Neutral Citation No: [2018] NIQB 92 | *Ref:* **HOR10788**

Judgment: approved by the Court for handing down | *Delivered:* **30/11/2018**

(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

TAL LTD (IN ADMINISTRATION)

Applicant;

and

THE VERY REVEREND D WHYTE PP

Respondent.

HORNER J

INTRODUCTION

[1] The Administrator of TAL Ltd (In Administration) ("TAL") appeals the arbitration award of Mr Robin Orme, the Arbitrator ("the Arbitrator"). Firstly, TAL appeals on the basis of a serious irregularity pursuant to Section 68 of the Arbitration Act 1996 ("the Act"). Secondly it appeals on a point of law pursuant to Section 69 of the Act. The appeal relates to the Arbitrator's ruling at 12.3 and 12.4 where he said:

> "12.3 TAL has not drawn my attention to provisions in the Contract or otherwise whereby:
>
> (i) The Quantity Surveyor had the authority to make an agreement binding on the Respondent regarding the Final Account.
>
> (ii) The Respondent was obliged to pay the sum agreed by the Quantity Surveyor.
>
> (iii) The Respondent was obliged to make a final payment before issue of the Certificate of Making Good Defects.
>
> 12.4 I therefore find that TAL's claim under this heading fails."

He then goes on to conclude that TAL fails in its claim to be paid £47,527.98 being the balance due on foot of the Final Account of £54,677.98 less agreed defects.

[2] TAL complains that the Arbitrator reached his decision upon an issue which he was not asked to decide and without giving the parties the proper opportunity to make submissions in respect of that issue, namely whether the Quantity Surveyor ("QS") had at that time the necessary authority to make a binding agreement on behalf of the Respondent regarding the Final Account.

BACKGROUND INFORMATION

[3] TAL is a construction company which is in administration. The Administrator is Mr James Kennedy of JB Kennedy & Co, Accountants. The Respondent is the Parish Priest of St Bernard's Church of the Parochial House, 165 Antrim Road, Glengormley.

[4] In or about June 2010 TAL and the Respondent entered into JCT Standard Building Contract with Quantities Revision Two 2009 with Northern Ireland Adoption Schedule. TAL agreed to demolish the existing Parish Hall and construct a new Pastoral Centre at St Bernard's Church, Glengormley, Belfast which also included site and drainage works ("the Contract").

[5] The Architect/Contract Administrator issued a Practical Completion Certificate on 30 September 2011 which certified that practical completion of the works had been achieved on 26 September 2011.

[6] In late 2011 TAL submitted its final account in respect of the works carried out under the Contract. The QS emailed Mr Gary Whiteman of TAL on 4 May 2016 under the subject "SMOTH Final Account Agreement" to confirm that the amount due to TAL was £54,677.98 and to seek TAL's agreement. On 5 May 2016 Mr Whiteman replied to the QS to confirm that "figure agreed".

[7] TAL then sought payment of the sum "agreed" by Notice of Arbitration as being the sum due and owing in respect of the Final Account. The Respondent counterclaimed for the sum of £55,149 in respect of alleged defective work by TAL.

[8] Mr Robin Orme RIBA, FCIArb of Ashcliff Consultancy was appointed the Arbitrator and the parties made their arguments to him. In an award of 12 June 2018 the Arbitrator concluded that TAL's claim failed.

[9] Inter alia, the Arbitrator found that the Respondent was not bound by the agreement alleged to have been entered into by the QS. TAL complains about this conclusion reached by the Arbitrator because it says the issue whether the QS had authority to bind the Respondent was never an issue in the arbitration and there were neither submissions nor evidence on that issue either from TAL or the Respondent.

