THE HIGH COURT

1987 Record No. 162 Sp

IN THE MATTER OF THE ARBITRATION ACTS 1954/1980
AND IN THE MATTER OF AN APPLICATION BY MICHAEL LARKIN

CLAIMANT/PLAINTIFF

AND

RICHARD GROEGER AND GEORGE EATON

RESPONDENTS/DEFENDANTS

Judgment of Mr. Justice Barrington delivered the 26th day of April 1988.

This is an application to set aside an arbitrator's award and to obtain ancillary relief.

The Plaintiff and the Defendants are all accountants and were formerly partners. Unhappy differences arose between them and the present case is but the latest step in protracted litigation in which allegations and counter allegations of a most serious kind have been made.

The partnership was governed by a deed of partnership dated the 7th day of August 1981. This provided that the parties should become partners in the profession of auditors, accountants, management consultants, personnel consultants and taxation consultants from the 1st day of July 1981 under the style or form of Groeger, Eaton and Larkin and Michael Larkin and Associates.

The partnership was to continue until determined by at least three months' notice in writing given by any partner to the others to expire at any time. The partnership deed contained an arbitration clause which could be invoked in the event of a dispute arising between the partners.

The partnership practice was to be carried on at 81 Merrion Square, Dublin 2. These were premises held under lease by the present Plaintiff Mr. Larkin and it was agreed that the partnership should sub-lease portion of these premises from him. A sub-lease was accordingly entered into on the 7th of August 1981 between the present Plaintiff on the one hand and the partnership on the other hand under which the present Plaintiff agreed to lease to the partnership portion of No. 81 Merrion Square for a term of nine years from the 1st of July 1981 at a yearly rent of £15,250 subject to the covenants and conditions therein contained. The lessor's covenants included the usual covenant for quiet enjoyment and the lease was subject, inter alia, to the proviso that in the event of the rent due under the lease being unpaid at the expiration of seven days after becoming due and payable the same "shall" until paid or until earlier re-entry by the lessor bear interest calculated on a day to day basis at a rate which was to be 5% over the Dublin intra Bank rates on sums of equivalent amount.

By an indenture of even date with the lease the present Plaintiff covenanted to obtain the consent of the superior lessor to the granting of the lease within a period of six months from August 7th 1981. It is common case that the Plaintiff never in fact obtained this consent although, strangely enough, the sub-lease was deposited with, and

accepted by, the bank as a security to secure the partnership's overdraft with the bank.

One of the matters agreed between the prospective partners was that the Defendants should pay to the Plaintiff the sum of £90,000. There is a dispute between the parties as to the precise reason for this payment but the Defendants maintain that it was paid on the understanding that the Plaintiff's personal practice was to contribute to the partnership not less than £90,000 in gross fees earned and charged for the year ending the 30th of June 1982. In the event of the Plaintiff's practice failing to contribute this there was to be a "clawback" arrangement under which the Defendants were to be entitled, upon demand made, to repayment of every pound by which the Plaintiff's contribution fell short of £90,000. The Defendants maintain that the Plaintiff's practice yielded less than £60,000 so that they demanded, and claimed to be entitled to, a repayment of £30,000. The first proceedings between the parties were High Court proceedings in which the present Defendants were Plaintiffs and the present Plaintiff was Defendant. These proceedings were issued on the 23rd of February 1984 and in them the present Defendants claimed payment of the said sum of £30,000.

The next set of proceedings were issued on the 24th of September 1984 and in them the present Defendants and others were Plaintiffs and the present Plaintiff was Defendant. In these proceedings the present Defendants claimed a declaration that the partnership carried on between the parties had terminated; an injunction restraining the present Plaintiff from holding himself out as a member of the partnership; damages and other relief.

ARBITRATION PROCEDURES

The parties eventually agreed to submit the disputes the subject matter of the High Court proceedings and all other disputes between them to arbitration.

