THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2016/0233

BETWEEN:

THERESA MARCELLIN
as Executrix of the estate of JOSEPH ST. ROSE (deceased)

Claimant

and

SAINT LUCIA ELECTRICITY SERVICES LIMITED (LUCELEC)

Defendant

Before:
The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:
Mrs. Lydia Faisal for the Claimant
Mr. Deale Lee for the Defendant

2017: November 23;
2018: January 4
October 4.

JUDGMENT

[1] CENAC-PHULGENCE J: The claimant filed a fixed date claim for an order to remit and/or set aside the award of arbitrator, Ms. Shan Greer ("the Arbitrator") dated 16th March 2016. The specific relief claimed in the statement of claim is as follows: (a) the award of the Arbitrator be set aside and (b) the issues of trespass, nuisance, notice, and the date for calculating the value of the land in question be determined by the court before the matter is remitted to the Arbitrator for further

consideration and (c) costs. The claim is made pursuant to sections 18 and 19 of the Arbitration Act[1] ("the Act").

Background

[2] Sometime in or about the year 2000, the defendant, Saint Lucia Electricity Services Limited ("LUCELEC") erected a 66,000 volt structure comprising power lines and utility poles along the western boundary of property registered as Block and Parcel 1453B 268 ("the property") which belongs to the claimant. As a result, the claimant alleged that 6,375 square feet of the property was rendered useless.

[3] The claimant filed a claim in the High Court against LUCELEC in 2010 seeking compensation for trespass, nuisance and personal injuries allegedly caused by the erection of the 66 KV electricity lines over the portion of his property.

[4] By order of the Court dated 31st March 2011, Wilkinson J noted in the preamble to the order that the Court was informed by counsel for the defendant that there was agreement that the matter ought to go to arbitration.

[5] The Court then ordered that Ms. Shan Greer be appointed arbitrator of the dispute pursuant to section 22(2) of the Electricity Supply Act[2] ("ESA").

Terms of Reference

[6] The claimant's statement of claim alleged that the matter was referred to arbitration along with the claim in trespass and nuisance.

[7] The terms of reference agreed by the parties in relation to the arbitration were as follows:

(a) Whether the claimant is entitled to damages for trespass and nuisance caused by the company to the claimant's land situate at Monchy, Gros Islet more fully

[1] Cap. 2.06, Revised Laws of Saint Lucia 2008.
[2] Cap. 9.02, Revised Laws of Saint Lucia 2008.

described as Block 1453B Number 286.

(b) Whether the claimant is entitled to personal injuries (pain and suffering) caused by the company to the claimant on the claimant's premises.

(c) Whether the claimant is entitled to be relocated at the respondent's expense to a similar or suitable piece of land to cease his exposure to the radiation caused by the 66KV cables and to be compensated the value of his property to the extent of $400,000.

(d) Whether the claimant is entitled to payment in full or part of his medical and travel expenses incurred by virtue of his cancer.

(e) The claimant having pleaded same is entitled to interest and costs on all sums awarded.

[8] The claimant met his demise in May 2015 and thereafter, the personal injuries aspect of the claim was withdrawn and the arbitration proceeded on the remaining terms of reference. The parties agreed that the matter would be dealt with by the Arbitrator on written submissions.

Defence

[9] The contentions of LUCELEC are set out below.

[10] LUCELEC denied that there was any misconduct of the proceedings by the Arbitrator. They said that the Arbitrator concluded on the issue of notice after careful consideration of all the evidence before her including the witness statement of the claimant, the notice exhibited by LUCELEC, the correspondence between the claimant and LUCELEC and the notes of meetings with the claimant. They said that the claimant never filed any objection at all during the first five years of the lines being erected. They therefore argued that the Arbitrator reasonably concluded on the evidence available that no trespass had been committed.

[11] LUCELEC averred that the claimant having withdrawn his claim for personal injuries the only matters for the Arbitrator to decide were whether LUCELEC'S

actions in erecting the lines constituted a trespass or nuisance; damages payable if a trespass or nuisance had been committed and compensation payable under the ESA. The Arbitrator could not consider relocation as this is not an available remedy for trespass or nuisance. Compensation for the entire property was inappropriate given that the Arbitrator found that only 6,118.50 square feet of the property was affected by the 66KV lines.