[10] On 5 July 2018 the solicitor for TAL wrote to the Arbitrator inviting him to correct his award or to make an additional award. The Arbitrator responded immediately on the same date:

> "Under Rule 12.9 of JCT CIMAR 2005, the Arbitrator has the powers set out in 57(3) to (6) of the Arbitration Act 1996. The types of correction which may be made are set out in Section 57(3)(a) and (b). My provisional view is that this sub-section does not provide for the type of correction which the Claimant invites me to make.
>
> In any event, paragraph 12.3(i) of my award dated 12 June 2018 was not the central point on which I found the Claim failed. Even if I had taken no account of paragraph 12.3(i), my findings at paragraph 12.4 would have been the same."

RELEVANT LEGAL PROVISIONS

[11] An award may be challenged under Section 68 of the Act. This states:

> "68 Challenging the award: serious irregularity.
>
> (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) and (3).
>
> (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—
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

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

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(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 an 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."

[12] In Lesotho Highlands Development Authority v Impreglio SpA [2006] 1 AC 221 the House of Lords considered the appropriate approach to Section 68. It considered that Section 68 is a high threshold. The purpose of the Act was to "reduce drastically the extent of intervention of courts in the arbitral process" and that Section 68 "is about whether there has been due process, not whether the tribunal *got it right*". The case law makes it clear that the court should only intervene where there is an asserted irregularity in only the most extreme cases: see 8.085 of Russell on Arbitration (24th Edition). The issue under Section 68 is not whether the Arbitrator is correct in his decision but whether the Arbitrator has committed a serious irregularity resulting in a substantial injustice.

[13] It will be noted that Section 33 of the Act imposes a general duty on the tribunal to:

> "(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."
> – see 8-089 of Russell on Arbitration.

[14] Section 69 of the Act provides for an appeal on the point of law in the following terms:

> "69 Appeal on point of law.
>
> (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.
>
> An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.
>
> (2) An appeal shall not be brought under this section except—
>
> (a) with the agreement of all the other parties to the proceedings, or
>
> (b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may by order—

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, 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.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

[15] It follows therefore that permission to appeal must be given only if the court is satisfied:

(i) That the determination of the question will substantially affect the rights of one or more of the parties;

(ii) That the question is one which the tribunal was asked to determine;

(iii) That, on the basis of the findings of fact in the award, either the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and

(iv) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question: see paragraph 578 of Halsbury's Laws of England Volume 2.

It is important to note that an application for permission to appeal must identify the question of law to be determined on stated grounds on which it is alleged that permission to appeal should be granted; see Section 69(4) of the Act.

ARGUMENTS OF THE PARTIES

[16] Before I briefly set out the main arguments of the parties, I should compliment counsel on both sides for the quality of their written and oral submissions. These short summaries are not intended to be comprehensive. The parties can be assured that I have taken into account all the submissions made to me even though some may not be expressly referenced in this judgment.

THE ARGUMENTS OF TAL

[17] Mr Anderson, counsel for TAL, candidly accepted that the challenge here related exclusively to the failure of the Arbitrator to give TAL the opportunity to address the Arbitrator on the issue of whether the QS had the necessary authority, whether actual or apparent, to conclude a binding agreement that the £54,677.98 was due to TAL on the Final Account at that stage. The Arbitrator's decision that, inter alia, he did not have authority from the Respondent to make an agreement binding on the Respondent and that accordingly the Respondent was not obliged to pay the sum agreed by the QS was never raised expressly with the parties. Consequently, TAL never had an opportunity to address the Arbitrator on this issue. This, he contended, was a fundamental unfairness constituting a serious irregularity and also an error of law.

[18] The response from Mr Fletcher, counsel for the Respondent, was:

(i) The finding that the QS had no authority to bind the Respondent was a finding of fact. It was up to TAL to prove as part of its claim that there was a binding authority and this included establishing that the QS had the necessary authority, actual or apparent, to enter into a binding agreement as was asserted on behalf of the Respondent.

(ii) The issue of authority of the QS in any event had been "put into the arena" in the arbitration and therefore there was no serious irregularity in extracting an alternative case from the submissions made to the Arbitrator.