The deed of partnership had contained, at Clause 10, an arbitration clause in the following terms -

"If during the continuance of the partnership or at any time thereafter any difference shall arise between the partners or their respective representatives or any other persons interested under these articles as respects the construction of any of the provisions herein contained or as respects any division, act, matter or thing to be made or done in pursuance thereof or as respects the rights or liabilities of any partner hereunder or the persons deriving title under him or any other matter relating to the partnership or the affairs thereof such difference shall be forthwith referred to a single arbitrator appointed by the President of the Incorporated Law Society of Ireland and dealt with pursuant to the provisions of the Arbitration Act 1954."

The President of the Incorporated Law Society nominated Mr. John Gore Grimes Solicitor to act as arbitrator. A written submission to arbitration was prepared and Mr. Gore Grimes entered on the arbitration. It is quite clear that the arbitration was protracted, difficult and contentious. The arbitrator heard evidence on thirteen different days spread over a period of some seventeen months from June 1985 until December 1986 and gave his award in January 1987.

The present Plaintiff was claimant in the arbitration proceedings and the present Defendants were Respondents.

Written points of claim and points of defence and counterclaim were exchanged. At the conclusion of the oral hearing the arbitrator asked for written submissions from both sides and both sides delivered lengthy written submissions. The Plaintiff's submission ran into some one hundred and one paragraphs exclusive of summary and schedules. The Respondents' submission ran into some twenty one pages of typed script.

The relief claimed by the Plaintiff in his points of claim was as follows:-

"1. A declaration that the partnership is subsisting and continuing.

2. In the alternative to 1. a determination of the date on which the partnership dissolved.

3. To make a full enquiry into the accounts of the partnership from the 1st day of July 1981 until the date of this arbitration and/or such other date as the arbitrator shall think fit.

4. To carry out a full inquiry of the accounts of the partnership from the 1st day of July 1981 and on the method of operation of the partnership to the date of the arbitration and/or to such other date as the arbitrator shall deem fit.

5. To carry out a full inquiry into all bank accounts carried on in the name of the partnership and/or in the name of Groegor Eaton and Larkin, Groegor Eaton and Company, Michael Larkin and Associates, Michael Larkin and Associates Limited, Yearling Limited, Larkin Groegor Eaton Limited, the bank accounts of the

Respondents and/or such other bank accounts as may appear.

6. To determine the amount of the profits to which the Claimant is entitled under the partnership agreement or at all.

7. To determine the compensation to which the Claimant is entitled by reason of matters herein set forth.

8. For a declaration, in the alternative, that as of the date of this arbitration and/or such other date as the arbitrator shall direct that the interest in the partnership is held as to 33 1/3% by the Claimant and as to 62 2/3% by the Respondents and/or the Respondents and William D. McCann and Liam J. O'Dowd.

9. To determine the entire sum payable by the Respondents to the Claimant under the following headings -

"I Partnership profits from the 1st July 1981.

II Arrears of rent, rates, insurance and interest on arrears in respect of the lease to the premises 81 Merrion Square.

IV A sum representing the goodwill of the Claimant in the partnership.

V To determine all other matters as to the division of the property and/or the realisation of any property of the partnership the continuation of the partnership business and indemnities in respect of claims being made and/or on foot

of payments already made by the Claimant.

VI To determine moneys due under capital account."

The Claimant further seeks

1. An Order directing the Respondents to discharge payment to the Claimant of the sums found due by the Respondents to the Claimant.
2. To determine the interest to which the Plaintiff is entitled on foot of the amount so directed to be paid by the Respondents to the Claimant.
3. Further and other relief.
4. An Order providing for costs in accordance with the submission to arbitration herein.

By reason of the matters herein and by the wrongful conduct of the Respondents the Applicant has suffered and is continuing to suffer severe financial restrictions and privations, he has lost the leasehold interest in the premises No. 81 Merrion Square by reason of the Respondents refusing to discharge rent due thereon. He has had to dispose of residential investment properties at an unsuitable period and at a financial loss resulting in loss of rental income, he has had to dispose of the family residence 16 Aylesbury Drive and a considerable number of the contents thereof and due to the loss of income from both the partnership and from the above mentioned residential properties has been unable to discharge personal liabilities to financial institutions and has suffered and is continuing to suffer severe financial restrictions and the Applicant seeks an order directing the Respondents

to pay compensation for such loss and damages so suffered."

