Neutral Citation No: [2012] NIQB 84

Ref: GIL8631

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

Delivered: 08/11/12

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

DERRY CITY COUNCIL

Applicant;

-and-

BRICKKILN LIMITED

First Named Respondent

-and-

PROFESSOR STEPHEN WILLETTS

Second Named Respondent

GILLEN J

INDEX

Paragraph

Application

[1] In this matter the applicant seeks to remove the second respondent Professor Willetts as the sitting arbitrator in a dispute between the applicant and the first respondent concerning a waste management disposal contract. The ground relied upon by the applicant appears from the summons to be Section 24(1)(a) of the Arbitration Act 1996 namely "that the circumstances exist that give rise to justifiable

doubts as to his impartiality … and that substantial injustice has been or will be caused to the applicant".

Background

[2] In or about April 2007 Brickkiln Limited ("BL") was appointed as main contractor in relation to the provision of a municipal waste transfer station and haulage service contract with the applicant. The contract basically provided that BL was to set up a facility for the receipt of municipal waste and thereafter the transfer of this waste to a landfill site.

[3] In or about June/July 2011 Strabane District Council allegedly alerted Derry City Council (DC) to a discrepancy in the delivery of waste to the landfill site, which had been billed to Strabane District Council when it should have been billed to DC. DC contends that it received information that waste was being delivered to the landfill site, marked as belonging to the applicant DC, when in fact it belonged to a third party. DC further contends that it was being charged for transfer and disposal of this third party waste.

[4] It is the case of DC that it retained accountants to review the working of the contract and it contends that the effect of the report was that waste, not belonging to DC, was being delivered to the landfill site incorrectly on the basis that it was the waste of DC. All of these allegations are denied by BL.

[5] As a result of this report, a letter was sent on 23 November 2011 to BL setting out the areas of concern and stopping payment to it thereafter.

[6] It is the case of DC that thereafter correspondence ensued between the parties in which BL asserted that as they did not operate an overdraft facility with their bank the delay in payment was causing a serious problem particularly in relation to a payment to HMRC.

[7] On 11 April 2012 DC wrote to BL in the following terms concerning a payment by DC to BL ("the impugned payment "):

> "Further to your request by letter dated 5 April 2012, I would advise that Derry City Council is willing to make a further payment on account of £100,366.89 plus VAT of £20,073.38 making a total of £120,444.27 which will be paid into your bank account on Friday 13 April 2012.
>
> Please note that this payment is being made completely without prejudice to the outstanding issues between the parties, and without any admission of liability by the council. The council reserves the right to recoup these monies and would like to make it clear that this payment

> is only being made strictly under protest to ensure that the service to the general public is not interrupted.
>
> It is being sent to you on the following conditions, and use by you of the monies shall be deemed to indicate your acceptance of same:
>
> - That the payment remains confidential between the parties;
> - The parties work together towards an arbitration process in order to settle all matters of dispute between them;
> - That the monies only be used for payment to HMRC as outlined in your letter of 5 April 2012 and your accountant and that you provide the council with evidence of this payment having been made at the earliest opportunity;
> - That an affidavit from your accountant is provided verifying the information provided".

[8] BL contend that on 11 April 2012 a sworn affidavit was received from BL and more especially from the accountants of BL indicating that the VAT liability to HMRC as of 2 April 2012 was £151,365.69.

[9] On 24 May 2012 the second named respondent Professor Willetts was appointed as an arbitrator and provided a detailed letter confirming his instruction and issuing certain directions. One of the directions included the applicant providing a Statement of Case and such a statement was provided on 21 June 2012. In the course of disclosure, BL revealed the impugned payment and thereafter the letter of 11 April 2012 to the arbitrator.

The Case of Derry City Council

[10] DC denies absolutely the entitlement of BL to the monies claimed in the Statement of Case and assuming that it is successful the arbitration will seek to recover the sum paid to BL. It emphasises that the payment was solely to ensure a continuity of waste disposal services to DC and more especially the residents of Derry City Council.

