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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered:	26/10/00

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

ARBITRATION APPLICATION

BETWEEN:

J RONALD BOWDEN, JONATHAN H E HOOL,
JAMES R KIRK AND RAYMOND J WILSON

Applicants

And

JAMES BOYD LOGAN

Respondent

SHEIL J

This application arises out of an arbitration in which Mr James Boyd Logan, solicitor, was claimant and his former partners, Messrs Bowden, Hool, Kirk and Wilson, were respondents. The arbitrator made his award on the substantive issues in the arbitration on 15 July 1999, holding that the applicants had been justified in summarily terminating Mr Logan's consultancy with the firm; on the applicants' counter-claim, which the arbitrator held in one part to be unsubstantiated and in another part to be

greatly exaggerated, the arbitrator awarded damages of £5,082.01 in favour of the applicants against Mr Logan. None of these findings is the subject of any appeal or application to this court.

Following the findings on those substantive issues as made by the arbitrator on 15 July 1999, the issue of liability for costs and the amount of costs remained for determination by the arbitrator; it is the latter determination of the amount of costs awarded to the applicants which is the subject of this application. The applicants, who were the respondents and cross-claimants in the arbitration, submit that this issue of the costs, £7,500, awarded to them by the arbitrator should be remitted to the arbitrator for reconsideration by him.

The application is brought pursuant to Section 68(1) of the Arbitration Act 1996 which provides that:

> "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."

Section 68(3)(a) of the Act provides that:

> "If there is shown to be serious irregularity affecting the Tribunal, the proceedings or the award, the court may remit the award to the Tribunal, in whole or in part, for reconsideration."

Section 68(2) of the Act provides that:

> "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 –

> (a) failure by the Tribunal to comply with Section 33 (general duty of tribunal);
>
> (b) ……………………………………………
>
> (c) failure by the Tribunal to conduct the proceedings in accordance with the procedure agreed by the parties."

The applicants submit that in the circumstances of the present case the award of £7,500 costs constituted a serious irregularity within the meaning of that term as set out in Section 68(2)(a) and (c), in that the arbitrator failed to comply with Section 33 of the Act and failed to conduct the proceedings in accordance with the procedure agreed by the parties. Section 33 of the Act provides:

> "(1) The Tribunal shall –
>
> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The Tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

Section 34(1) provides that:

> "It shall be for the Tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter",

while Section 34(2)(h) provides that procedural and evidential matters include:

> "whether and to what extent there should be oral or written evidence or submissions."

Following the arbitrator's award on the substantive issues on 15 July 1999, the applicants' London solicitors, Ralph Hume Garry wrote on 17 August 1999 to the arbitrator in the following terms, sending a copy of the said letter to Messrs Elliott Duffy Garrett, solicitors for Mr Logan:

> "It would assist the respondents *(the applicants in the present application, who were the respondents in the arbitration)* in their preparation for the forthcoming costs hearing if you were to indicate whether you intended to deal not only with liability for costs but also a detailed assessment of the quantum of the costs for which any particular party may be liable. You will appreciate that, if you intend to deal with the latter also, bills of costs will have to be drawn up and the hearing itself will last considerably longer.
>
> We hope to be able to let you have shortly dates for the costs' hearing which are convenient to the respondents' representatives.
>
> We are copying this letter to Elliott Duffy Garrett."

Mr Russell, the arbitrator, replied to Messrs Ralph Hume Garry by letter dated 18 August 1999, which letter read as follows:

> "With reference to your letter of 17 August I intend at the hearing to deal only with the question of liability for costs. I do not intend to endeavour to make any assessment of quantum at this stage.
>
> I await hearing from you regarding the date of hearing.

> I am sending a copy of this letter to Elliott Duffy Garrett."

A liability for costs hearing was held by the arbitrator on 21 September 1999. On 26 October 1999 the arbitrator made an award of costs dealing not only with liability for costs but also with the quantum of costs, awarding the applicants the sum of £7,500 costs against Mr Logan. It is this award which is the subject of this application.