The Respondents in their points of defence and counterclaim counterclaimed as follows -

1. That a dissolution account be approved by the arbitrator.
2. That the arbitrator determine the rights and liabilities of the Claimant and the Respondents inter se and declare such sum as is due and owing by either of the parties to be paid to the other(s).
3. An Order for the payment by the Claimant of the sum of £30,000 which was due and owing by the Claimant to the Respondents under the terms of the deed of 7th of August 1981.
4. Damages for the Claimant's failure to obtain the lease and the appropriate consents thereto.
5. A declaration that the Respondents are entitled to the sum of £4,000 deposited with the Bank of Ireland, Westland Row, Dublin and all interest thereon.
6. An Order setting off all sums that may be found due as between the Respondents and the Claimant in respect of this arbitration.
7. An Order that the Claimant should bear all costs of and incidental to the submission to arbitration the costs of the arbitration, including the arbitrator's fees and furthermore the High Court proceedings No. 1984 No. 7221P and 1984 No. 1619P.
8. For such further and other relief as to the arbitrator seems appropriate.

ARBITRATOR'S AWARD

The arbitrator's award is in the following form -

"Arbitration award whereby it is held as follows:

1. That a valid partnership agreement was entered into between the Claimant and the Respondents on the 7th August 1981.

2. That the said partnership agreement was not validly determined in accordance with the terms thereof neither on the 29th October, 31st October nor the 1st November 1981 as alleged by the Respondents.

3. That neither the Claimant nor the Respondents acted during the terms of the partnership with due regard to the provisions and intentions of the partnership agreement or partnership agreements and that de faco such agreements had effectively ceased to operate by April 1983.

4. That the premises at 81 Merrion Square (with the exception of the basement) were occupied by the Respondents from June 1981 until February 1984 and that an ejectment Order was obtained against the Claimant on the 1st November 1983.

5. That it was the intention of both the Claimant and the Respondents to include the Claimant's assets being such items as the computer, photocopier, telephones and typewriters as part of the partnership property and that these items were handed over to and utilised by the partnership.

6. That the Claimant's claim for £74,711.86 as set out in Schedule 1 of the Claimant's submission dated the 23rd of October 1986 is disallowed.

7. That the Claimant's claim as set out in the said Claimant's submission, for interest on sums due under the lease dated the 7th of August 1981 in the sum of

£31,361 is disallowed.

8. That the Claimant's claim set out in the Schedule of Claim of the Claimant's said submission for petty cash float amounting to £400 is disallowed.

9. That the Claimant's claim for accounts, debts and liabilities of the partnership paid by the Claimant personally as set out in the Schedule of Claim of the Claimant's said submission amounting to £31,056.52 (inclusive of interest) is disallowed.

10. That the Claimant's claim for Larkin Brill premerger - debtors payment recorded by Groeger Eaton and Larkin and not transferred to the Bank Lr. Baggot Street Judgments dated the 26/6/1985 .v. Michael Larkin as guarantee of debts - registered (interest to date at 11%) and costs, amounting to £23,966.53 as set out in the Schedule of Claim of the Claimant's said submission is disallowed.

11. That the Claimant's estimated loss of earnings with interest thereon totalling £105,660 as set out in the Schedule of Claim of the Claimant's said submission is disallowed.

12. That the Claimant's claim in respect of goodwill amounting to £220,820 as set out in the Schedule of Claim of the Claimant's said submission is disallowed.

13. That the Claimant's claim to a joint equal interest with the Respondents in the sum of £7,008.95 which has been lodged to a joint deposit account in the names of the names of the Claimant and the Respondents in the Westland Row branch of the Bank of Ireland as set out in the submission to arbitration dated the 11th of April 1985 is disallowed.

14. That the Claimant's claim for the cost of redecoration

of 81 Merrion Square in the sum of £2,768.38 as set out in note 1 of the Schedule of Claim of the Claimant's said submission is disallowed.