[11] It is the contention of Mr Gibson, who appeared on DC's behalf that these facts would raise concern in the mind of a fair-minded observer as to the impartiality of the arbitrator who has now seen this correspondence for the following reasons:

- The arbitrator would doubt the sincerity of the proffered explanation by DC given that DC is making the case that BL had engaged in acts, possibly criminal acts, and yet made a payment.

- The arbitrator would, even subconsciously, doubt the veracity of DC's witnesses.
- The arbitrator, knowing that a substantial payment had been made to BL, would be suspicious as to whether or not DC intended to contest the matter fully and be more inclined to reach a compromise.
- The arbitrator may be affected as to any quantum award by virtue of the previous payment even to the extent of wanting to ensure that the award was higher than the "lodgement" which had been produced.
- The arbitrator is not a legally qualified person and therefore there will be a greater feeling of unease that he would be able to put this matter out of his mind given that this information has been disclosed before the actual arbitration has even commenced.

The Case of Brickkiln Limited

[12] Mr Orr QC who appeared on behalf of BL with Mr Shields, contended that the applicant's articulation of a lack of confidence in the arbitration is unduly subjective and falls a considerable way short of the legal threshold. This is a highly experienced and qualified arbitrator who is quite capable of understanding the concept that such a payment has been made by DC without prejudice to its position overall and to avoid disruption of service to the public.

[13] Counsel contended that it was unrealistic to suggest unconscious bias against Professor Willetts.

[14] Finally, counsel contended that the power to remove an arbitrator is a draconian one and the court will not exercise that power lightly (see Dredging & Construction Co Ltd v Delta Civil Engineering Co Ltd (No 2) [2000] 72 Con LR 99 at 117 per Judge Wilcox as adopted by the author of Halsbury's Laws of England 5th Edition 2009 at paragraph 1233 footnote 6).

Legal Principles

[15] The formula for apparent bias set out in Porter v Magill [2002] 2 AC 357 is now so well known to lawyers that it scarcely merits repetition. For completeness sake I shall repeat Lord Hope's well-trodden description:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

In the context of the Arbitration Act 1996, and grounds for removal, the concept has been considered most recently in A v B & X [2011] EWHC 2345. That case considered circumstances where an arbitrator had been instructed some years before on an unrelated matter by the law firm which was also representing the defendant in

the matter before the court. That litigation had been settled in 2008, but revived in 2009 with the trial concluding on 8 December 2010, a few days before the arbitrator had signed the partial award in the arbitration.

[16] Flaux J entered into a detailed analysis of the law on bias and from that judgment I have distilled the following principles:

- The test is an objective one and not dependent upon the characteristics of the parties. The issue is whether the impartial objective observer would conclude from the facts that there was a real possibility the arbitrator was biased.
- It is assumed that the impartial observer is "fair-minded" and "informed" ie in possession of all the facts which bear on the question whether there was a real possibility that the arbitrator was biased.
- The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious … "the real possibility" test ensures that there is this measure of detachment. Such an observer is not complacent and knows that fairness requires that a judge must be, and must be seen to be, unbiased.
- Being informed, means that the arbitrator will take the trouble to inform himself on all matters that are relevant. He is the sort of person who takes the trouble to read the text of an article or letter as well as the headlines. He is fair-minded and so will appreciate that the context forms an important part of the material to be considered before passing judgment (see Helow v Secretary of State for the Home Dept [2008] 1 WLR 2416).
- The fair-minded and informed observer is not to be regarded as a lawyer. However he or she is expected to be aware of the way in which the legal profession in this country operates in practice.

[17] Three other authorities of note were helpfully drawn to my attention by Mr Gibson. First, Director General of Fair Trading v The Proprietary Association of Great Britain & Anor [2000] All ER(D) 2425. It is unnecessary for me to relate the facts of that case. Its relevance in this context is that at paragraphs 96-99 the court indicated that the test was that of a fair-minded observer who might apprehend that the decision-maker would be unable whether consciously or subconsciously to come to an impartial appraisal.