[12] The finding that no award in relation to aggravated damages could be made was based on the authority relied on by the claimant which indicated that the remedy for trespass included aggravated damages in the appropriate circumstances.

[13] The Arbitrator at paragraph 37 of the Award clearly stated the reason for using the 2005 valuation as opposed to the 2015 valuation which she stated was in accordance with established legal principles.

[14] Finally, that the Arbitrator addressed all the issues raised by the claimant in accordance with established legal principles. In every instance, the Arbitrator acted within the limits of her jurisdiction. The claimant did not establish any basis for the contention that the Arbitrator misconducted the proceedings or that the award should be remitted or set aside.

Issues

[15] The issues to be determined are:

(a) Whether the Arbitrator misconducted herself within the meaning of section 19 of the Act and the award should be set aside.

(b) Whether there are grounds to remit **the Arbitrator's award.**

(c) Should the award be remitted, should the following matters be determined prior to the award being remitted, to wit: (i) whether LUCELEC is liable for trespass or nuisance; and (ii) the date from which the value of the property affected should be calculated.

The Applicable Law

[16] Section 18(1) of the Act states:

> "In all cases of reference to arbitration the Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire."

[17] Section 19(2) of the Act states:

> "Where an arbitrator or umpire has misconducted himself or herself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside."

[18] The Act does not define misconduct and so one must look to case law to determine whether there has been misconduct on the part of an arbitrator in the given circumstances of a case. The Privy Council in National Housing Trust v YP Seaton & Associates Company Limited[3] in relation to the term misconduct stated as follows:

> "As Atkin J remarked with regard to the word "misconduct" in Williams v Wallis and Cox [1914] 2 KB 478, 485: "That expression does not necessarily involve personal turpitude on the part of the arbitrator, and any such suggestion has been expressly disclaimed in this case. The term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice."

Or as Russell on Arbitration (20th ed (1982)) put it at p 409:

> "Misconduct' is often used in a technical sense as denoting irregularity, and not any moral turpitude. But the term also covers cases where there is a breach of natural justice. Much confusion is caused by the fact that the expression is used to describe both these quite separate grounds for setting aside an award; and it is not wholly clear in some of the decided cases on which of these two grounds a particular award has been set aside."

[19] There must be more than a mere error of law or fact. As Sir John Donaldson MR in **Moran v Lloyd's (A Statutory Body)**[4] put it:

> "For present purposes it is only necessary to say, … that the authorities established that an arbitrator or umpire does not misconduct himself or the

[3] [2015] UKPC 43 at para. 51.

[4] [1983] 1 QB 542 at p. 549F.

> proceedings merely because he makes an error of fact or law. …"

[20] In the Jamaican case of R.A. Murray International v Brian Goldson,[5] the Court said:

> "…"the expression "misconduct" is of wide import and does not necessarily connote that the arbitrator has been guilty of moral turpitude. It ranges from a fundamental abuse of his position, i.e. "on the one hand, that which is misconduct by any standard, such as being bribed or corrupted, to "mere 'technical' misconduct, such as making a mere mistake as to the scope of the authority conferred by the agreement of reference. That does not mean that every irregularity of procedure **amounts to misconduct".** Our Act does not define misconduct, and it is tolerably clear that it is difficult to define exactly what this term means." (my emphasis)

[21] In the case of Belize Natural Energy Ltd. v Maranco Ltd.[6] Mr. Justice Anderson spoke to the nature of arbitration. He stated as follows:

> "Parties to an arbitration agreement make the conscious decision to prefer the prompt, expedient, and final settlement of their disputes through the arbitral process rather than the often protracted process of court adjudication. As it is sometimes put, they choose finality over legality. …
>
> The courts do retain residual responsibility for guaranteeing the integrity of the arbitral process in ensuring, for example, the application of the principles of natural justice but court involvement should be as minimal as possible. The margin of judicial discretion to intrude into an arbitral award is exceedingly narrow. …"[7]