15. That the Respondents' claim for £13,333.33 in respect of a 1/3 share of moneys paid by the Respondents to the Bank of Ireland in respect of partnership debts as set out in the Respondents' submission dated the 20th of October 1986 at paragraph 4.02 is disallowed.

16. That the Respondents' claim for 2/3 of an undetermined sum stated to be a proportion of an amount in excess of £120,000 if the partnership is held to have ceased on the 29th October 1988 or an alternative sum if it is held that the partnership ceased on a subsequent date, as set out in the Respondents' said submissions at paragraph 4.02 is disallowed.

17. That the Respondents' claim in the sum of £30,000 with interest thereon in respect of the "clawback agreement" as set out in the Respondents' said submission in paragraphs 5.01 and 5.02 is disallowed.

18. That the Respondents' claim for £4,000 with interest thereon alleged to have been wrongfully appropriated by the Claimant on or about the 11th June 1984 as set out in the Respondents' said submission at paragraph 6.01 is disallowed.

19. That the Respondents' claim for High Court costs in relation to various proceedings specified in the Respondents' said submission at paragraph 8.01 and 8.02 is disallowed.

20. That the Respondents' claim for damages in respect of the Claimant's failure to obtain landlords consent to the lease to the partnership of 81 Merrion Square as set

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out in the Respondents' said submission at paragraph 8.03 is disallowed.

21. That all or any other claims of both the Claimant and the Respondents save as is ordered below are disallowed.

AND IT IS HEREBY ORDERED -

A. The Respondents shall pay to the Claimant a sum of £20,501.93 in respect of their occupation of 81 Merrion Square in the City of Dublin.

B. That the Respondents shall pay to the Claimant a sum of £7,640.66 in respect of loss of assets, fixtures and fittings.

C. That the Respondents shall pay to the Claimant a sum of £17,500 as general damages.

D. That the Claimant shall sign the form 9 so as to enable the company's office to record Mr. Eaton's resignation as secretary of Yearling Limited.

E. That the Claimant shall sign form RBN5 so as to indicate that both the Respondents are no longer partners in the business of Michael Larkin and Associates.

F. That the Claimant shall sign surrender form with the Caledonian Insurance Company in regard to the insurance policy set out as part of the partnership arrangements.

G. That the costs of the arbitration together with the arbitrator's costs shall be borne equally as to one half by the Claimant and as to one half by the Respondents."

THE PLAINTIFF'S COMPLAINT

One of the terms contained in the submission to arbitration was that -

> "Each of the parties hereto shall in all cases obey, abide, perform, fulfil and keep to the award so made and published by the arbitrator and shall not bring or prosecute any action against the other concerning the matters referred to other than to enforce such award made by the arbitrator herein."

It is clear from the terms of the award that the arbitrator had considerable reservations about a number of the claims being made by both parties to the arbitration. Yet there is no suggestion of any personal impropriety in the way the arbitrator conducted the arbitration. Nor is there any suggestion that the arbitrator did not attempt to resolve the disputes before him in a conscientious and honest way. The Plaintiff does however suggest that the award is bad on its face, and that it is contradictory, inconsistent and uncertain. The Plaintiff also suggests that the arbitrator has made mistakes in law which appear on the face of the award and that he has therefore been guilty of what the law - perhaps unfortunately - terms "technical misconduct". It is also suggested that the arbitrator admitted evidence which should not have been admitted and that some of his rulings were so mistaken in law as to allow the Respondents to procure the award by methods which were unacceptable and were fraudulent, or both.

In considering the Plaintiff's various complaints I have to bear in mind that the arbitrator heard a great deal of oral evidence and considered a very large number of documents and I must assume that, in a hotly disputed case, he accepted the version of the facts most in accordance with the conclusions which he reached. In other words it is not for me to say that

because there might have been evidence which pointed to different conclusions that the arbitrator was wrong in the conclusions which he drew.

