Neutral Citation Number: [2006] IEHC 271

THE HIGH COURT

[2004 No. 253 SP]

IN THE MATTER OF THE ARBITRATION ACTS, 1954 AND 1980
AND IN THE MATTER OF AN ARBITRATION

BETWEEN

MALCOLM MARSHALL

PLAINTIFF

AND
CAPITAL HOLDINGS LIMITED
TRADING AS SUNWORLD

DEFENDANT

Judgment of Mr. Justice Roderick Murphy dated the 21st day of July, 2006.

1. The Arbitration Reference
On 22nd October, 1999 the plaintiff's travelling companion, David McElroy, booked a Christmas and New Year, 2000 holiday for and on behalf of the plaintiff and himself with the defendant in the Paradiso Apartments, Playa del Ingles in Gran Canaria. The booking was from 24th December, 1999 to 8th January, 2000.

The agreement with the defendant, who was the tour organiser, contained a condition that disputes be referred to arbitration under the Chartered Institute of Arbitrators, Irish Branch scheme.

The plaintiff says that, as a result of a fall on "unguarded and unmarked steps" in the accommodation allocated to him and his travelling companion in the Paradiso Apartments, he sustained severe personal injuries, inconvenience and expense which he detailed in a letter of complaint to the defendant on 18th January, 2000.

The plaintiff, as claimant in the reference, was represented by solicitor and counsel.

The arbitrator duly accepted the nomination by the Chairman of the Chartered institute of Arbitrators, Irish Branch on 13th November, 2000. The arbitrator convened a preliminary meeting with the parties later that month and directed points of claim and points of defence.

In accordance with the arbitrator's order for directions neither party requested a reasoned award. Pleadings were closed on 2nd July, 2001. A hearing date was agreed for 12th September, 2001.

By interim award dated 12th September, 2001, the arbitrator thereby awarded and determined that the plaintiff's claim had failed. The issue of costs was reserved to a further hearing and final award.

Following the further hearing, a final award was made on 21st November, 2001, whereby the arbitrator awarded and determined that the respondent (the defendant herein) recover from the claimant (the plaintiff herein) the costs of the reference and award.

The Taxing Master, by Certificate dated 12th July, 2004, taxed the costs of the respondent to the sum of €9,690.13.

2. The High Court Proceedings
Over two and a half years later, by special summons dated 25th June, 2004, the plaintiff in person, having claimed an extension of time, applied to the court for an order to set aside both the interim award dated 12th September, 2001, and the final award of an arbitrator dated 21st November, 2001, and/or to grant leave to have the matter re-tried in a court of competent jurisdiction.

The special endorsement of claim also sought an order declaring that any consumer who was a party to any contract requiring any dispute to be referred to arbitration should not only be told of this clause or condition but that the consequences of such condition be explained fully in advance of signing such a contract. The plaintiff also sought a declaration that, even in the event of such circumstances having been satisfied, if a dispute should thereafter arise the consumer should still have the option of serving notice on the other party to the contract confirming that it was the consumer's wish, regardless of any alleged prior consent to arbitration, to have the dispute resolved at a trial to be heard in a court of competent jurisdiction in accordance with the normal legal rules of Irish law, rather than by way of referral to arbitration.

3. Interim award
The first interim award dated 12th September, 2001, recited as follows:

> (1) By an agreement in writing dated on or about 27th October, 2000 and made between the claimant and the respondent, it was agreed by the parties that disputes and differences arising between them out of or in connection with a holiday taken by the claimant in Gran Canaria in or about December, 1999/January, 2000, which was purchased from the respondent by the claimant, be referred to the arbitration of an arbitrator to be nominated by the Chairman of the Chartered Institute of Arbitrators, Irish Branch, in accordance with the terms of the arbitration scheme arranged by the said branch for the resolution of disputes involving the trading of tour organisers (as defined in s. 3 of the Package Holidays and Travel Agents Act, 1995).
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> (2) By letter dated 9th November, 2000, the Chairman of the Chartered Institute of Arbitrators, Irish Branch, nominated (the Arbitrator) in this reference and invited (him) to accept the said nomination.
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> (3) By letters to the said Chairman of the Chartered Institute of Arbitrators, Irish Branch, dated 13th November, 2000, (the Arbitrator) accepted the nomination offer said.
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> (4) By letters to the parties to this reference, dated 15th November, 2000 (the Arbitrator) convened a preliminary meeting for the purpose of giving directions on procedural matters for the 24th day of November, 2000, which said meeting having been at the request of the respondent rescheduled to the 1st day of December, 2000, the preliminary meeting was held on that day. The representatives and parties agreed that (the Arbitrator) had been validly appointed and consented to the directions to be given.

(5) By order for directions in writing embodying the matters consented to by the parties and dated 14th December, 2000, (the Arbitrator) ordered the procedure to be adopted in the reference and formally communicated to the parties the applicable rules of the Chartered Institute of Arbitrators, Irish Branch.

(6) On the 4th day of January, 2001, the claimant delivered points of claim in writing, claiming damages as against the respondent for breach of contract, negligence and breach of duty, including statutory duty, by reason of the claimant's fall while in the accommodation premises provided by the respondent, its servants or agents, as part of the package holiday to be provided to the claimant in Gran Canaria from 24th December, 1999 to 8th January, 2000, pursuant to the agreement made between the claimant and the respondent made on or about 22nd October, 1999, in consequence whereof the claimant alleged he sustained severe personal injuries, loss, damage, inconvenience and expense on the basis of the allegations of fact and law and that the respective particulars thereof furnished in the points of claim aforesaid.