The applicants submit that the arbitrator, in acting as he did, namely in dealing with not just the liability for costs but also the quantum of costs, was in breach of the agreement set out in the correspondence, to which I have referred above; the applicants submit that in acting as he did the arbitrator awarded the applicants only £7,500 costs without any further reference to the parties and without giving them any opportunity to produce any evidence or to make any submissions on that issue of quantum of costs and that as a result thereof the applicants have suffered a serious injustice.

Mr Orr QC, who appears with Mr Quinn for the applicants, submits that if the arbitrator had given the applicants an opportunity to place before him evidence and submissions in relation to quantum of costs, his award would have been far in excess of the £7,500 awarded to the applicants; Mr Orr stated that the costs incurred by the applicants amounted in reality to a very substantial six figure sum.

Mr Orr accepts that if the arbitrator had decided that there should be no oral or written evidence or submissions on the issue of quantum of costs, the arbitrator might well have been entitled to do so in view of the provisions

of Section 34(1) and Section 34(2)(h) of the Arbitration Act 1996, to which I have already referred. Mr Orr submits that was not the position in the present case where there was an implied agreement between the parties and the arbitrator, in the light of the correspondence, that the arbitrator:

(1) would not address the issue of quantum of costs and required no evidence or submissions on that issue at the hearing on 21 September 1999; and

(2) would not make any ruling on quantum without giving the parties an opportunity to submit evidence and to make submissions on that issue,

and, that in accordance with that agreement neither party presented any evidence or submissions on quantum at the costs hearing on 21 September 1999.

Mr Orr referred the court to the decision of the Court of Appeal in *K/S Nnorjarl A/S v Hyundai Heavy Industries Company Limited* [1991] 3 All ER 211 at 228e, where Sir Nicholas Browne-Wilkinson VC stated:

> "The arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract: see *Ccie and The Europeene de Cereals SA v Tradax Export SA* [1986] 2 LR 301. Under that trilateral contract, the arbitrator undertakes his quasi judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status."

Mr Orr also referred to Bernstein's Handbook of Arbitration Practice, 3rd Edition at pages 237-239 and 245. He referred in particular to paragraph 2-837 (page 245) where the text reads as follows:

> "**Determining the amount of costs to be paid**
>
> *Carrying into effect the order for costs*
>
> When an arbitrator awards that a party pay all or part of the opposing party's costs of an arbitration, or of a particular part of it (eg an interim award or an application for further discover), it is open to the arbitrator to make his award in the form of a money sum. For at least two reasons this may not be convenient. First, it should rarely be done without giving the parties an opportunity to make submissions as to the amount. Secondly, the party who is to receive the costs often wants time to make a more or less detailed account of his costs. So the more usual course is for the arbitrator merely to award that party P pay to party R his costs (or a fraction of is costs) of the arbitration (or of a specified stage of the arbitration) and pay the arbitrator's fees and disbursements (or a fraction of them). The next stage is for party R to formulate his claim for costs, and to invite party P to agree it. Where solicitors are acting for both parties, they more often than not agree upon the amount. But if they cannot agree, there is a dispute which has to be resolved. In a heavy case the amount in issue as to costs can be substantial. The process of resolving this dispute is called in litigation 'taxation of costs'. The phrase is not used in the Act and 'determination of costs' is a more apt phrase."

At paragraph 2-844/845/846 (page 247) the text continues:

> "**Taxation of costs by the arbitrator**
>
> It is an unhappy fact of life that the costs of litigation or of arbitration are often high in relation to the amount in issue, and the 1996 Act is unlikely to change this overnight. The higher the

> proportion, the more important it is that there should be an efficient and speedy method of dealing with the costs.
>
> …………………………………………………………..
>
> *Fixed sum without taxation*
>
> For the arbitrator to fix a sum for the costs is apparently a simple, quick and cheap procedure. However, he ought not to fix the amount without giving the parties an opportunity of making submissions to him. If they have that opportunity, they obviously have the opportunity to agree a sum. It follows that in practice most of the cases in which the arbitrator will be asked to fix a sum will be cases in which the parties unsuccessfully attempted to agree. In such cases resolving the differences between them is in effect taxing the costs rather than fixing a particular sum.
>
> *Taxation by the arbitrator*
>
> Taxation by the arbitrator has several advantages and should be preferred to taxation by the court. Arbitrators shall not shirk this responsibility. It is part of their duty under Section 33.
>
> …………………………………………………………"

