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Irish High Court Sets High Threshold in Set Aside Application

Karl Shirran (Bar of Ireland) · Thursday, February 13th, 2025

In the case of *Parkdenton Ltd v Euro General Retail Ltd t/a EuroGiant* [2024] IEHC 387 (Nolan J) a set aside application pursuant to two of the four grounds as per Article 34 of the UNCITRAL Model Law was rejected by the High Court. The application sought to set aside an arbitration award on the basis that the Applicant "was otherwise unable to present his case" and/or that the arbitral award contained "decisions on matters beyond the scope of the submission to arbitration" (Article 34 s.2(a)(ii) and s.2(a)(iii) respectively). The High Court considered three separate issues arose for determination: (1) whether the "context comparable" evidence concerning a proposed lease agreement which never transpired (and was withdrawn from the arbitrator) was *actually* considered; (2) whether the so-called one-third rule was applied by the arbitrator for the storage unit per square foot ("psf") rate; and (3) whether sufficient reasons were given for determining the rate for ground floor rent psf.

The article will consider the pertinent facts of the case (including the "context comparable" evidence), the expert evidence and argument, the applicable law and its application by the High Court.

Facts of the Case

The Applicant landlord and Respondent tenant entered a lease agreement (the subject premises being Unit 1 and Unit 2 of The Parnell Centre) on 9 November 2012. The agreement provided for a rent review provision which was to be applied at five-year intervals. No agreement was reached by the parties prior to the rent review of the 6 January 2023. The agreement was to run for a further 20 years from 7 January 2023. No break clause option or rent-free period was contained in the agreement. As per the arbitration clause contained in the lease agreement, the President of the Chartered Society of Surveyors Ireland appointed an arbitrator (Mr. Feely) to determine the appropriate rent for the next five-year period. The parties made written and oral submissions (through surveyor experts), the arbitrator visited the subject premises, and an award was rendered on 12 July 2023. The only consideration for the arbitrator was the appropriate rent to be paid by the tenant under the agreement based on "open market rent" with vacant possession by "a willing landlord to a willing tenant." The decision was further simplified by the arbitrator discounting any prior period of rental, any goodwill attaching to the premises by reason of the business being carried on therefrom and any effect on retail value due to works undertaken by the tenant with the consent of the landlord.

Experts' Argument

By way of summary, both parties were represented by surveyors for what was a relatively net issue at the arbitral hearing, with both experts presenting their evidence and cross examining the other. Mr. Potter, for the Applicant, referenced four separate nearby premises as comparators for the subject premises. The figures suggested by him ranged between €34 – €39 for the ground floor retail space and €10 for the first-floor storage area. Mr. Markey, for the Respondent, relied on three comparators in his evidence submitted to the arbitrator. These ranged from €7 – €9 for the ground floor retail rate with no reference made to the appropriate storage floor rate for these premises.

Added Complication

The Respondent's expert, Mr. Markey, referred to another property (or "context comparable") in written submissions, but ultimately it was agreed between the parties that this comparator should not be considered by the arbitrator. Despite Mr. Markey not accepting its irrelevance, it was agreed that this matter be withdrawn from the arbitrator's consideration. This "context comparable" concerned a proposed lease agreement which did not transpire as planning permission had not been secured for the property. The proposed lease agreement concerned FLYEfit (a gym chain) taking over the Ivy Building premises on Parnell Street (beside the Tesco store of the same street). The psf rate for the ground floor retail unit was proposed to be €7.90, with a psf rate of €3 applicable to the first-floor storage area. The proposed lease agreement would have differed in other key respects, including the total term of the lease being for 20 years, with a break clause option exercisable and a rent-free period of 12 months. To be clear, despite the arbitrator clarifying that the "context comparable" was not for consideration, it formed part of the basis for the Applicant's set aside application.

Law Considered

The High Court cited a small number of seminal Irish cases in determining the correct approach. The Supreme Court case of *Keenan v Shield Insurance Company Ltd* [1988] IR 89 (McCarthy J) was cited, predating the adoption of the UNCITRAL Model Law in this jurisdiction by the Arbitration Act 2010, demonstrating the commitment of the courts in Ireland to upholding arbitral awards. In *Keenan*, the Supreme Court dismissed the set aside application, as the appellant only met the threshold of an "arguable case" as opposed to that of "obvious error." Despite recognising that an error of law may be so fundamental that a court cannot allow it to remain unchallenged, the court highlighted "the desirability of making an arbitration award final in every sense of the term."