[22] The Act does not specify the grounds on which an arbitration award may be remitted and on its face the power given to the court under section 18(1) is very wide.[8] A court should be slow to remit, and ought not to do so, unless there is good reason for the remittal. In Belize Natural Energy, Mr. Justice Anderson stated that four grounds were identified in nineteenth century authorities as entitling a court to remit: (1) where the award was bad on its face; (2) where there had been misconduct on the part of the arbitrator; (3) where there had been an

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[5] Claim No. 2012 CD 0046 at para 19.
[6] CCJ Appeal BZCV2014/004.
[7] ibid, at paras. 16-17.
[8] Para. 23 of Belize Natural Energy.

admitted mistake and the arbitrator asked that the matter be remitted and (4) where additional evidence had been discovered after the making of the award.

[23] In the case of King and Another v Thomas McKenna Ltd. and Another,[9] the court said:

> "… **taking into the account the fact that the parties had chosen arbitration,** where fina**lity predominated over legality, and the court's ultimate duty to** enforce awards, the remission jurisdiction was not to be invoked to permit the correction of errors of judgment on fact or law, but that it did extend to cases where, due to some mishap or misunderstanding, some aspect of the dispute had not been adjudicated on in a manner to which the parties were entitled and it would be inequitable to allow the award to take its effect without further consideration by the arbitrator; …" (my emphasis)

[24] In Belize Natural Energy, it was stated that:

> "… **Misconduct must be clearly established since setting aside an award is** obviously a drastic remedy which unravels and unwinds the affected arbitral award, so resulting in the wastage of time and costs. Not every technical error amounts to misconduct; something substantial is required so that the award smacks of injustice. In deciding whether there has been misconduct the court does not act as an appellate court reviewing the decision of a lower court. Nor are the general standards of judicial review applicable ex facie since the discretion of the arbitral tribunal should not **be fettered in the same manner as that of a judge. …**[10]

[25] In addition to misconduct, it has been held that an award could be set aside for an error of law on the face of the record. The error must however reach the level of being so serious or substantial or fundamental that the court cannot permit it to stand. It is not enough to simply point to an error.[11]

Particulars of Misconduct

[26] The claimant alleges the following as the particulars of misconduct on the part of the Arbitrator:

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[9] [1991] 2 QB 480 at p 488.
[10] Para. 28 of Belize Natural Energy.
[11] Galway City Council v Kingston [2010] 3 LR 95.

Notice Requirement

(a) The Arbitrator made an affirmative finding of fact at paragraph 44 of her award that LUCELEC gave notice to the claimant in accordance with section 8(3) of the ESA in the absence of any evidence, when the burden of proving compliance with the notice requirement was on LUCELEC and they failed to discharge that burden.

(b) The Notice form submitted by LUCELEC contained no acknowledgement by the claimant that the claimant had received the requisite notice.

(c) The Arbitrator failed to determine that LUCELEC had committed trespass despite the fact that there was no evidence to support a finding that notice had been given to the claimant;

Jurisdiction

(d) The Arbitrator having at paragraph 35 indicated her inability to deal with all the heads of the claimant's claim, failed to seek the claimant's approval to proceed with the arbitration.

General Conduct

(e) The Arbitrator at paragraph 34 of the award opined that the documents before her clearly showed that all material times, attempts were made by LUCELEC to negotiate compensation without giving any particulars of dates and time.

(f) The Arbitrator refused to make an award of aggravated damages when no such claim was made by the claimant in his pleadings.

(g) The Arbitrator unfairly and without particularity blamed the claimant for the delay in obtaining compensation by determining at paragraph 37 that the delay could not be laid at the feet of LUCELEC.

Valuation of Property

(h) The Arbitrator allowed the parties to obtain a current joint valuation of the claimant's land but resorted to the 2005 valuation without giving any justifiable ground for ignoring the current valuation.

(i) The Arbitrator ignored the conclusion of Dr. Frederick Isaac at paragraph 6(d) of his report and determining at paragraph 45 that the claimant had produced no proof of diminution in value of the property.