[18] In Volker Stevin Limited v Holystone Contracts Ltd [2010] All ER(D) 82 the court held that there was no evidence of bias in the case of an adjudicator who had become aware of the disclosure of a without prejudice offer of settlement in the course of a construction dispute. The court held there was no evidence of bias as the adjudicator would not be surprised of offers being made in the context of a construction dispute once liability was determined. Mr Gibson contrasted that case with the present matter where liability has not been decided and where an offer could be distinguished from an actual payment.

[19] Finally in Ellis Building Contractors Limited v Vincent Goldstein [2011] EWHC 269 without prejudice correspondence had been placed before the adjudicator. There is no doubt that it was improper for this without prejudice correspondence to have been deployed and in strict legal terms was not admissible. At paragraph 25 Akenhead J said:

> "Whilst if `without prejudice' communication surfaced in a court, the judge being legally qualified and experienced can usually put it out of his or her mind, it is a more pernicious practice in adjudication because most adjudicators are not legally qualified and there will often be a greater feeling of unease that the `without prejudice' material may have really influenced the adjudicator."

[20] However in that case it was clear that the adjudicator had not based his decision at least openly on the contents of, the fact of or inferences drawn from the without prejudice correspondence. Accordingly the court came to the view that there was no basis for a legitimate fear that the adjudicator might not have been impartial. Although the court assumed that the adjudicator did see and had read the without prejudice communication it had raised nothing other than a tangential point which was in any event supported by open evidence. The very fact that the adjudicator had not mentioned the without prejudice communication suggested strongly that it was not part of and clearly did not need to influence his reasoning.

[21] Finally, Mr Gibson raised the right to a fair trial pursuant to the European Convention on Human Rights and Fundamental Freedoms Article 6(1). I find nothing in Article 6(1) which adds to the principles already set out in Porter v Magill and the ensuing authorities.

Conclusions

[22] I am not satisfied that the fair-minded and informed observer would have concluded that there was a real possibility of Professor Willetts being biased in this case as a result of the impugned correspondence. My reasons are as follows:

[23] First, the correspondence in question makes it crystal clear that DC is not only paying this money under protest, but is doing for the sole purpose of ensuring that the service to the general public is not interrupted. Not only is this a noble motivation which if anything would prejudice an arbitrator in favour of DC but could not cause any informed arbitrator to consider that the money was being paid for any other reason or that it represented a concession on the part of DC. Far from being a lodgement which could influence the question of costs in the event of a decision less than the money proffered it expressly states that the monies must be used solely for the payment to HMRC and that the council reserves the right to recoup these monies. It is inconceivable that the fair minded observer reading this

correspondence could ever have conceived of the arbitrator construing this as a lodgement much less any admission of a liability to pay.

[24] The fair minded observer would note that Professor Willetts is a highly experienced well qualified arbitrator according to the affidavit evidence and would conclude that he would have no difficulty grasping the motivation which generated this sum paid. Any conscious or subconscious view formed by him that somehow it acknowledged a liability to pay BL would be perverse. In any event any arbitrator is bound to contemplate the possibility of offers being made even in instances where liability is hotly contested for the purpose of saving costs in the long run and for buying off a risk however remote that might be. Most cases are conducted on this basis. Even had the letter not been couched in such strong terms, and the meaning somewhat more ambiguous I do not believe that the fair minded observer would have considered the arbitrator would have been biased in his approach to the case. However this proposition is rendered unnecessary by the strength and unequivocal nature of the correspondence which could have left no doubt in anybody's mind as to the reason why this money was being proffered. To suggest otherwise would be to visit on this arbitrator a naivety which no well-informed fair-minded observer would have contemplated.

[25] I pause to observe in conclusion that it is important that arbitrators as well as other judicial officers discharge their duty to sit and do not, by acceding too readily to robustly contrived suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of an arbitrator they will have their case tried by someone thought to be more likely to decide the case in their favour (although certainly not a consideration in this case) or somehow delay the hearing and thereby incur further costs. (See M's Application (Leave Stage) [2011] NIQB 4 per McCloskey J at paragraph 4). However that consideration must take its place across the judicial board and there is no ground for according any special consideration to arbitrators as was suggested by Mr Orr.

[26] In all the circumstances I therefore dismiss the application.