Several High Court judgments were cited post the enactment of the Arbitration Act 2010. The case of *Ryan v O'Leary (Clonmel) Ltd* [2018] IEHC 660 (Barniville J as he then was) was cited where two general principles underlying arbitration practice were highlighted by the High Court. First, at paragraph [31], the Court notes the importance of the finality of arbitral awards. Secondly, the set aside application is not an opportunity for a court for "second-guessing the arbitrator's decision on the merits, whether on the facts or on the law." Thus, at paragraph [34] of *Ryan*, it was highlighted that the "courts are required to construe narrowly the grounds on which an award may be set aside

under Article 34 and to exercise the jurisdiction to set aside in a sparing manner." Finally, *Delargy v Hickey* [2015] IEHC 436 (Gilligan J) is cited by the Court. It concerned a party having forfeited its entitlement to bring a set aside application having refused to partake in the arbitral proceedings (save for a preliminary meeting) but not raising a jurisdictional objection at arbitration. Gilligan J took the view that allowing a party opportunity to opt back into proceedings after the arbitral award has issued would undermine the aims of preventing unnecessary legal costs and ensuring efficiency. At paragraph [70], Gilligan J cites *Keenan*, repeating the words of McCarthy J concerning "the desirability of making an arbitration award final in every sense of the term."

High Court's Analysis

The Applicant's application claimed that the arbitrator considered the "context comparable" despite claiming he had not done so, as there was no other basis by which he could have reached the decision for the storage floor rate (€2.50). Further, as a direct consequence, the Applicant could not make representations in respect of same. Finally, inadequate reasons were provided for the arbitrator determining the appropriate rate for the ground floor rent (€23.44).

Nolan J was satisfied that the award was "detailed, professional and comprehensive." The arbitrator was experienced in this work and had physically inspected the premises. Numerous factors were considered by the arbitrator in adjusting the figures suggested by the parties as applying to the subject premises. These included the location, nature and size of the premises, the fact that the first-floor storage area could only be accessed from a ramp outside the retail unit, few empty retail units existing nearby, the premises being on the edge of the "quality retail area" and a pedestrian crossing just outside the entrance. The arbitrator was critical of the analysis provided by both experts. The Applicant's expert used direct comparators but failed to make adjustment due to the size and nature of the premises and the Respondent's expert's figures were based on unsubstantiated facts. The arbitrator considered (and adjusted) both sets of figures in coming to his decision on the ground floor rent. Thus, the award for the ground floor rate was based on sufficient reasoning. In determining the storage floor rate, the arbitrator found the Respondent's expert's figure to be more convincing – accepting the mark down suggested by the said expert. He was critical of the Applicant's expert not providing the basis for his calculating figures suggested as appropriate for the ground floor rent. Moreover, the High Court was satisfied that the "context comparable" was not considered by the arbitrator.

The High Court rejected the set aside application, being satisfied that no breach of fundamental or natural justice occurred.

Conclusion

Whilst it may have been more prudent for the arbitrator in this matter to have provided greater detail for choosing the Respondent's expert's figure for the storage floor (albeit with adjustment), given that the said expert referred to the one-third rule and the "context comparable" (Ivy Building), the High Court nonetheless accepted that sufficient evidence by both parties was before the arbitrator on this matter, thereby putting the arbitral award beyond challenge. Thus, the Applicant's fundamental rights were not breached by being prevented from addressing the issue. This decision demonstrates that applicants in a set aside application carry the burden of meeting an

extremely high threshold. Moreover, the decision is consistent with the policy of giving every benefit to ensuring that an arbitral award will be upheld, consistent with the principles cited in the above cases of *Keenan, Ryan* and *Delargy*. Furthermore, the decision is consistent with *Hoban v Coughlan* [2017] IEHC 301 (McGovern J), where at paragraph [38], the High Court stressed that an arbitrator need not give a reasoned award expected of a judge of the Superior Courts if the award enables a party "to see why he reached his decision."

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