CHARLES GHIRARDOSI .....APPELLANT;

1966
*Jan. 31
Mar. 11

AND

THE MINISTER OF HIGHWAYS FOR BRITISH COLUMBIA ...} RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Arbitration—Expropriation of appellant's land—Motion to set aside award of umpire—Existence of solicitor and client relationship between arbitrator and respondent at time of arbitration unknown to appellant —Disqualification of arbitrator fatal to validity of award.

The appellant was the owner of certain lands in Trail, British Columbia, expropriated by the Department of Highways. No agreement was reached as to compensation. In the arbitration proceedings which followed pursuant to the *Department of Highways Act*, R.S.B.C. 1960, c. 103, one McQ was appointed arbitrator by the Minister of Highways and one M, by the appellant. The arbitrators, together with H, the umpire appointed by them, convened and heard evidence and argument. The arbitrators were unable to reach an agreement and accordingly, pursuant to s. 26 of the *Department of Highways Act*, requested that the amount of compensation be determined by the umpire who thereupon fixed the compensation at $25,000.

By originating notice, the appellant proceeded to set aside the award on the grounds that (1) the arbitrator McQ was disqualified by interest in that he, at the time of the arbitration, was acting as solicitor for the Minister of Highways and (2) the umpire was disqualified by interest in that, at the time of the arbitration, he was acting as crown counsel for the Province of British Columbia. On motion an order was made setting aside the award. On appeal the Court of Appeal, by a unanimous judgment, set aside the order of the judge of first instance and affirmed the award.

Held: The appeal should be allowed and the order of the judge of first instance restored.

The arbitrator McQ was disqualified. From the beginning to the end of the arbitration he was retained by the respondent Minister in a dispute of the same nature as that which was the subject-matter of the arbitration; in that dispute the party whose land was required by the respondent was in no way connected with the appellant and the land expropriated was some 250 miles distant, but the disqualification arose from the circumstance that, unknown to the appellant, the confidential and mutually beneficial relationship of solicitor and client existed at all relevant times between McQ and the respondent. Assuming that the umpire H was in no way personally disqualified, the disqualification of McQ was fatal to the validity of the award. *Sellar v. The Highland*

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*PRESENT: Taschereau C.J. and Cartwright, Martland, Hall and Spence JJ.

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Railway Co., [1918] S.C. 838; [1919] S.C. (H.L.) 19, followed; *North Shore Railway Co. v. The Reverend Ursuline Ladies of Quebec* (1885), Cass. S.C. Dig. 36, distinguished; *Szilard v. Szasz*, [1955] S.C.R. 3; *Summer et al. v. Barnhill* (1879), 12 N.S.R. 501, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], setting aside an order of Collins J. and affirming an arbitration award. Appeal allowed and the order of Collins J. restored.

Charles Ghirardosi, in person.

W. G. Burke-Robertson, Q.C., and *D. T. Wetmore*, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Court of Appeal for British Columbia[1] setting aside an order of Collins J. and affirming an award made in an arbitration between the parties.

The appellant was the owner of 7.226 acres of land in the City of Trail, British Columbia, expropriated by the Department of Highways. No agreement was reached as to compensation. In the arbitration proceedings which followed pursuant to the *Department of Highways Act*, R.S.B.C. 1960, c. 103, Mr. C. D. McQuarrie, Q.C., was appointed arbitrator by the Minister of Highways and Mr. M. E. Moran, by the appellant. The arbitrators, together with Mr. D. B. Hinds, the umpire appointed by them, convened at the City of Trail in November 1963, and heard evidence and argument. The arbitrators were unable to reach an agreement and accordingly, pursuant to s. 26 of the *Department of Highways Act*, requested that the amount of compensation be determined by the umpire who on December 23, 1963, made an award fixing the compensation at $25,000.

By originating notice dated February 11, 1964, the appellant moved to set aside the award on the following grounds:

1. The Arbitrator, Colin D. McQuarrie, Q.C., appointed by the Minister of Highways of the Province of British Columbia, was and is disqualified by interest in that he has been and was at the time of the

[1] (1964), 50 W.W.R. 296.

arbitration referred to herein acting as solicitor or counsel or agent for the said Minister of Highways or the Department of Highways of the Province of British Columbia or both.

2. The Umpire, D. B. Hinds, was and is disqualified by interest in that he has been and was at the time of the arbitration referred to herein acting as Crown Counsel for the Province of British Columbia.

The material before Collins J. consisted of five affidavits. There was no cross-examination on any of these and there is really no dispute as to the relevant facts.

From time to time Mr. McQuarrie had acted for the Department of Highways and had also acted against that Department. Neither he nor any member of his firm had ever held a general retainer from the Department. Prior to being appointed arbitrator in the matter with which we are concerned Mr. McQuarrie was retained by the Minister of Highways to act as solicitor for the Department of Highways in the matter of an expropriation by the Department of a property situate near to Radium, British Columbia, and continued to be so retained throughout the period of the holding of the hearing in the arbitration and the making of the award in regard to the appellant's property.