(7) By notice for particulars dated 2nd February, 2001, the respondent requested further and better particulars of the claimant's claim.

(8) Replies to the respondent's notice for particulars were delivered by the claimant on or about 15th March, 2001.

(9) By notice in writing dated 27th April, 2001, the solicitors (for the claimant) requested that a final time limit be set for delivery of the points of defence.

(10) By notice dated 7th June, 2001, the solicitors for the claimant furnished further particulars of the claimant's personal injuries and also requested that (the Arbitrator) set a time limit for points of defence or judgment in default thereof.

(11) By order for directions dated 8th June, 2001, (the Arbitrator) directed peremptorily the delivery of points of defence not later than 5 p.m. on 22nd June, 2001 in default whereof (the Arbitrator) would proceed as he considered just in accordance with the law and rules applicable.

(12) By enclosure with a letter dated 22nd June, 2001, received on 25th June, 2001, the solicitors for the respondent delivered points of defence which placed in issue all (material) matters in dispute arising out of or in connection with the contract aforesaid.

(13) The points of defence aforesaid also raised issues and arguments of law. No reply was required. In consequence, the pleadings were in accordance with (the Arbitrator's) order for directions closed from 2nd July, 2001.

(14) In consequence of the matters aforesaid and further correspondence with the parties, a hearing date was set by consent for 12th September, 2001.

(15) (The Arbitrator) carefully considered the pleadings and particulars furnished together with the evidence adduced at the hearing.

(16) On the hearing date aforesaid, (the Arbitrator) heard (counsel's) opening statement and the evidence of (the claimant and an engineering witness on behalf of the claimant and an employee of the respondent) all of whom were duly sworn and to whose evidence and demeanour (the Arbitrator) had due regard.

(17) (The Arbitrator) further heard legal submissions on behalf of the claimant and the respondent, to all of which he had due regard.

(18) In accordance with (the Arbitrator's) order for directions No. 2, neither party had requested a reasoned award.

(19) (The Arbitrator) thereby awarded and determined as follows:

(A) the claimant's claim fails; and

(B) notwithstanding (the Arbitrator's) award for directions dated the 14th day of December, 2000, at paragraph 11, and having regard to the history of the proceedings, (determined) that he would hear the parties at a date to be fixed regarding the final award of costs and reserved his award as to the costs of the reference including liability for his fees as between the parties. In all other respects, the award was (the Arbitrator's) final award.

4. Final Award

The final award was dated 21st November, 2001 and referred to the interim award and to the order for directions in relation to costs which provided that certain detailed costs would be costs in the arbitration:

It had been agreed that costs of the Arbitrator paid by one party were to be recoverable from the opposite party subject to the terms of any award for costs and otherwise on a 50:50 basis.

The Arbitrator referred to the submissions on behalf of the claimant and was satisfied that the matters raised were not such as would require or permit the Arbitrator to depart from the principle originally accepted by the parties that costs should in general follow the event.

Therefore the Arbitrator awarded and determined that the respondent recover from the claimant the costs of the reference in award when the same were taxed and ascertained pursuant to s. 29(2) of the Arbitration Act, 1954.

The claimant's notice of application dated 19th May, 2004 had previously asked the court to make enquiries and to reduce the amounts of costs sought and to grant a stay of execution on the recovery of costs until the matter be re-tried. Reference was also made to an application for an order to be granted requiring the solicitors on record for the claimant to undertake to pay the amount of any costs so measured by their insurers as per the claimant's agreement with his solicitors. This was not, however, a matter that was addressed at the present hearing.

A bill of costs was prepared by the respondent's solicitor which included witnesses' expenses, counsel's fees and arbitrator's fees as certified by the Taxing Master on 12th July, 2004, after allowing for reductions of over €2,000.

5. Evidence on affidavit
5.1 The proceedings comprise over a dozen affidavits: three extensive affidavits of the plaintiff relating to the special summons; four relating to interlocutory matters and a further three affidavits supporting the plaintiff's claim for damages.

There are two replying affidavits and an affidavit of discovery on behalf of the defendant.

5.2 I have considered the following affidavits, many of which refer to the facts of the claim which was heard by the arbitrator, and summarises the more significant affidavits.

> 15th October, 2004: Affidavit grounding claim, stating, *inter alia*, that the deponent reluctantly agreed not to make any application to court at time of award (12 paragraphs). (See 5.3 below).
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> 20th October, 2004: Affidavit of discovery of John Kinane on behalf of defendant.
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> 15th November, 2004: Replying affidavit of Caroline O'Reilly, solicitor for the defendants. (see 5.4 below)
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> 28th January, 2005 Plaintiff's further replying affidavit opposing the awards of the arbitrator; referring in general to consumer arbitration and asserting a challenge to the arbitration clause inserted into holiday contracts. (see 5.5 below)
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> 11th February, 2005: Seeking an extension of time to appeal the order of the Master striking out the proceedings.
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> 5th April, 2005: Requesting further discovery.
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> 20th October, 2005: Grounding an application to strike out the defendant's defence on the grounds that the defendant had failed to comply with an order for discovery by the Master on 11th May, 2005. (Defendant to pay the plaintiff the costs of that motion.)
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> 12th December, 2005 Affidavit of David McElroy, travelling companion re booking, not being able to recall signing and relating to the incident which he heard but did not see but "nearly fell" in same area.
>
> 12th December, 2005 Affidavit of Weldon Costello re subsequent inspection, standard and photographs.
>
> 8th February, 2006: Grounding affidavit of Fionnuala Ryan, solicitor for the defendant, seeking security for costs following a letter of 25th January, 2006 requesting same. Reference was made to the plaintiff's financial circumstances, loss of fee income and to his letter of 25th July, 2005 to Dr. Staunton regarding three claims arising from road traffic accidents in 1994, 1997 and 2001. Costs awarded on taxation remained outstanding since 11th June, 2004. (31 paragraphs)
>
> 9th March, 2006: Plaintiff's grounding affidavit for leave to appeal Master's order requiring a strike out of defence and plaintiff's application to strike out motion for security for costs. (85 paragraphs).
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> 23rd March, 2006: Plaintiff's affidavit "to clarify issues" exhibiting note dated 27th December, 1999 from the defendant's doctor and to an additional report dated 23rd March, 2006 from Mr. Val O'Brien, chartered building surveyor, regarding the steps in the apartment. (see 5.7 below)