(iii) There was no substantial injustice in any event because it did not affect the final decision of the Arbitrator. He had also determined that there was no obligation to make a final payment before the issue of the Certificate of Making Good Defects and no such certificate had been issued. Thus, the decision that there was no binding agreement was sound on more than one ground.

DISCUSSION

[19] In the Statement of Case served on 6 April 2018 TAL pleaded:

> "Following consideration of said Final Account the Quantity Surveyor emailed Mr Gary Whiteman for the Complainant on 4 May 2016 under subject "*SMOTH Final Account Agreement*" to confirm that the amount due to the Claimant was £54,677.98 and to seek the Claimant's agreement as to this figure."

It goes on to plead at paragraph 12:

> "On 5 May 2016 Mr Whiteman replied to the Quantity Surveyor to confirm that *Figure Agreed*."

Paragraph 13 pleads:

> "**This exchange between the parties constituted an express agreement as to the value of the Claimant's Final Account**."

[20] The response and counterclaim of the Respondent pleaded at paragraph 12:

> "The Respondent accepts that the Quantity Surveyor agreed the figure but denies that this signified that the Final Account had been agreed and maintains that the Claimant was on notice of the fact that there were defects they were contractually bound to attend to and that any Final Account was subject to rectification of the defects. No Final Account standard form signed by the parties was ever produced in this matter. The exhibited correspondence demonstrates the defects remained and put the Claimant on notice that the Respondent would seek reduction on final account in respect thereof."

[21] It then goes on to say at paragraph 13:

> "The email of 4 May 2016 only confirms agreements on figures. It is not a signed Final Account. It does not absolve the Contractor's obligations under the JCT contract to complete and/or make good defects before a Certificate of Making Good Defects can be issued. A final valuation can then be raised and certified by a Final Certificate and the contract confirmed as fully complete."

[22] It then continues:

> "The email of 4 May 2016 cannot be considered in isolation of the factual position as between the parties

> and the clear understanding between them that the defects had to be attended to. The statement of case makes an uninformed leap from 2011 to 2016 without taking an [sic] cognisance of the interparty correspondence and understanding on the core issue. It was only on 21 November 2016 that Gary Whiteman of TAL Ltd emailed to confirm that TAL were in a position for the final inspection – see file F2 TAB 5. Final inspection was never actually achieved because the defects remained outstanding."

[23] In response to the response and counterclaim dated 21 May 2018 TAL state at paragraph 5:

> "(ii) … the exchange between the parties dated 4 May 2016 following the Claimant's submission of its Final Account on or about 2011, constitutes an express agreement as to the value of the Final Account, namely £54,677.98.
>
> (iii) That payment has not been forthcoming by the Respondent in respect of the Final Account for a period of almost 5 years."

[24] There is then a further submission from the Respondent under Rule 8.2.1(d) which states:

> "2. The Respondent does not accept that the exchange of 4 May 2016 constitutes and [sic] express agreement or that the Final Account was agreed at £54,677.98. The Claimant's Response Para 7 submits that the *Parties are now in agreement that the value of the claimant's Final Account is £54,677.98*".

It is set out within the Respondent's response that the "4 May 2016 email can only be considered in the context of other correspondence and conduct and the Final Account was at all times subject to the making good of the defects."

> "3. TAL had in fact agreed that any final payment was subject to all defects being made good and the Architect being been able to issue a Certificate of Making Good Defects. TAL had a contractual responsibility to make good defects. TAL's failure to properly attend to defects identified within the rectification period and the reappearance of some of these defects prevented the Certificate of Making Good Defects being issued and

> frustrated the closure of the contract and the formation of a Final Valuation."

[25] In Lesotho Highlands Development Authority v Impregilo SpA & Ors [2005] UKHL 43 Lord Steyn said in respect of Section 68 of the Act:

> "[28] First, unlike the position under the old law, intervention under S.68 is only permissible *after* an award has been made. Secondly, the requirement is a serious irregularity. It is new concept in English arbitration law. **Plainly a high threshold must be satisfied.** 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)." (Emphasis added).