These facts were not disclosed to the appellant or his solicitor and did not come to the notice of either of them until some time in January, 1964, after the appellant had received a copy of the award.

Mr. Hinds had never acted for the Department of Highways but from time to time had acted as counsel for the Crown in the right of British Columbia in criminal prosecutions. These facts also were unknown to the appellant and his solicitor until after the appellant had received a copy of the award.

On March 2, 1964, the motion came before Collins J. who set aside the award. He gave no recorded reasons for his decision but it is said in the reasons of Lord J.A. in the Court of Appeal that counsel were agreed that the judgment of Collins J. was:

> based on a reasonable apprehension that the arbitrator appointed by the Minister might not act in an entirely impartial manner. There was no suggestion of actual bias, and it is common ground that he is a gentleman of integrity and high standing in his profession.

In the Court of Appeal, Sheppard J.A. was of opinion that there was no evidence to support a reasoned suspicion of bias on the part of Mr. McQuarrie. Lord J.A., with

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whom Davey J.A. was in substantial agreement, proceeded on the ground that the award was that of Mr. Hinds and not that of the Board of Arbitrators and so found it unnecessary to deal with the question whether Mr. McQuarrie was disqualified. With the greatest respect I am unable to agree with either of these views.

The applicable principles have recently been restated by Rand J. giving the unanimous judgment of this Court in *Szilard v. Szasz*[1]. At p. 4 he said:

> From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to. This principle has found expression in innumerable cases, and a reference to a few of them seems desirable.

Rand J. then reviewed a number of decisions and continued at pp. 6 and 7:

> These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables a party to an arbitration to challenge the tribunal set up. It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.
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> Nor is it that we must be able to infer that the arbitrator 'would not act in an entirely impartial manner'; it is sufficient if there is the basis for a reasonable apprehension of so acting.

One of the cases referred to with approval by Rand J. was *Summer et al. v. Barnhill*[2], in which an award was set aside on the ground that one of the arbitrators was disqualified by the fact of having been regularly retained as solicitor of the estate of which the defendant was the executor, although he had not been engaged as counsel or attorney in the matter referred, and did not concur in the award. Sir William Young C.J. in delivering the judgment of the Court said at p. 505:

> The modern cases are in Russell 101-3, affirming the general principle that an arbitrator ought to be a person who stands indifferent between the parties, and that any concealed or unknown interest or bias will disqualify him. The rule is well expressed in *Kemp v. Rose*, 1 Giff., 258; 'a perfectly

[1] [1965] S.C.R. 3.

[2] (1879), 12 N.S.R. 501.

even and unbiased mind, said the Vice-Chancellor, is essential to the validity of every judicial proceeding. Therefore where it turns out that, unknown to one or both of the parties who submit to be bound by the decision of another, there was a circumstance in the situation of him to whom the decision was entrusted, which tended to produce a bias in his mind, the existence of that circumstance will justify the interference of the Court.' See also *Harvey v. Shelton,* 7 Beav. 462-4. It is of no consequence that Mr. Longworth has not joined in the award. He sat upon the reference and was there as a judge, and, without at all questioning the purity and conscientiousness of his action, I am of opinion, that, as the solicitor of Pearson's estate and the adviser of the executor quite independently of this case, he was not competent to act as one of the arbitrators thereon, and, the fact being unknown to the plaintiffs, their attorney and counsel, that the award should be set aside and the rule *nisi* made absolute with costs.

In the case at bar from the beginning to the end of the arbitration Mr. McQuarrie was retained by the respondent in a dispute of the same nature as that which was the subject-matter of the arbitration; the party whose land in *Radium* was required by the respondent was in no way connected with the appellant and the land expropriated was some 250 miles distant, but the disqualification arises from the circumstance that, unknown to the appellant, the confidential and mutually beneficial relationship of solicitor and client existed at all relevant times between Mr. McQuarrie and the respondent.

Lord J.A. relied in part on the decision of this Court in *North Shore Railway Company v. The Reverend Ursuline Ladies of Quebec* (1885), which is briefly noted in Cassels Digest of Supreme Court Decisions at p. 36. An examination of the complete record of that case in this Court shews that the appeal was heard on March 4, 1885, and judgment reserved. On the following day judgment was given orally and the note in the Registrar's book reads as follows:

> In the *North Shore Railway Company v. The Ursulines of Quebec,* the Chief Justice states there is no doubt that the judgment of the Court below was correct and the Court is of opinion that the appeal should be dismissed with costs.