DATE OF DISSOLUTION

The Plaintiff's first complaint is that the arbitrator has failed to find in his award the date on which the partnership dissolved. The Respondents did attempt to terminate the partnership in October 1981 but it is clear from the findings at paragraph 2 of his award that the arbitrator took the view that the efforts by the Respondents to terminate the partnership were ineffective. The partnership was not therefore determined in any of the ways set out in the partnership agreement itself. Nor was it dissolved by any of the other standard methods known to the law such as death, bankruptcy, expulsion or completion of the joint adventure (see Halsbury 4th, edition, volume 35, paragraph 164 et seq).

Mr. Bradley, who appeared for the Plaintiff, conceded that a Court might dissolve a partnership if it took the view that the partners were incompatible and unable to work together but such a dissolution, he suggested, must date from the Order of the Court. In the present case the parties had given the arbitrator power to dissolve the partnership but the dissolution could only date from the date of the arbitrator's award.

Mr. Shanley, who appeared for the Defendants, submitted that parties might by their conduct repudiate the partnership and thereby bring it to an end. He instanced the case of Bothe .v. Amos 1975 2 All England Reports page 321. That was a case of a husband and wife who were in business together. Unhappy differences arose in the marriage and the wife left her

husband. The Court held that, by her conduct, she had abandoned not only the marriage but the partnership and that the date of her departure from home therefore fixed the date of the termination of the partnership. The 14th edition of Lindley on Partnership accepts that repudiation of the partnership by one of the partners accepted by the other, dissolves the partnership (see page 619). It also cites Bothe .v. Amos (1975) 2 All England Reports page 321) as authority for the proposition that the conduct of the partners in acting in a way which is inconsistent with the continuance of the partnership dissolves the partnership. This appears to me to be the significance of paragraph 3 of the arbitrator's award where he says -

> "That neither the Claimant nor the Respondents acted during the term of the partnership with due regard to the provisions and intentions of the partnership agreement or partnership agreements and that de facto such agreements had effectively ceased to operate by April 1983."

Mr. Bradley submits that use of the words "de facto" and "effectively" indicates that the arbitrator has not found the date by which the partnership terminated in law. I disagree. It appears to me that the arbitrator's problem was that because all partners had at some stage begun to ignore their duties under the partnership it was difficult to say by what precise date the partnership had ended. But he was satisfied that the partnership was no longer operating as a partnership by the 1st of April 1983. It appears to me that the correct interpretation of his award is that, doing the best he can in a difficult situation, he has fixed March the 31st 1983 as the date on which the partnership ended.

CLAIM FOR INTEREST

One of the Plaintiff's claims in the arbitration was a claim for arrears of rent in respect of the premises 81 Merrion Square. This claim, the Plaintiff submits, has been allowed in part in paragraph (a) of the arbitrator's award yet the Plaintiff's claim for interest on sums due under the lease is totally rejected in paragraph 7 of the award. But the Plaintiff submits the second proviso in the lease provides that whenever during the term the yearly rent or other sums of money therein reserved or any part or parts thereof shall at any time be unpaid at the expiration of 7 days after becoming due and payable the same "shall", until paid, bear interest. Mr. Bradley submits that the arbitrator having found that any sum was due under the lease had no discretion but to award interest on it. He says that the Defendants did not deny that they were obliged to pay interest on rent overdue and that, in these circumstances, the failure of the arbitrator to award interest was a mistake in law which amounted to technical misconduct on the part of the arbitrator.

But the matter is more complicated than this. It would appear that the Defendants were at all times submitting in the arbitration that they had suffered loss because of the failure of the Plaintiff to obtain the necessary consent of the superior lessor to the sublease. There is no doubt that the sublease contemplated that the rent should be paid quarterly in advance by standing order into the lessors account. Such a standing order was in fact executed and, initially, the rent was paid in the manner contemplated but the standing order was subsequently cancelled. The Plaintiff maintained at the arbitration that the standing order was cancelled without his knowledge or consent. The Defendants deny this and say that

the standing order was revoked with effect from the 1st of April 1982 with the Plaintiff's knowledge and that the revocation was due to the serious cashflow position of the practice brought about, they suggest, principally by the non-performance of the Plaintiff.