[26] The simple answer to this application under Section 68 of the Act is that it is doomed to failure because the Arbitrator found that there was no obligation to make a final payment before issue of the Certificate of Making Good Defects. No such certificate had been issued. This is not challenged by TAL in this arbitration. This is in itself a complete answer to TAL's claim. In those circumstances, and Mr Anderson on behalf of TAL did not make any competing argument never mind a compelling one, it cannot conceivably be said that TAL has suffered any injustice never mind a serious one. The award by the Arbitrator expressly found at 12.3(iii) that the obligation to make a final payment did not arise before the issue of the Certificate of Making Good Defects. No such certificate has been issued. As the Arbitrator said in response to the claim dated 5 July 2018 that he correct his award under Section 57 on the basis that the issue of whether the QS had the authority to make an agreement binding on the Respondent regarding the final point had never been raised:

> "In any event, paragraph 12.3(i) of my award dated 12 June 2018 was not the central point on which I found that the Claim failed. Even if I had taken no account of paragraph 12.3(i) my finding at paragraph 12.4 would have been the same."

The Arbitrator had found that TAL had failed to satisfy him that TAL was entitled to rely on any contractual provision to receive a final payment before the issue of the Certificate of Making Good defects. It is common case that no such Certificate was issued. Accordingly, on one limb of the Arbitrator's decision no sum could become due and owing in respect of the final account.

[27] Further, even if the only reason for the Arbitrator's decision was that the QS did not have the authority to make a binding agreement in respect of the Final Account, I still do not consider that this gives rise to a serious injustice.

[28] In Latvian Shipping Company v Russian People's Insurance Company (ROSNO) [2012] EWHC 1412 (Comm) Field J cited at para [30]:

> "The authorities on S.68 of the Act were extensively reviewed by Tomlinson J in ABB AG v Hoctief Airport GmbH [2006] 2 Lloyd's Rep 1. I agree with the conclusions Tomlinson J came to on the base of these decisions. He held that their effect is that an applicant under Section 68 is a high hurdle to overcome; there will only be a serious irregularity if what has occurred is far removed from what could reasonably be expected from the arbitral process (P.17). If the issues in question have been *put into the arena*, there is no serious irregularity in extracting an alternative case from the submissions of the parties (P.18, citing Warborough Investments v Robinson [2003] EGLR 149). It is not a ground for intervention that the court considers that it might have done things differently or expressed its conclusions on the essential issues at greater length (P.19). If a party had a fair opportunity to address its arguments on all of the essential building blocks of the Tribunal's conclusion, the fact the Tribunal did not refer back to the parties its analysis of the material before it and the conclusion it reached on it does not constitute a serious irregularity resulting in a substantial injustice (P.21)."

[29] It is clear from the Statement of Case that TAL at least impliedly relied upon the QS as having the authority to bind the Respondent without pleading expressly, as it could have done, that the QS was its agent and that he had the authority to reach such an agreement in respect of the Final Account. It is also clear that the Respondent expressly denied that there could be no binding agreement reached until, inter alia:

(a) A Final Account had been agreed. (Indeed no Final Account standard form which had been signed by the parties had ever been produced.)

(b) A Certificate of Making Good Defects had been issued.

In its final submission the Respondent states:

(a) that the exchange of correspondence on 4 May 2016 did not constitute an express agreement or that the Final Account was agreed at £54,677.98; and

(b) the email of 4 May 2016 has to be considered in the context of other correspondence and conduct and that the Final Account was at all times subject to the making good of the defects.