The plaintiff referred to commentaries and case law on consumer arbitration in the European Union and the United States. He also referred to a recent affidavit of Noel Quirke exhibiting photographs of the apartment. (Neither these affidavits nor the letter of Mr. O'Brien dated 23rd March, 2006 were, of course, before the Arbitrator)

In relation to these three affidavits and the affidavits of Mr. McElroy and of Weldon Costello, both of 12th December, 2005, it is clear that they were not before the Arbitrator and, indeed, it was not appropriate that they be considered by this Court in relation to the setting aside of the Arbitrator's award as they refer to matters which are appropriate to the reference rather than to these proceedings to set aside the award.

5.3 The plaintiff's extensive grounding affidavit, sworn 15th October, 2004, stated that the defendant had reluctantly agreed not to make any application to the court at the time of the award.

Much of the extensive affidavit consists of submissions in relation to general matters which, though not appropriate to the plaintiff's claim, have been considered by the court.

The plaintiff said that he was acting personally as a consumer but also as a matter of public importance in the interests of the common good. He further stated that he never wanted to proceed by way of arbitration: he went where he was led. He said he took every possible opportunity to raise his concerns with all relevant parties at the first available opportunity at the time of reference; that the defendants had caused delay by their actions and that he had been abandoned by the original solicitors on record for him.

He had prepared the papers without the benefit of legal assistance. He had understood that the matter had been closed several years ago but was increasingly distressed and anxious about the protracted nature that the matter had taken in relation to a relatively minor matter. He said he had no alternative but to apply to the court and that he had no interest in costs and did not seek costs in relation to his application. He had considered just paying the costs measured by the Taxing Master in the arbitration but felt that the matter raised serious issues in relation to consumers. For his own peace of mind he had consented to the taxation proceeding. He believed the level of costs was out of proportion to the value of the matter in dispute. He understood that the application to this Court would put a stay on the defendant's ability to recover its costs. If the court found in his favour he would request that any costs paid should be refunded to him by the defendants.

He referred to the complaint, to the arbitration and taxation of costs in the sum of €11,300 awarded against him. (The Taxing Master's certificate reduced this to €9,690.13)

He said he did not give an informed consent to the arbitration. His travelling companion, David McElroy (affidavit of 7th December, 2005) had no recollection of actually signing an arbitration clause. He said he wanted to appeal the award of the arbitrator but was told there was no appeal and, to the limited application that could be made, that his case did not warrant such an appeal.

He said that he was only recently aware that the defendant was seeking its costs which he said were approximately ten times the

level of scale had the matter been heard in the District Court rather than by way of referral to an arbitration.

He referred to the arguments in support of arbitration and said that, in his case, it was not swift, informal or low in costs.

He referred to specialised areas of arbitration in contrast.

He said there was a very real danger of consumers being told that their disputes must be referred to arbitration. There was no appeal, which robbed the consumer of certain fundamental rights and created an inequality before the law. The arbitrator did not have to give any reasons for his award and he stated that the arbitrator could ignore the evidence given at the reference. He said the courts were slow to interfere with the award of an arbitrator which was a further disincentive to an aggrieved party.

He referred to the growing number of contracts with arbitration clauses.

He said the consumer who apparently "consents" to arbitration is, in his opinion, giving an uninformed consent. Any procedure which attempted to restrict or deprive a consumer of his rights should be abolished. No solicitor should allow his client to consent to a dispute resolution procedure where, he said, Irish law could be ignored.

In relation to the specifics of his own case, he referred to his claim for negligence and/or breach of duty of care, failing to provide safe accommodation for him; that the defendant was, in reality, the occupier of the premises and had entered into a contractual relation with an unreliable party who reneged on its obligations. He referred to his engineer's evidence which he said was not rebutted.

He referred to the unsafe and dangerous condition of the accommodation which he detailed. The brochure (p. 30) indicated that the Paradiso Apartments were split level. The plaintiff's affidavit of 15th October, 2004 said that the defendant's representative had told him so when he complained of his injuries.

He said the reference took several hours to conclude; that he was very tired and had a very sore head having been injured the previous day in a traffic accident.

He referred to the defendant's defence as being extreme and quite unnecessary.