The Plaintiff, in turn, did not pay or was not able to pay, the rent reserved in the head lease. As a result the superior lessors by notice to quit dated the 6th of January 1983 terminated the head lease with effect from the 6th of February 1983. The superior lessors subsequently obtained a decree in ejectment against the Plaintiff. It appears from the affidavit grounding the ejectment proceedings that the superior lessors relied not only on the fact that the rent was in arrears but also on the fact that the Plaintiff had made two sublettings of portions of No. 81 Merrion Square to subtenants without obtaining the consent of the superior lessor. They did not however rely upon the sublease to the partnership as being a ground for forfeiture.

As the Plaintiff's interest in the premises was terminated on the 6th of February 1983 no rent was payable to him under the lease from that date. The only rent due to the Plaintiff under the lease would be for the ten month period from the cancellation of the standing order until the expiration of the notice to quit.

The relevant finding of the arbitrator is at paragraph A of his award and it may be significant that this paragraph contains no reference to rent. It says -

> "The Respondents shall pay to the Claimant a sum of £20,501.93 in respect of their occupation of 81 Merrion Square in the City of Dublin".

Use and occupation money would not be payable under the

lease and would not carry interest. Insofar as the sum of £20,501.93 includes a sum for rent the arbitrator, if satisfied that the Plaintiff was a party to the decision to cancel the standing order for the rent may have considered it inequitable that the Plaintiff should, in all the circumstances of the case, receive interest notwithstanding the wording in the lease.

If this was the arbitrator's view I cannot say that he was wrong.

EQUIPMENT ON LEASE

The Plaintiff and the Defendants had all owned certain office equipment prior to the partnership. They transferred some of this equipment into the partnership and no particular problem arises about this. However there was other office equipment which the Plaintiff had on lease. The intention apparently was that this equipment should be transferred to the partnership. But as the Plaintiff was not the owner of this equipment he could not assign it to the partnership. A new agreement would have been necessary between the Plaintiff, the owners of the equipment and the partnership but no such agreement was ever executed. The partnership was however allowed to use this office equipment but so, according to the Defendants, were other tenants of No. 81 Merrion Square.

Paragraph 5 of the award refers to this equipment. It is as follows -

> "That it was the intention of both the Claimant and the Respondents to include the Claimant's assets being such items as the computer, photocopier, telephones and typewriters, as part of the partnership property and that these items were handed over to and utilised by the partnership."

The Plaintiff maintained that the Defendants should relieve him of all his obligations to the lessors of this equipment under the terms of his leasing agreements with them. But there was never any formal assignment of this equipment to the partnership. Nor would it appear that the partnership ever had exclusive use of this equipment. Other tenants had access to it and the Defendants alleged that these other tenants paid the Plaintiff for the use of it. The arbitrator, in paragraph 5, has accordingly chosen his words with care. In paragraph 6 he rejects the basis on which the Plaintiff has formulated his claim in the first schedule to the Plaintiff's submission. But at paragraph B of his order he provides -

> "That the Respondents shall pay to the Claimant a sum of £7,640.66 in respect of loss of assets, fixtures and fittings."

I cannot say that the arbitrator was wrong in his approach to this part of the claim.

CONDUCT OF THE ARBITRATION

The Plaintiff suggests that the arbitrator misconducted the arbitration in a number of respects and that because of this the Defendants were able, fraudulently, to procure an award to which they were not entitled.

DISCOVERY

The first item in respect of which complaint is made is the discovery of documents. A preliminary hearing had been held in relation to procedural matters including discovery. The Defendants contended at the preliminary hearing that they ought not to make discovery in relation to any matter after October 1982 because they contended that the partnership had

ceased at the end of October 1982. The Plaintiff however contended that the partnership was still in existence and that discovery should continue up to the commencement of the arbitration. The arbitrator decided to restrict discovery, in the first instance, to the 31st October 1982. By agreement between the parties dscovery was made by the exchange of copy documents. Later the arbitrator extended the period in respect of which discovery should be made up until the 24th of September 1984. As the Defendants failed to make discovery in time and as there was doubt as to the arbitrator's power to order them to do so, the Plaintiff applied in the High Court for an Order to strike out the Defendants' points of defence and counterclaim. On the 20th of January 1986 an Order was made by Mr. Justice Costello, on consent, directing the Defendants to make discovery on oath in accordance with the arbitrator's direction but excusing them from revealing the names of any new clients acquired by the Defendants after the 1st day of November 1982.