Mr Orr submits that the arbitrator in acting as he did in dealing with the issue of quantum of costs in addition to the issue of liability for costs, was in breach of the agreement that he would not do so and that he failed to act fairly as required by Section 33(1)(a) of the 1996 Act.

Mr Lavery QC, who appeared with Mr Toner QC for the respondent in this application, submitted that the arbitrator, Mr Russell, was a very experienced arbitrator; this was not challenged. He, the arbitrator, had found that a major part of the applicant's counterclaim, namely that Mr Logan had

carried on "a practice within a practice" was unsubstantiated and that in other respects it was greatly exaggerated. Mr Lavery submitted that the arbitrator had plenty of material upon which to make his determination to award only £7,500 costs and that no injustice, substantial or otherwise, had been done to the applicants and that any hearing which he might have held on the issue of quantum of costs would not have resulted in any different award. He referred to Section 65(1) of the Arbitration Act 1996 which reads as follows:

> "(1) Unless otherwise agreed by the parties, the Tribunal may direct that the recoverable costs of the arbitration, or any part of the arbitral proceedings, shall be limited to a specific amount."

Section 65(2) goes on to provide however:

> "(2) Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account."

Mr Lavery submitted that the arbitrator, in acting as he did, was acting in accordance with Section 33(1)(b), which I have already set out above, which enjoined the arbitrator to "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined".

Mr Lavery submits that if the matter is remitted for reconsideration by the arbitrator, the result is likely to be the same. While that may be the case, I do not consider that that can be stated with any certainty.

I hold that the arbitrator's action in determining the quantum of costs in addition to liability for costs constituted a serious irregularity, having regard to the terms of the correspondence which I hold amounted to an agreement between all parties including the arbitrator that he would not deal with the issue of quantum of costs without a further hearing in the course of which the parties would have an opportunity to make submissions to him and to produce evidence in support of those submissions. I further hold that in the circumstances of this case the failure of the arbitrator to give the parties an opportunity to make submissions to him and to produce evidence in support of those submissions was in breach of Section 33(1)(a) of the 1996 Act.

The arbitrator, Mr Russell, in a letter dated 6 December 1999 to the applicant's present solicitors, Messrs L'Estrange and Brett, a copy of which was sent to Messrs Elliott Duffy Garrett, solicitors for the respondent, requested that in the event of the court acceding to the present application, the court should refer any measurement of costs to the Taxing Master of the Supreme Court as being the most appropriate way now to proceed. I have already referred to Bernstein's Handbook of Arbitration Practice, 3rd Edition and to paragraph 2-846 wherein it is stated that taxation by the arbitrator has several advantages and should be preferred to taxation by the court. The learned author went on in that paragraph to state:

> "The arbitrator will, by reason of his having conducted the arbitration, be able to understand both the claims for costs and the objections to them. The Taxing Master of the court, on the other hand, will require the bill to be presented in High Court form, will have to read some documents,

> and may have to read a great mass of documents before he can understand them, the claim, the objection, what work was reasonable, what witnesses it was reasonable to engage, and so on. Moreover, where the arbitrator is himself an expert in the field in which the dispute arose, he should be better placed than a taxing master to know what are the prevailing rates of remuneration for professionals practising in that field. The amount of additional reading required is so much less than in taxation by a taxing master, and the queues for taxation are so much shorter, that the arbitrator should be able to give a much earlier appointment for oral argument (if required) than would a taxing master."

Unless the applicants and the respondent in this application take a contrary view and wish to make submissions with regard thereto, I consider that the matter should be remitted to the arbitrator, Mr Russell, for reconsideration by him.

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JUDGMENT

OF

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