He said the arbitrator found against him unreasonably, refused to give reasons for his award and that he had instructed his solicitor to appeal. He reluctantly accepted the advice of senior counsel that the value of the case did not warrant an appeal to the High Court. He reluctantly accepted this advice and, as he had heard no more from his solicitor or from the respondent, he thought the matter was at an end. He only became aware of the respondent's claim for costs several years after the event.

He said the parties were hurried into the reference before they had a chance to attempt to settle the matter by way of negotiation.

He said that the arbitrator was clearly hostile to him and that the manner in which he conducted the reference offended the rules of natural justice. The reference was the opposite of informal. He was of the opinion that the arbitrator did not want to entertain the legal submissions of his barrister.

He said there was an unspoken prejudice against him given the triviality of his claim by comparison with what had happened on the previous day, September 11, 2001.

He said he was entitled to the benefit of the doubt and that the arbitrator might have awarded him a low amount of damages. Not to do so demonstrated something seriously wrong in the findings of the arbitrator. To discover that the arbitrator had awarded costs against him, which he understood to be a rarity, he believed highlighted the extreme disapproval of the arbitrator.

He referred to evidence given by the defendant's witness and referred to his travelling companion, Mr. McElroy, nearly falling in the same area.

He said that he was asking the court to acknowledge that there were different categories of people requiring the protection of the law and that consumers as one such category should not be subject to the rigorous and inherent disadvantages of the arbitration process. Consumers should not be subjected to arbitration as a mode of dispute resolution and, if they are, they should have a right of appeal to a court of competent jurisdiction.

The letter sent to the arbitrator dated 23rd September, 2001 and copies to the other parties on the basis that the matter was not yet concluded, referred to the plaintiff's personal injury claim arising out of a road traffic accident, to the award of the court and to the plaintiff's medical condition.

On September 31st, 2001 the plaintiff wrote to his solicitor further to a lengthy letter of the previous day, asking him to put the other side on notice of his intention to appeal.

5.4 Replying affidavit of Caroline M. O'Reilly
Miss O'Reilly, a solicitor with the Vincent Hoey and Company, solicitors for the defendant, referred to the pleadings and to the interim and final award.

The special summons was issued on 25th June, 2004, some two and a half years after the determination of the arbitration proceedings. The taxation of costs concluded on 11th June, 2004.

She referred to the submission within the special endorsement of claim that the plaintiff as consumer should have the option, in the teeth of his having previously consented to arbitration, to proceed to trial. By applying as a claimant pursuant to the Arbitration Acts the plaintiff had tacitly given his approval and confirmed his acceptance of proceeding by way of arbitration. He is only now upset in consequence of his claim having failed, resulting in his now facing a bill of costs.

The deponent referred to O. 56, r. 4 of the Rules of the Superior Courts, which require an application to remit or set aside an award to be made within six weeks after the award has been made and published to the parties, within such further term as may be allowed by the court.

The deponent further asserted that on the merits no cause of action as claimed by the plaintiff has been outlined.

The grounding affidavit contained hearsay evidence and evidence that was not adduced at the hearing of the arbitration which is a matter for dispute between the plaintiff and his legal team.

5.5 The plaintiff's replying affidavit to the defendant's reply dated 28th January, 2005 denied the contents of the defendant's replying affidavit in its entirety. The plaintiff said he is not complaining about the award or the arbitrator itself but also to the whole system of arbitration as it affects and disadvantages customers.

Though there was no reference in the grounding affidavit nor in the affidavit of Caroline O'Reilly, the plaintiff, at this stage, referred to the European Communities (Fair Terms and Consumer Contracts) Regulations, 1995 (S.I. No. 27 of 1995) in support of his assertion that the arbitration clause amounted to an unfair term and, further, that it ran contrary to the spirit of good faith.

The plaintiff said that he had no choice of proceeding by way of ordinary civil bill. While he confirmed that it was his belief that the court should not have to hear an application relating to such a minor matter, he said he had no alternative other than to bring his application to the High Court and was beginning to realise that the costs involved in the taxation procedure related to High Court costs which, he said, was a further disincentive for any consumer attempting to assert his rights. He had a genuine concern about the whole system of arbitration.

He regarded the inclusion of all medical reports by the defendants as being irrelevant and clouding the issue. (This seems to refer to the arbitration hearing rather than to the replying affidavit.) He said that he had written to the arbitrator was sent before he was aware of the award.

5.6 It is not proposed to deal with the affidavits in relation to interlocutory matters which are summarised above at 5.2.

5.7 The plaintiff swore a further affidavit on 23rd March, 2006 which purported to clarify issues.

He enclosed a medical report together with some comments thereon (2-7).

He said his principal concern was for the court: that the defendant had deliberately attempted to mislead in relation to its affidavit of discovery. While the High Court (Butler J.) had upheld the Master's order that discovery was complete, the plaintiff said that that was not to say that it was true or complete. The defendant did not come into court with clean hands and was acting in bad faith. He again referred to the absence of the booking form which was the basis of the contract.

5.8 The affidavit of David McElroy, the plaintiff's travelling companion who, the plaintiff asserts, booked the holiday, sworn on 7th December, 2005 "to provide … evidence for the benefit of the court". He said he booked the holiday through Arrow Travel in Belfast who assisted him in choosing the accommodation with the plaintiff's agreement and paid in full at the time of booking, eight weeks before departure. He did not recall the exact price but recalled that the holiday was expensive. He paid for the extra week for the plaintiff on a single occupancy rate after his departure. He did not recall signing a booking form.