In purported compliance with the said Order of Mr. Justice Costello the Defendant Richard Groeger swore an affidavit of documents on the 14th day of February 1986. The Plaintiff was dissatisfied with the Defendant's discovery and on the 14th day of March 1986 the Defendant Richard Groeger swore a second affidavit of documents. Neither affidavit of documents was in standard form in that neither affidavit contained the usual Second Schedule dealing with documents which formerly were, but were no longer, in the possession of the Defendants.

No one seems to have adverted to this at the time. In the course of the arbitration, however, it emerged that some of the Defendants' documents were missing. In particular the

Defendant Mr. Eaton had an office in Athlone through which a limited number of partnership affairs had been transacted. Mr. Eaton also claimed that he had had in Athlone a cash receipts book which contained a number of entries relevant to the partnership. This cash receipts book had been sent to the Dublin offices of the partnership and had, the Defendants claimed, been mislaid. Mr. Eaton however claimed that he tried to get his staff to follow a practice of taking photostat copies of any important original document being sent out of the Athlone office. That, he claimed, had been done in this case and he produced two photostat sheets which, he claimed, were copies of the relevant entries in the cash receipts book. The Plaintiff's advisers objected to the production of these photostatic copies on the grounds that the existence of the cash receipts book had not been disclosed in the discovery; that the photostatic copies were not the best evidence; and that the provenance of the photostat copies was highly suspect.

The arbitrator investigated these matters fully and, being satisfied that the cash receipts book had, genuinely, been lost, admitted the photostat sheets in evidence.

The Plaintiff suggests that the arbitrator's ruling was wrong and that the Defendants conduct in relation to discovery was obviously fraudulent. However, it appears to me that the matter was a matter within the arbitrator's discretion and that once he was satisfied that there had been a bona fide mistake and that the cash receipts book had genuinely been lost he was entitled to admit the photostat copies.

CROSS EXAMINATION OF MR. GROEGER

Mr. Eaton was the principal witness for the Defendants during the arbitration. At times during his cross-examination

he may have said that Mr. Groeger was the expert in relation to certain technical matters, e.g., VAT returns. He said that he did not at any time give any undertaking that Mr. Groeger would be called to give evidence in relation to these matters. But I am satisfied that the Plaintiff's legal advisers got the impression that Mr. Groeger would be called to give evidence in relation to these matters. They accordingly refrained from pressing Mr. Eaton in cross-examination in relation to these matters because of their belief that Mr. Groeger would be the appropriate witness to deal with them. When Mr. Eaton had concluded his evidence he indicated that the Defendants' case was now closed. The Plaintiff's legal advisers protested at this because they said they had been led to believe that Mr. Groeger would deal with the technical matters referred to and that they had not accordingly pressed Mr. Eaton about them in cross-examination. This interchange took place on or about the 17th of July 1986. Neither the Defendants' counsel nor their solicitor was present on that occasion. Mr. Groeger agreed that he would give evidence concerning the technical matters referred to and did so. Counsel for the Plaintiff cross-examined him about these matters and then proceeded to cross-examine him about the case at large. Mr. Groeger protested that he had given evidence only about a limited number of technical matters. He said he thought he could only be cross-examined about these matters and that he had been so advised. Counsel for the Plaintiff however maintained that he was entitled to cross-examine Mr. Groeger at large. In evidence before me Mr. Groeger stated that the reason for his objection was, not that he was afraid to be cross-examined, but that Mr. Eaton had already covered everything he had to say, that the proceedings had already gone on for more than a year

and were costing a fortune and that he felt further evidence from him would be a waste of time.