Discussion

Notice Requirement, Trespass and Nuisance

[27] Section 8 of the ESA confers on LUCELEC the power to enter on to property of third parties for the purpose of erecting any pipes, electricity lines or other apparatus to be used in its operations. The section also states in subsection (3) that in the exercise of this power under subsection (2)(a), LUCELEC must first serve written notice of its intention on the owner or occupier of any private land or property if the name and address of such owner or occupier can reasonably be ascertained. If the name and address of such owner or occupier cannot reasonably be ascertained, LUCELEC must post such notice in a conspicuous place on the land or property in question. If such owner or occupier, within 15 days of such notice, gives written notice to LUCELEC of his or her objection thereto, the matter must be referred by LUCELEC to the Minister; and LUCELEC may not enter upon private land or property in question if the Minister, within 15 days of being notified by LUCELEC of any such objection so directs.

[28] Counsel for the claimant, Mrs. Lydia Faisal ("Mrs. Faisal") in closing submissions filed on 4th January 2018 submitted that the Arbitrator came to her conclusion on the issue of notice by pure speculation and conjecture. She also submitted that the obligation to prove service was on LUCELEC and they failed to provide any documentary evidence such as an affidavit or letter to prove service. Counsel argued that the requirements to give notice and prove notice are statutory and therefore the Arbitrator could not have come to the conclusion that LUCELEC had complied with the notice requirement in the absence of proof. The arguments presented in relation to the statutory requirements in articles 1133 and 1134 of the Civil Code[12] were not part of the closing arguments which were before the

[12] Cap. 4.01, Revised Laws of Saint Lucia 2013.

Arbitrator. It is therefore wrong to now suggest that the Arbitrator did not have regard to these articles in coming to her conclusion on the issue of notice.

[29] Nowhere in the claimant's issues to be decided were damages claimed for breach of the articles in the Civil Code and this cannot now be introduced in closing submissions. A review of the Arbitrator's award is not an opportunity to have a second bite at the cherry.

[30] Counsel for LUCELEC, Mr. Deale Lee ("Mr. Lee") argued that the claimant did not specifically plead either in his claim or witness statement that there was no service of the notice as required by section 8 of the ESA. He stated that the issue of service was only raised indirectly in a letter exhibited to the witness statement. The issue not having been raised in the claim was not specifically addressed in LUCELEC'S witness statements other than through a copy of the notice being exhibited.

[31] Mr. Lee further submitted that there was no oral testimony by either party and the matter was determined on paper with the consent of the parties. The Arbitrator therefore sought to determine the issue of service based on the evidence adduced by the parties which included the copy of the notice, letters from the claimant's attorneys which did not speak to the issue of non-service, the letter from the claimant's daughter which mentioned non-service and the claimant's witness statement which did not mention this issue at all.

[32] Mr. Lee submitted that the Arbitrator's finding was correct. He went on to submit that it is not for the Court to determine whether the arbitrator's finding of fact was correct or not but rather whether there was support for the finding or whether the finding was one that the Arbitrator could have reasonably made. Mr. Lee further argued that the Arbitrator is limited to the facts and law adduced by the parties. The claimant he said did not raise the issue of notice as he has before this Court and it would therefore be inappropriate for the Court to assess the Arbitrator's

finding of fact against facts or issues of law not raised before the Arbitrator.

[33] Mr. Lee relied on the case of NH International (Caribbean) Ltd. v NIPDEC Ltd.[13] in which Lord Neuberger stated that it was not open to a court to interfere with or **set aside an arbitrator's finding of fact unless there was no basis on which the** arbitrator could have concluded as he or she did. He noted that the mere fact that a judge takes a different view, even one that is strongly held; from an arbitrator on such an issue is simply not a basis for setting aside or varying an award. The conclusion of fact must be unsupported by the evidence.

[34] Counsel, Mrs. Faisal however submitted that NH International is different from the case at bar. In NH International the Arbitrator conducted a hearing and heard evidence from the witnesses which did not happen in this case. I however do not think that this means that the NH International principles are not applicable to the instant case.