While he was in the bathroom he heard the plaintiff uttering a startled cry and found him on the floor just beyond the unmarked split in the floor level of the apartment. He had noted a few minor cuts and abrasions on his arms and assisted him to get up. The plaintiff then left the apartment to find a representative and seek medical assistance. A doctor arrived within an hour and examined the plaintiff in Mr. McElroy's presence. The following day he accompanied the plaintiff to a clinic to have the plaintiff's prescription filled. He noted that the plaintiff's knee was badly swollen and that his ability to enjoy his holiday was seriously impaired.

He referred to the poor design of the kitchen area and to the split level nature of the floor which he said was "totally invisible and because of this we had to place a row of kitchen stools across the area in order to remind us of the hidden danger".

He referred to the brochure and to the official ratings of the property.

He referred to his meeting with the tour representative, Mr. Billy Milligan, whom he found to be pleasant but not to have the necessary experience to grasp the plaintiff's predicament nor deal with it.

The exhibit of the brochure in relation to the Paradiso Apartments gives them an official rating of 1 "Key" whereas the defendants had awarded it their own rating of "3 Suns".

There would not appear to be any explanation of "3 Suns" in the brochure for 2005/2006 which was provided to the court in relation to the apartments booked. The court notes that all of the apartments and bungalows appear to be 3 Suns (with three, not including Paradiso, to be 3 plus). The hotels and "aparthotel", Los Fariones, are 4 Suns, while the Hotel San Antonio and the Princesa Yaiza Suite are 5 suns. There is no accommodation less than 3 Suns.

6. Booking Conditions

6.1 The booking conditions in the same Sunworld brochure, "Summer Sun" March to October, 1999 provide, inter alia as follows:

> 12 COMPLAINTS
>
> (a) If the Consumer wishes to make a complaint in relation to a holiday, he must immediately inform the Organiser's representative at the location where the Consumer is when the complaint arises and shall if the Organiser requires, complete a form setting out in detail the consumer's complaint. If the Consumer fails to comply with such requirement, the Organiser shall be entitled to recover the costs from the Consumer of any additional expenses incurred by it in carrying out a subsequent investigation of a complaint which is found to be unjustified.
>
> (b) Notwithstanding any action taken under sub-paragraph (a) of this clause the Consumer shall be obliged to notify the Organiser in writing of any unresolved complaint not later than 28 days after his return to the port of departure or termination of the holiday whichever is the earlier. The Organiser shall be entitled a reasonable period of time within which to investigate any written complaint received from the Consumer and to respond thereto before any arbitration or other legal proceedings are initiated by or on behalf of the Consumer.
>
> (c) …
>
> 16 ARBITRATION AND LEGAL PROCEEDINGS.

> Subject to the provisions of sub-clause 12(b) of the these conditions any dispute or difference of any kind whatsoever which arises or occurs between any of the parties hereto in relation to any thing or matter arising under, out of or in connection with this contract shall be referred to arbitration under the arbitration rules of the Chartered Institute of Arbitrators – Irish Branch. Alternatively, claims which fall within the jurisdiction of the small claims court may be referred to that court."

7. Decision of the Court

7.1 The first issue which arises is the absence of a booking form. The plaintiff's travelling companion, Mr. David McElroy, did not recall the signing of a booking form for this holiday with the travel agents which he states was perhaps due in part to the lateness of the booking. No evidence was given as to the relationship the travel agents and the defendant. No objection was taken by or on behalf the defendant Sunworld in relation thereto.

The plaintiff's solicitor referred the plaintiff's claim to arbitration and participated in the reference. There is no evidence that any point was taken in relation to the conditions in the booking form not applying.

The court finds that the plaintiff acquiesced and cannot now claim that the conditions in the booking form did not apply.

7.2 The second issue that arises is the concerns that the plaintiff had with regard to the procedure followed by the arbitrator which the plaintiff submitted was rushed. The arbitrator promptly arranged for a preliminary meeting; granted an adjournment and proceeded by consent with preliminary directions. No objection was taken by the plaintiff or on his behalf. The plaintiff gave evidence to the court that he went where he was led. There was no evidence that he was unwilling or was not advised. He was represented by his solicitor who was present at the preliminary meetings. He, his travelling companion, David McElroy and his engineer gave evidence on his behalf. At no stage did he seek to have the matter litigated. There is no evidence that he requested an adjournment. He was represented by counsel.

The court concludes that the plaintiff was properly advised and fully represented.

7.3 While it is not necessary for the court to consider the evidence given in the arbitration hearing, the court would make the following observation. The brochure clearly referred to the apartment being what was termed "split level" and indeed included a photograph of a typical apartment which indicated two levels. It would seem that from a consideration of that representation that the claimant had such actual or imputed notice such that a reasonable person could conclude that he had or should have been aware of such representation.

7.4 The plaintiff chose to invoke the arbitration clause in the agreement which provided, subject to the provisions of sub-clause 12(b) of the conditions, that any dispute or difference of any kind whatsoever arising occurring between any of the parties should be referred to arbitration. Alternatively, the clause provided that claims which fall within the jurisdiction of the Small Claims Court could be referred to that court.

The provisions of sub-clause 12(b) relating to complaints is arguably wider as it refers to any arbitration or other legal proceedings being initiated by or on behalf of the consumer.

The provision regarding complaints seems to this Court to be reasonable as between the organiser and the consumer. Nothing arises in relation to clause 12. Indeed, clause 12 allows the organiser to investigate any written complaint and to respond thereto before any arbitration or other legal proceedings are initiated by or on behalf of the consumer. It is clear that the consumer is not limited to arbitration.