The issue was fully argued before the arbitrator who ultimately ruled that Mr. Groeger should be allowed to withdraw but that his entire evidence would then be disregarded. Mr Eaton agreed to submit to cross-examination about the technical matters referred to and was further cross-examined by counsel for the Plaintiff in relation to these matters.

Even allowing for the informality with which arbitration proceedings are properly conducted it appears to me that counsel for the Plaintiff was right in his contention that he was entitled to cross-examine Mr. Groeger at large. The procedure adopted by the arbitrator appears to me to have been irregular. Nevertheless it appears to me that the arbitrator adopted the course which he did adopt in an effort to be fair to litigants who, at the time the problem arose, were unrepresented by solicitor or counsel. I cannot see that the Plaintiff suffered any injustice as a result of what happened nor do I think that the case falls within the maxim that justice must not only be done but be seen to be done. Counsel proceeded to cross-examine Mr. Eaton on the basis of the compromise suggested and no further action was taken in the matter until the arbitrator had delivered his award some six months later.

CORRESPONDENCE WITH ARBITRATOR

It would appear that after the evidence had concluded both parties wrote to the arbitrator. On the 5th of September 1986 the Plaintiff's solicitor in the course of a letter to the arbitrator referred to the fact that certain gossip concerning the Plaintiff had appeared in Phoenix Magazine. They went on to say -

"Not only has our client's affairs been bandied about in this magazine, but also copies of same have been sent to our client's clients by some parties or persons unknown so causing damage and distress to our client and the sooner this arbitration is brought to a conclusion and the findings made known the better so that we will be free from our restraints and undertakings concerning publication and discussion of this arbitration outside the arbitration, and that we can try to trace the person or persons who sent this magazine to the applicant's clients and take if necessary the appropriate remedies."

The arbitrator passed on this letter to Mr. Eaton by letter dated the 9th of September 1986.

On the 25th of September 1986 Mr. Eaton wrote back to the arbitrator a letter in which he said -

"Mr. Groeger and I share Mr. Crawford's concern regarding the publication of our former partner's affairs. In addition to the journal mentioned by Mr. Crawford which perhaps is not taken very seriously, there has been the report of our former partner's claim against Co-operation North in Business and Finance and more recently the publication in the Irish Times of a report headed "Letter forged Court told". Mr. Crawford does not appear to act for our former partner in either of these cases. They are both embarrassing and damaging to us."

Under cover of this letter Mr. Eaton enclosed a photostat copy of the extract from the Irish Times referred to in the letter.

On the 30th September 1986 the arbitrator wrote to the

Plaintiff's solicitor a letter enclosing a copy of the letter he had received from Mr. Eaton and included a copy of the enclosure from the "Irish Times".

It would have been better if neither party had written such letters to the arbitrator but it appears to me that the arbitrator behaved impeccably in the matter. He passed on each side's letter to the other side without comment. I do not see that the arbitrator can be criticised in any way for what happened and I am sure he did not allow these letters, referring as they did to gossip hearsay and irrelevant matter, to influence his decision in the arbitration.

CONCLUSION

It is worth recalling that this arbitration continued over a period of some seventeen months during which each side had ample time to consider its position and to invoke the assistance of the court if it thought the arbitrator was behaving unfairly. It is also worth recalling that the partnership, during the period of its existence, appears to have lost money and that the arbitrator has awarded to the Plaintiff the sum of £17,500 as general damages. The arbitrator has clearly rejected many of the claims being made by the Plaintiff and many of the claims being made by the Defendants. This is reflected in the fact that he has provided that each side such bear its own costs of the arbitration.

In these circumstances it appears to me that the arbitrator has finally determined all matters in dispute between the parties and that his award finally disposes of all these matters. One of the purposes of arbitration procedure is that the arbitrator's award should finally dispose of the dispute between the parties. Both parties to the present case

knew this and adverted to it expressly in their submission to arbitration. It appears to me that the arbitrator has made an honest and careful effort to resolve the dispute between the parties and that I should not interfere with his decision. I do not see anything on the face of the award or in the procedures followed by the arbitrator which would justify me in doing so.

Approved

Dre Berg

18/10/88

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