No recorded reasons were delivered in either of the Courts below. The action was brought by the Ursulines of Quebec to recover from the Railway Company the amount awarded by a board of arbitrators as compensation for a piece of land taken by the Railway. The main defence was that Charlebois, the arbitrator appointed by the plaintiffs, was disqualified because since a date prior to the arbitra-

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tion he was "le procureur agent" of the plaintiffs, that he had always left the defendant in ignorance of this fact and this had prevented it from taking steps to have him removed as arbitrator. In answer the plaintiffs denied that Charlebois was disqualified and added that if he were it was the duty of the defendant to take steps to set aside his appointment before proceeding with the arbitration. In the plaintiff's factum filed in this Court it is stated that the appellant and its arbitrator knew the facts and never raised any objection and this allegation is supported by the evidence of Charlebois and also by that of Bertrand who was the arbitrator named by the defendant. In these circumstances I think it probable that the ground of the decision was that the defendant proceeded with the arbitration with knowledge of the facts which, after the award, it claimed disqualified Charlebois. There is no doubt that, generally speaking, an award will not be set aside if the circumstances alleged to disqualify an arbitrator were known to both parties before the arbitration commenced and they proceeded without objection.

Turning to the main ground on which Lord J.A. proceeded, I am of opinion that, assuming that Mr. Hinds was in no way personally disqualified, the disqualification of Mr. McQuarrie was fatal to the validity of the award. On this point it is sufficient to refer to the judgments in *Sellar v. The Highland Railway Company*[1]. In this case it was held that an arbitrator was disqualified because he held some shares in the Railway Company and that by reason of this the award made by the oversman appointed by the arbitrators must be set aside. On appeal to the Inner House from the judgment of Lord Sands, Lord Johnston said at p. 853:

> The disqualification here of the arbiter has had a somewhat exceptional result. It has not tainted his award, for he did not get the length of making one. It has vitiated his nomination of and devolution on the oversman. At first sight disqualification of the oversman may appear far-fetched. But I think, when the practice in the conduct of arbitrations, at least in Scotland, is remembered, that the propriety and justice of the judgment becomes apparent. By common, and I may say almost invariable, practice the arbiters nominate their oversman before commencing the work of the reference. As a pure matter of convenience, and to charge him with a knowledge of the matter at issue, and the considerations *hinc inde*, he

[1] [1918] S.C. 838; [1919] S.C. (H.L.) 19.

accompanies them on any visit to the *locus*. He sits with them throughout the leading of evidence and hears the arguments addressed to them by counsel or agents. He is present at their deliberations. In point of fact he may not inaptly be described as the president of a Court of three, with a controlling voice in case of difference between subordinate colleagues. There can be no question that a man in such a position, should the decision of the question in dispute ultimately devolve upon him, is open to be swayed by the opinions and reasoning of either of those with whom he has thus sat, and therefore that there is substance and not merely form in carrying the objection to the arbiter to the length of vitiating the appointment of the oversman in which he has had a hand. The objection must have been sustained if the disqualification of the arbiter had been discovered before the devolution, and it is, I think, equally well founded, though the discovery does not take place till the devolution has been made, or even the oversman's award has been issued. The arbitration in question has therefore proved abortive,

This judgment was affirmed in the House of Lords. At p. 24 Lord Finlay said:

It follows that the decreet-arbitral cannot stand. It is perfectly true that the decreet-arbitral was not the work of Mr. Hogg, but Mr. Hogg did act as arbiter in the matter. Having this interest in the Highland Railway Co. he heard the evidence and arguments and he considered the matter, and he and the arbiter on the other side failed to come to agreement. It seems to me that in doing that Mr. Hogg did act judicially in the matter, and, inasmuch as the function of the oversman in deciding by decreet-arbitral was the result of the failure to agree by the arbiters, the decreet-arbitral cannot stand.

The principle of this decision appears to me to govern the case at bar.

Before parting with the matter it is scarcely necessary to add that no impropriety is imputed to Mr. McQuarrie whose integrity and high standing in the profession are unquestioned; but when circumstances exist which have the legal result of disqualification the award cannot stand. An outstanding illustration of the application of this rule is found in the well known case of *Dimes v. Proprietors of the Grand Junction Canal et al.*[1], in which the House of Lords set aside a decree of the Lord Chancellor of England because he held some shares in the Canal Company although, as Lord Campbell said at p. 793, "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern".

[1] (1852), 3 H.L. Cas. 759.

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I would allow the appeal, set aside the judgment of the Court of Appeal and restore the order of Collins J. The appellant will recover from the respondent his costs in the Court of Appeal and in this Court such costs as are taxable in view of the circumstance that he conducted the appeal in person.

Appeal allowed and the order of the judge of first instance restored.

Charles Ghirardosi, appellant, on his own behalf.

Solicitor for the respondent: A. W. Hobbs, Victoria.