This becomes clear in clause 16 which is headed "application and legal proceedings". It seems to me to be clear that the defendant does not restrict the choice of a claimant although, it might be argued that the Small Claims Court jurisdiction is in itself limited and indicates that arbitration proceedings are more appropriate for larger claims.

However, it is clear to the court that at all material times in the arbitration, not alone was the plaintiff represented by a solicitor but he was also represented by experienced counsel in the conduct of the arbitration.

The grounding affidavit of the plaintiff in referring to his objection to the arbitration hearing does not indicate that any objection was made regarding the procedure followed at the preliminary meeting nor during the course of the hearing.

It seems clear to this Court that the plaintiff, as consumer, could have initiated legal proceedings even if such proceedings may appear to have been limited to the small claims court. However, it is also clear that the plaintiff could have initiated legal proceedings contemplated in sub-clause 12(b) to which clause 16 is subject.

7.5 The plaintiff also asserts that his only remedy in relation to the setting aside of the Arbitrator's award was to apply to the High Court. Once the plaintiff had initiated the reference he had chosen a dispute resolution mechanism that was final and was not subject to appeal. In choosing to set aside the award he was, of course, obliged to apply to the High Court.

7.6 Order 56, rule 3 of the Rules of the Superior Courts provides:

> "[a]n application to remit or set aside an award shall be made within six weeks after the award has been published to the parties, or within such further time as may be allowed by the court."

The fact that the plaintiff was allowed to issue these proceedings is not conclusive of his right to delay. An extension of time was allowed by Baron J. in *Vogelaar v. Callaghan* [1996] 2 I.L.R.M. 226 on the basis that the award was taken up jointly on a date when the six-week period had already run (at 330).

Even within time the courts are reluctant to set aside an award. In D*oyle v. Kildare County Council and John Shackleton* [1996] I.L.R.M. 252 at 256 the Supreme Court allowed an appeal against the High Court decision to set aside the arbitrator's award pursuant to s. 38. No complaint was made as to the manner in which the arbitration was being conducted. Hamilton C.J. held (at 265) that the common law jurisdiction to set aside an award where an error of law appears on the face of the award should only be exercised sparingly. The Chief Justice referred to the statement of McCarthy J. in *Keenan v. Shield Insurance Co. Ltd.* [1988] I.R. 89 at 96:

> "…every consideration points to the desirability of making an arbitration award final in every sense of the term."

The Chief Justice concluded at 256:

> "Basically what is being sought by the plaintiffs in these proceedings is a complete rehearing of the arbitration and an opportunity of re-arguing the merits of the evidence … Unfortunately perhaps for them they are not entitled to such relief."

The delay of over two and a half years is a matter of some significance, notwithstanding that the plaintiff was granted an extension of time within which to apply to this Court by way of special summons.

The plaintiff is clearly out of time. The delay is inordinate. The court should then examine whether the delay was justifiable or excusable.

7.7 The taxation of costs concluded on 11th June, 2004. Within two weeks the present proceedings issued on 25th June, 2004.

I accept the averments of the plaintiff that he had considered just paying the costs as measured by the Taxing Master and thereby putting the whole matter behind him. He believed, of course, that the level of costs measured was out of proportion with the value of the matter in dispute. He had no difficulty with the Taxing Master who was courteous to him and, indeed, reduced the overall figure. The taxed costs were certified in the sum of €9,690.13.

He understood that the application by way of special summons would put a stay on the defendant/respondent's ability to recover his costs as measured against him in relation to the arbitration process. (See affidavit of 15th October, 2004 grounding the special summons).

Costs may indeed be a contributory factor if not a dominating factor in the issue of these proceedings and, indeed, in the many interlocutory applications that were made before the matter came for hearing before this court.

The court concludes, on the balance of probabilities, that the plaintiff initiated the present proceedings to delay or avoid the payment of costs measured and certified by the Taxing Master. That does not excuse what is inordinate delay.

7.8 The plaintiff seeks an order declaring that any person acting as a consumer should not only be told of the arbitration clause or condition in the contract and have the consequences of such arbitration explained fully to the person in advance of signing such a contract. The plaintiff, indeed, goes further in relation to this order which is, of course, of general nature in relation to which the plaintiff would not appear to have standing to seek such a general order. Such a matter would more appropriately be dealt with by legislation or a draft general effect.

The plaintiff says he is making the application personally and as a consumer but not just for his own sake but as a matter of public importance in the interests of the common good. He has no standing to make such a case. He is not entitled to plead a case on behalf of the public interest.

The court considers the application of the E.C. Unfair Terms in Consumer Contracts Regulation below at 7.14.

7.9 The plaintiff says that he never wanted to proceed by way of arbitration. He said that he went where he was led. There is no substantiation to that assertion. He was advised by solicitor and counsel. He has made no complaint in relation to their conduct of his case.

It is clear that he gave instructions in relation to the arbitration proceedings. The claimant, through his solicitor, initiated and continued with the arbitration proceedings. He has not made any case at the preliminary hearing or the hearing of a claim that he was unwilling to submit the complaint to arbitration. The special damages claimed were more appropriate to the Small Claims Court though, of course, the plaintiff was entitled to claim for loss of earnings and, indeed, for general damages for pain and suffering

He did write what he termed a polite letter to the arbitrator on 23rd November, 2001, believing that the arbitration was not completed. The interim award had been made on 12th September, 2001 and the final award on 21st November, 2001. However, it is clear that the hearing, at that stage, had determined. While he did copy his letter to all of the other parties, it was not appropriate, after the hearing had concluded, to make further submissions outside of the hearing. It would appear, indeed, that the letter was sent by the plaintiff himself and not by his solicitor. There is no evidence that the contents of that letter were raised at the hearing in relation to costs on 21st November, 2001.