[35] In NH International, Lord Neuberger stated:[14]

> **"The Arbitrator's conclusion in this connection was one of fact rather than** law. It can be said to be a finding of secondary fact or even the making of a judgment rather than a strict fact-finding exercise, but it is not a resolution of a dispute as to the law. In those circumstances, save (arguably) to the extent that it might be contended that there was simply no evidence on which he could make the finding (or reach the judgment) that he did, or that no reasonable arbitrator could have made that finding (or reached that judgment), it was simply not open to a court to interfere with, or set aside, his conclusions on such an issue.
>
> Where parties choose to resolve their disputes through the medium of arbitration, it has long been well established that the courts should respect **their choice and properly recognise that the arbitrator's findings of fact,** assessments of evidence and formations of judgment should be respected, unless they can be shown to be unsupportable. In particular, the mere fact that a judge takes a different view, even one that is strongly held, from the arbitrator on such an issue is simply no basis for setting aside or varying the award. Of course, different considerations apply when

[13] [2015] UKPC 37.
[14] At paragraphs 28 and 29.

it comes to issues of law, where courts are often more ready, in some jurisdictions much more ready, to step in."

[36] It is noteworthy that there is no stipulation as to what proof is required to satisfy that there was service of the section 8 notice. It therefore means that it was for the Arbitrator to consider all the evidence and make a finding.

[37] At paragraphs 20 to 29 of the award the Arbitrator carefully detailed the basis for her finding that on a balance of probabilities that there had been service of the notice. It is not for me to agree or disagree with the Arbitrator but to assess whether in her conduct of this aspect of the Arbitration she did misconduct the proceedings and that no reasonable arbitrator would come to the finding that she did as regards notice. I can find no basis for such a finding. A mere error of fact does not constitute misconduct on the part of the Arbitrator.

Jurisdiction

[38] Section 22(1) and (2) of the ESA states:

> "(1) In the exercise of any powers conferred by this Act, the Company shall cause as little inconvenience and damage to other persons as is reasonably practicable and the Company is liable to pay compensation to any person who suffers damage to his or her property in consequence of the exercise of such powers by the Company.
> (2) The amount of such compensation must, failing agreement, be determined by arbitration." (my emphasis)

[39] When one examines the terms of the Order dated 31st March 2011, it appears that the parties had agreed that the issue of compensation would be arbitrated. It would seem that there was agreement that the claimant had suffered damage to his property and thus was entitled to compensation. The judge's order was therefore specific and the appointment of the Arbitrator was made pursuant to section 22(2) of the ESA which specifically relates to arbitration in circumstances where the amount of compensation to be paid cannot be agreed. That clearly was the extent of the matter referred to arbitration and what it appears was contemplated by the court's referral.

[40] Subsequently, the matter took a turn which I do not think was envisaged by the court but which may nonetheless have been permissible given the nature of arbitration proceedings. When the parties agreed the terms of reference to be determined by the Arbitrator it would appear that they agreed to put more than just the issue of compensation before the Arbitrator. As submitted by Mr. Lee, the arbitration process is controlled and driven by the parties and it is therefore competent for the parties to determine what matters were to be put to the Arbitrator for determination. Based on the terms of reference put to the Arbitrator, the parties clearly expanded the scope of the Arbitration and it meant that the Arbitrator should have made a finding with respect to the issues of trespass and nuisance. The issue of compensation, if any, would then be considered and as part of that consideration, whether the claimant was entitled to the other remedies which he sought.

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[41] In the award at paragraph 15, the Arbitrator stated that counsel for the claimant advised of the withdrawal of the part of the claim relating to personal injury. She then stated that the only issues in the terms of reference left for her determination were:

(a) Whether the claimant is entitled to relocation to an alternative property or removal of the power lines;

(b) Whether the claimant is entitled to damages for alleged trespass and nuisance caused by LUCELEC to the claimant's land; and

(c) Whether the claimant having pleaded the same is entitled to interest and costs on all sums awarded.

[42] At paragraph 19 of the Award, the Arbitrator stated that the parties agreed that compensation was due and owing to the claimant but that they disagreed as to quantum. This is where the matter seemed to have gone wrong. She then indicated that in determining what amount was due and owing, the issues to be addressed were: (a) whether LUCELEC's actions constituted a nuisance or trespass; (b) whether the claimant is entitled to claim for removal of the power

lines or relocation to an alternative property; (c) what amount of compensation is due to the claimant; (d) the appropriate date by which the compensation should be assessed; and (e) whether the claimant is entitled to interest and costs. On the one hand, the Arbitrator acknowledged that the parties only disagreed as to quantum but then agreed to consider other matters which the parties had put to her.