[30] It could not have been made clearer by the Respondent that it did not accept that there was unconditional and binding agreement. It was therefore up to TAL to establish that there was such an agreement in respect of the Final Account. One of the essential proofs was to prove that the QS had the actual or apparent authority as agent of the Respondent to enter into a binding agreement on his behalf when no Certificate of Making Good Defects had been issued. The authority of the QS in those circumstances was very much "in play" and "in the arena". There was no evidence that the QS had the necessary authority at that stage to agree a Final Account binding on the Respondent. In those circumstances for the reasons which I have set out TAL has not come near to surmounting the high threshold necessary to establish a serious injustice under Section 68.

THE SECTION 69 APPEAL

[31] This application for leave to appeal can be dealt with in a summary fashion. There are a number of different reasons why I am not prepared to grant leave in this case.

[32] Firstly the determination of this question will not substantially affect the rights of one or more of the parties. The simple reason for this is that even if TAL succeeds on this ground, it does not provide an answer to all the Arbitrator's findings. These include a conclusion, inter alia, that there can be no obligation to make a final payment before issue of the Certificate of Making Good Defects, and no certificate has been issued.

[33] Secondly, the issue of whether the QS had the necessary authority is a question of fact, not law.

[34] Thirdly, in Vinava Shipping Co Ltd v Finelvet AG "The Chrysalis" [1983] 1 WLR 1469 at 1475 Mustill J set out the classic 3-stage test as to what amounts to a question of law:

(i) The Arbitrator ascertains the facts; this process includes the making of findings on any fact which are in dispute;

(ii) The Arbitrator ascertains the law; this process comprises not only the identification of all the material rules of statute in common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached.

(iii) In light of the facts and the law so ascertained, the Arbitrator reaches his decision.

[35] The Arbitrator did this on the basis of the respective cases which were put before him by TAL and the Respondent. He was entitled to reach the conclusion he did. There was no basis for the Arbitrator to conclude that the QS had the authority to agree a Final Account on behalf of the Respondent before the Certificate of Making Good Defects had been issued or at all.

[36] Fourthly, taken at its height the case made by TAL is very thin. It states that David Beswick of Naylor & Devlin, the contract QS, confirmed that the sum of £54,677.98 was due on TAL's Final Account. But it did not make the case:

(a) That David Beswick was an agent of TAL.

(b) As an agent of TAL he had the actual authority to reach this agreement.

(c) If he did not have actual authority then he had ostensible authority or apparent authority to reach such an agreement.

(d) He had some other authority on the basis of the Contract to conclude a deal on behalf of the Respondent.

On the case put forward by TAL, there is no mention of the QS's authority to contract on behalf of the Respondent at all. Therefore, TAL is in no position to complain about the Respondent's denial that there was any agreement on the Final Account. The Arbitrator in the circumstances of this particular arbitration and given the respective cases that were made in the Statement of Case and the Response and Counterclaim was entitled to reach the conclusion he did. It was not the Arbitrator's responsibility to direct the proofs of either party.

[37] Fifthly, TAL could have complained that there was no evidence upon which a properly directed Tribunal could have reached the conclusion that the QS did not have the authority to contract on behalf of the Respondent in these particular circumstances. This is a question of law. This case has never been made. But on the evidence put before the Arbitrator, the Arbitrator was perfectly entitled to reach the conclusion he did. His decision on the issue of whether there was an agreement on the Final Account which was binding on the Respondent is unimpeachable. There is no question of the Arbitrator making an error which is "transparent and clear": see Morris Homes (West Midlands) Ltd v Keay and Anor [2013] EWHC 923 (TCC).

[38] Finally, the complaint made by TAL in reality is that it did not have an opportunity to address the Arbitrator on the issue of the QS's authority to enter into an agreement on behalf of the Respondent in those circumstances. This is not a point of law. It is a claim of procedural unfairness, which if correct, has a remedy which is found at Section 68 not Section 69.

CONCLUSION

[39] TAL's application for leave to appeal the award of the Arbitrator fails. There is no basis for giving leave to appeal either under Section 68 or Section 69 for the reasons which are set out in full above.

[40] I will hear the parties on the issue of costs when they have had the opportunity to digest this judgment.