The court has taken into account that the plaintiff instructed his solicitors to notify the other parties that he intended to appeal the decision of the arbitrator.

The court also notes that, in interlocutory hearings in this matter the plaintiff has queried the completeness of discovery notwithstanding the ruling of Butler J. on the plaintiff's appeal from the Master's decision. He queries the truthfulness of the discovery, notwithstanding that discovery relates to documents and is not proof of the contents thereof. The appropriate manner of dealing with these matters was to have reference made in the arbitration hearing to the documents, if they were available, or to ask that they be provided before the arbitration hearing. At all times the plaintiff had the benefit of a solicitor and counsel with regard to these matters and, if they were in issue, they could have been dealt with at the arbitration hearing.

The plaintiff complains that the defendants have not acted with clean hands nor in good faith. There is no evidence that such complaint was made at the arbitration hearing.

7.10 It is well settled that the arbitrator derives his authority from the parties who refer the dispute to the arbitrator. Section 9 of the Arbitration Act, 1954, provides that the authority of the arbitrator appointed by or by virtue of an arbitration agreement shall be irrevocable except by leave of the court. In the present case there is no contrary intention expressed in the agreement. The agreement provides for a referral to arbitration under the arbitration rules of the Chartered Institute of Arbitrators – Irish Branch. It also provides that claims which fall within the jurisdiction of the Small Claims Court may be referred to that court.

The parties submitting to arbitration have the same rights of assistance of the court with regard to interlocutory matters as if they had initiated the matter in court by way of litigation rather than arbitration.

In any event, neither party to the reference sought the assistance of the High Court during the reference.

It is clear that an arbitrator must act on the basis of the evidence given at the hearing. No evidence has been adduced to support the allegation by the plaintiff that arbitrators generally, or the arbitrator in the reference ignored or did not consider the claimant's evidence nor the evidence of his engineer.

7.11 The arbitrator has no power to disregard the law. While he or she has a wide measure of discretion to decide how a dispute is to be resolved such decision must be according to the law unless the parties agree to an arbitrator acting as *amiable compositeur*, the arbitrator must conduct the case according to rules of law. An arbitrator can not, of course, take sides nor, indeed, incline in relation to a consumer, unrepresentative party or, indeed, an unsuccessful party.

The duty of an arbitrator is to decide the questions submitted according to the legal rights of the parties and not according to what he may consider fair and reasonable under the circumstances. See Singleton L.J. in *Taylor (Davis) & Sons v. Barnet Trading Company* [1953] 1. W.L.R. 562.

Despite the bare assertion, there is no evidence that the arbitrator disregarded the law nor, indeed, did not follow proper procedure.

7.12 In relation to holiday claims such as the present claim, Margaret Rutherford in Bernstein: Handbook of Arbitration Practice (1987) states:

> "The facts that the claimant's hopes were unfulfilled, and that he was disillusioned with his holiday for reasons which involved no breach of contract by the tour operator, or that the disappointment sustained was due to circumstances falling within an exemption clause upon which the respondent is entitled to rely, will in themselves be insufficient to constitute a breach of contract. The victim of a misrepresentation in a brochure or a holiday maker who has been allocated accommodation inferior to that to which he was contractually entitled must be distinguished from the claimant who may, quite genuinely, sustain disappointment because his own expectations exceeded the reality, e.g. in relation to the holiday location, or the price or the particular grading of the hotel of his choice or even more simply, the weather."

It seems to the court that these remarks can extend to cover mishaps. There is no evidence before this Court of the misrepresentation nor that the Arbitrator did not hear all of the evidence adduced in relation to the plaintiff's claim nor precluded any submissions made in relation thereto. There is no evidence of any bias or misconduct.

The court has already found that the plaintiff, as claimant in that reference, despite his instructions to his solicitor to give notice of his intention to appeal, notwithstanding the provisions of s. 27, did not do so. It was only on the finalisation of the taxation of costs that two and a half years later, on 25th June, 2004, these proceedings commenced.

7.13 In relation to costs, it is clear that the arbitrator has the same discretion as judges with regard to costs following the event.

Section 29 of the Arbitration Act, 1954 provides as follows:

> "29 – (1) Unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to include a provision that costs of the reference and award shall be in the discretion of the arbitrator or umpire who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may, with the consent of the parties tax or settle the amounts of costs to be so paid or any part thereof, and may well award costs to be paid as between solicitor and client.
>
> (2) Where an award directs any costs to be paid, then, unless the arbitrator or umpire, with the consent of the parties, taxes or settles the amount thereof -
>
> (a) the costs shall be taxed and ascertained by a Taxing Master,
>
> (b) the procedure to obtain taxation and the rules, regulations and scales of costs of the Court relative to taxation and to the review thereof shall apply to the costs to be so taxed and ascertained as if the award were a judgement or order of the Court."

It is, accordingly, a feature of arbitration that, in the absence of agreement, costs are taxed by the Taxing Master.

Such an agreement as to the payment of costs is, of course and agreement after an award of costs has been made. Section 30 of the Act provides that any provision in an arbitration agreement to the effect that the parties or any parties thereto shall in any event pay their own or his own costs of the reference or award or any part thereof shall be void.

