspect of public policy relied on is that it amounted to unconscionable conduct on the part of the respondent to recover the sum in circumstances that are said to amount to unjust enrichment of the respondent.

[11] The section has been described as a two stage process, being first of all whether there has been an irregularity of at least one of the nine kinds specified and secondly whether such irregularity has caused or will cause substantial injustice. The character of these applications has been considered by the House of Lords in Lesotho Highlands Developments Authority v Impregilo [2005] UKHL 43. Lord Steyn stated at paragraph 28, having set out section 68 of the Act, -

"This is a mandatory provision. The policy in favour of party autonomy does not permit derogation from the provisions of section 68. A number of preliminary observations about section 68 are pertinent. First, unlike the position under the old law, intervention under section 68 is only permissible *after* an award has been made. Secondly, the requirement is a serious irregularity. It is a new concept in English arbitration law. Plainly a high threshold must be established. Thirdly, it must be established that the irregularity caused or will cause

> substantial injustice to the applicant. This is designed to eliminate technical and unmeritorious challenges. It is also a new requirement in English Arbitration Law. Fourthly, the irregularity must fall within the closed list of categories set out in paragraphs (a) to (i)."

[12] The applicant referred to Cuflet Chartering v Carousel Shipping Company Limited [2001] 1 AA ER (Comm) 398 and Double K Oil v Neste Oil [2009] All ER 214. In the former case it was contended that the award had been procured in a manner contrary to public policy in that the other party was said to have lulled the applicant into believing that no award would be made while negotiations were continuing. Moore-Bick J referred to the approach of Lord Donaldson MR in commenting on public policy as a ground for refusing enforcement of an award under section 5(3) of the Arbitration Act 1975 –

> "Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution …. It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."
> (Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co [1987] 2 All ER 769. 779)

Moore-Bick J stated, in relation to a case where the complaint related to the manner in which the other party conducted himself in relation to the proceedings, that he doubted whether anything short of unconscionable conduct would justify the court in setting aside the award. Further it was stated that once it was recognised that the allegation was one of serious impropriety it also had to be recognised that cogent evidence would be required to satisfy the court that the party did behave in that manner (page 403 b-c).

[13] In Double K Oil the complaint was that false evidence had been given in the arbitration and reliance was placed on both fraud and public policy under section 68(2)(g). Witness statements were produced on the application that sought to establish that the evidence in the arbitration had been false. In following the themes emerging from the cases referred to above Blair J made reference to the high threshold that is applicable to all applications; that under ground (g) it would normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct had contributed in a substantial way to the obtaining of the award; where the allegation is fraud the onus is on the applicant to make good the allegation by cogent evidence. In particular, Blair J stated that new evidence relied upon to demonstrate the fraud must be shown not to have been available at the time

of the arbitration and that it would have had an important influence on the result (paragraph 33).

[14] Russell on Arbitration (23rd ed.) at paragraph 8-099 refers to the term 'public policy' as capable of covering a wide variety of matters other than fraud. It is stated that this may include unconscionable conduct in certain circumstances, referring to Cuflet. The commentary in Russell goes on to state that the fact that witnesses can be shown to have lied when giving evidence does not of itself mean that any award subsequently produced will trigger ground (g). It will need to be shown that the defendant can fairly be blamed for the adducing of the evidence and the deception of the tribunal and that the evidence of deception could not have been produced at trial with reasonable diligence and could be expected to be decisive at the re-hearing. A footnote to the text refers to DDT Trucks of North America v DDT Holdings [2007] EWHC 1542, also relied to by Blair J in Double K Oil, which dealt with an allegation of perjury in the evidence given in the arbitration. Cooke J examined whether the evidence produced to the Court that countered the perjury in the arbitration could have been produced at the arbitration.

[15] The present applicant relies on both the award and the way in which it was procured being contrary to public policy. The broad public policy ground would be that the award would be wholly offensive to the ordinary reasonable and fully informed member of the public. The applicant adopted 'unconscionable conduct' as the measure of the conduct of the other party in the proceedings. The unconscionable conduct is said to be that of the respondent in claiming and being awarded the payment when that is said to amount to unjust enrichment. The onus is on the applicant to make good the allegation by cogent evidence of the alleged unconscionable conduct. New evidence relied on by the applicant must have been unavailable at the arbitration and be such as would have had an important influence on the result had it been available.

[16] The new evidence relied on by the applicant to seek to establish the unconscionable conduct of the respondent consists of the confirmation of the invoicing and of the applicant's cheque for payment in respect of the redundant materials. It has not been established that the invoice and the cheque were not available at the time of the arbitration. It is clear that the invoice and the cheque would have had an important influence on the result of the arbitration had the evidence been accepted by the Arbitrator.

[17] The new evidence was produced on 1 February 2013 in the course of this application and after the completion of the arbitration. I am satisfied that the evidence was available to be produced at the arbitration. The applicant's emphasis is on the conduct of the respondent in making the claim for payment and securing an order for the payment in circumstances which the applicant's contends were unwarranted. The respondent's emphasis is on the failure of the applicant to produce in the arbitration the evidence on which reliance is now placed to establish that the award was unwarranted. The applicant does not contend that there was

fraud or false evidence on the part of the respondent. However, as appears from Double K Oil and DDT Trucks of North America, had the respondent relied on false evidence to secure the award, a challenge to the award would have been unsuccessful if the rebutting evidence could have been made available at the arbitration. Similarly where the applicant presents the challenge as unconscionable conduct on the part of the respondent, if the evidence now relied on could have been made available at the arbitration, the challenge will be unsuccessful. As the evidence was available but not made available at the arbitration this is not a case where the applicant's challenge can succeed.

[18] If the outcome is indeed an unjust enrichment of the respondent, as the applicant contends, the remedy lies against those responsible for the non-production of the relevant evidence in the course of the arbitration.

[19] The respondent also relied on the applicant's failure to adhere to the 28 day time limit for an application under section 68 of the Act. The award was issued on 18th September 2012.The application was launched on 1st November 2012. An affidavit filed by the solicitor on behalf of the applicant offered the explanation for the delay as being that he was in communication with the Arbitrator about the award and he received a reply from the Arbitrator on 2nd October 2012 and believed that the 28 days would run from the date of the Arbitrator's reply. Even then the application was late. Time limits should be obeyed. It is unnecessary to deal with this issue as I am dismissing the application. However the overrun was short and I would have extended time to allow the application to be looked at in substance.

[20] The application under section 68(2)(g) of the Arbitration Act 1995 is dismissed.