[43] Mrs. Faisal submitted that the Court should deal with the issue of trespass since the Arbitrator indicated that section 22 of the ESA limited her jurisdiction to compensation only. She also argued that this meant that the Arbitrator declined to deal with any other issue apart from compensation. I am not so sure that this is quite accurate.

[44] The issue of whether damages ought to have been paid to the claimant would have necessitated a finding as to whether the defendant had indeed committed the torts of trespass and nuisance. Counsel for the defendant, Mr. Lee argued that the Arbitrator dealt appropriately with the issue of nuisance. It was his submission that there was no evidence before the Arbitrator to allow her to address the issue of nuisance as a distinct issue from trespass. He further argued that even if there had been evidence to establish nuisance, the claimant had adduced no evidence of loss to enable the Arbitrator to assess damages.

[45] Whilst it has not been raised by the claimant on its pleadings, a review of the award clearly shows that the Arbitrator did not make any finding with regard to whether there was nuisance which was clearly a matter put before her based on the terms of reference. The Arbitrator made no findings that there was no evidence to support a claim for nuisance or that had such been proven, there was no evidence of the loss suffered. These are statements made by the defendant and not supported by anything in the Arbitrator's award. The reason for the lack of a finding or mention in relation to nuisance cannot be left to inference or imagination.

[46] Having identified the issues to be determined, the Arbitrator concluded at paragraph 35 that section 22(2) limited her jurisdiction to the grant of compensation. The claimant submitted that the Arbitrator should have obtained consent to proceed with the arbitration given that posture.

[47] At paragraph 35, the Arbitrator stated as follows:

> "The Claimant has sought remedies pleaded in the alternative. Firstly, he seeks either the removal of the Power Lines or acquisition of the Property by the Respondent. If I am not minded to grant these remedies, the Claimant seeks compensation. Unfortunately, Section 22(2) of the Act limits my jurisdiction to the grant of compensation. Consequently, I am unable to consider granting removal of the Power Lines or relocation to an alternative property as this is outside my purview."

[48] Mr. Lee, counsel for the defendant submitted that even if the Arbitrator had found that she had jurisdiction, the claimant led no evidence to justify an order for relocation or removal of the power lines. Counsel argued that it cannot be said that the conduct of the proceedings by the Arbitrator resulted in a decision that was unjust to the claimant. Again, this submission does not reflect any of Arbitrator's findings. There was no assessment of the evidence to make any determination as to the adequacy or not of the evidence to support an order for relocation or removal of the power lines.

[49] The Arbitrator accepted the terms of reference. If it is that the grant of compensation was all that was within her jurisdiction, then she ought to have raised with the parties the extent of her jurisdiction as a preliminary issue. However, by accepting the terms of reference, she accepted issues which were outside compensation for determination and was obliged to consider all the issues.

[50] Mrs. Faisal now asks the Court to deal with the outstanding issues which the Arbitrator declined to deal with. This Court cannot on this claim now before it embark on any determination of the issues which were before the Arbitrator as effectively the matter is still subject to an arbitration award unless that award is set

aside.

[51] By not dealing with the issues put before her, the Arbitrator did not operate within the parameters as mandated by the scope of the terms of reference and as a result I find that she misconducted the proceedings. The manner in which the proceedings were conducted meant that the full extent of **the claimant's** claim was not considered. I am of the view that the manner in which the Arbitrator conducted the arbitration led to the claimant not having the benefit of determination on all of the issues which he raised.

General Conduct and Value of the Property

[52] The Arbitrator discusses the issue of the compensation payable pursuant to section 22 of the ESA and determined that an award of damages for trespass or nuisance would place the claimant in no better position than he would be under the ESA.

[53] Having made the finding above, it is not necessary for me to consider the matters raised by the claimant at paragraphs (4), (6) and (7) of the particulars of misconduct. In any event, none of these constitute misconduct in the sense described by the case law. If the award is set aside, then the issues of whether and if so what damages or compensation should be awarded would have to be considered anew. However, the Arbitrator in her award provided the basis upon which she used the 2005 valuation as opposed to the 2015 valuation and I am satisfied that the Arbitrator did not apply wrong legal principles in making that determination. The Arbitrator also discussed the diminution in value of the property and concluded that there was no evidence before her to support such, and made no award in that regard. Again it is not for me to determine whether that is correct. It suffices that the Arbitrator made a finding on the issue.

Error in the Quantity of Land owned by the Claimant

[54] Mrs. Faisal for the first time in her written submissions raises this as an issue claiming that the arbitration proceeded on the premise that the claimant owned 40,192 square feet when the actual amount of land owned by the claimant was less. She provided an explanation for this. However, this is not a matter which was known to the Arbitrator. Neither was it pleaded as part of the claimant's case.

Relief Claimed

[55] In the fixed date claim filed on 18th April 2016, the claimant claimed the following: That the award of the Arbitrator be set aside, the issues of nuisance, notice and the date for calculating the value of the land in question be determined by the court before the matter is remitted to the Arbitrator for further consideration.

[56] In written submissions, the claimant now seeks damages for breach of statutory obligation to give notice, damages for trespass at the rate of $150.00 per month for the period of the trespass with interest, damages for nuisance and removal of the structure and costs.

[57] The remit of the fixed date claim was to determine whether a case has been made out for remitting the award to the Arbitrator or for setting it aside. These are the only remedies which the Court can grant on this fixed date claim.

Conclusion

[58] To set aside or remit? That is indeed the ultimate question. The manner in which this arbitration proceeded has led to confusion. The parties did not assist the Arbitrator and appeared not to realize that they proceeded to operate outside the scope of what had initially been agreed and on which basis the judge made the order referring the matter to arbitration pursuant to section 22 of the ESA. The Arbitrator having accepted the terms of reference put to her by the parties did not address all of the issues and it is only fair that the Arbitrator be called upon to determine the matters which she incorrectly did not determine. This is so even if

the ultimate outcome may have the same result. I do not think that this is a case for setting aside of the award as that is reserved to cases where there has been a serious injustice done to the claimant[15].

[59] In the case of McCarthy v Keane,[16] the Irish Supreme Court noted that:

> "the discretion to remit could be invoked where it would be inequitable for the award to take effect or where the dispute between the parties had not been adjudicated in accordance with overarching requirements of fairness or to the extent envisaged in the arbitrator's terms of reference." (my emphasis)

[60] Setting aside an award in this case would lead to additional cost and time in a claim filed in 2010. I consider that remission to the Arbitrator is the more appropriate remedy in the circumstances of this case.

Order

[61] In light of the foregoing discussion, I make the following orders:

(a) The matter is remitted to the Arbitrator for determination of the following aspects of the **terms of reference: (a) whether LUCELEC's actions constituted** a nuisance; (b) whether the claimant is entitled to damages for nuisance, and (c) whether the claimant is entitled to damages for nuisance and (c) whether the claimant is entitled to removal of the power lines or relocation to an alternative property;

(b) The Arbitrator is at liberty should she think it necessary having considered the issues identified above to re-visit the aspect of her award relating to compensation.

(c) The award of the Arbitrator shall be made within 3 months of the date of this Order.

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[15] See Fayleigh Ltd v Plazaway Ltd Trading as Hotel Partners and Francis Murphy, [2014] IEHC 52.
[16] [2004] 3 I.R. 617.

Costs

(d) The claimant was not successful in relation to all of the grounds of misconduct identified in the pleadings and the claimant must bear some responsibility for the manner in which this entire arbitration was handled. In light of this, I am therefore of the view that in the circumstances the appropriate order should be that the defendant should pay costs to the claimant reduced by 50% of the prescribed costs which would ordinarily be payable on this claim. The defendant is therefore to pay the claimant prescribed costs in the sum of $3,500.00.

[62] I apologise to counsel and the parties for the delay in delivering this judgment.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar of the High Court