7.14 The plaintiff referred to Council Directive 93/13/EEC 5th April, 1993, on unfair terms in consumer contracts which is enacted in this jurisdiction by the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 (S.I. No. 27/1995).

This Directive recites the many disparities in the laws of Member States relating, *inter alia*, to a supplier of services with the result the national markets for the sale of services to consumers differ from each other and that the distortions of competition may arise among suppliers where they supply other Member States. It also recites the responsibility of Member States to ensure that contracts concluded with consumers do not contain unfair terms. The Directive also recites the objective of contracts being drafted in plain, intelligible language; that the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable the consumer should prevail. Member States should ensure that unfair terms are not used in contracts concluded with consumers by a supplier and that if, nevertheless, such terms are so used, they will not bind the consumer. The contract will continue to bind the parties upon those terms of it is capable of continuing in existence without the unfair provisions.

The Council of the European Communities adopted the Directive which provides for the following relevant provisions;

> "Article 3
>
> (1) A contractual term which has not been individually negotiated shall be regard as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
>
> (2) A terms shall always be regarded as not individually negotiated where it has been drafted in advance and the

consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulation standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of the contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

(3) The annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

The annex of terms referred to in Article 3(3)(1) include:

> (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non- performance or inadequate performance by the seller or supplier of any of the contractual obligations …, and
>
> (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to applicable law, should lie with another party to the contract."

The Directive was enacted into Irish Law by S.I. No 27/1995: European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 which implements Article 3 of the Directive in Regulation 3(2), (4), (5) and (6).

Article 3(3) of the Directive and the reference to the annex is contained in Regulation 3(7) and to the 3rd Schedule.

In both the Directive and the Regulation.

> (q) Refers to the requirement that the consumer take disputes exclusively to arbitration not covered by legal provisions. The court has already held that the arbitrator is subject to and cannot deviate from the law including, indeed, the provision of the Statutory Instrument implementing the Directive.

It was clearly open to the plaintiff to argue this matter before the arbitrator. Indeed there is no evidence that he did not do so or was precluded in any way by the arbitrator to arguments regarding the fairness of the terms in the consumer contract to which he was subject. While there may have been some issue with regard to his travelling companion who booked the holiday, having been aware of the provisions of the conditions, including conditions 12 and 16, it is clear that the plaintiff himself did not do so. However, that was not a matter that caused any difficulty insofar as it was accepted that he had the benefit of the terms of the contract entered into on his behalf.

Not alone does the stipulation at (q) deal with arbitration not covered by legal provisions, is also requires the consumer to take disputes exclusively to arbitration not covered by legal provisions. As the court has already found condition 16, particularly when taken with the complaints provision at condition 12, does not exclude litigation. It is not necessary for the court to go this far, however, having regard to the qualification of arbitration not covered by legal provisions.

7.15 Unfair Contract Terms Regulations 1995
Unless the arbitrator unduly restricts the evidence tendered or alters the burden of proof from plaintiff to defendant would there be a breach of natural and constitutional rights.

There is nothing in the evidence regarding the conduct of the arbitration that would point to the arbitration being conducted other than by under the provisions of law.

In *Picardi v. Cuniburti QBD* [2002] EWHC 2923 (TCC) Judge Toulmin stated at 127 in relation to adjudication as opposed to arbitration as follows:

> "The common law is, and always has been, concerned to promote fairness between the parties. As common form contracts in this country drafted by lawyers become even more complicated, it is essential that both particularly onerous and unusual terms are specifically drawn to the attention of the other party. I include the requirement that either party may invoke an adjudication procedure in this. This is an unusual procedure invented for good reason, primarily to assist the construction industry to resolve its disputes. Parliament having considered the Latham recommendations, specifically excluded private dwelling houses from its application. A provision that, despite this exclusion, adjudication is to be included as a matter of contract, is clearly an unusual provision which must be brought to the specific attention of a lay party if it is later to be validly invoked.
>
> It is not disputed that, for the purpose of the regulations, Mr. Picardi is a supplier and Mr. and Mrs. Cuniberti are consumers and that the regulations apply. It is also not in dispute that the adjudication provisions were not individually negotiated. Here, the issue is whether or not the adjudication provisions caused a significant imbalance in the parties' rights and obligations arising out of the contract to the detriment of the consumer. The test, under article 3(1) of the Directive, is: does the term cause a significant imbalance in the parties' rights and obligations arising out of the contract to the detriment of the consumer? An instance of this is hindering the consumer's right to exercise a legal remedy. It is significant that a requirement to take a dispute to arbitration is an example of a significant imbalance."

The trial judge referred to a guidance from the Royal Institute of British Architects that required their members individually to negotiate those clauses and believed that they were right to give such guidance. As the plaintiff architect did not do so and if these clauses had been incorporated in his contract with the defendants, they would be excluded by reason of the unfair terms in consumer contracts regulation. Accordingly he declined to enforce the adjudicator's award.

It seems to this Court that that decision relates to adjudication as an unusual provision which was not individually negotiated. The issue is whether or not the adjudication provisions caused a significant imbalance in the parties' claims and obligations arising out of the contract to the detriment of the consumer.

The reference to a requirement to take a dispute to arbitration being an example of a significant imbalance would seem to necessarily include arbitration which was not subject to the provisions of the law (as is clear from the regulations in this and in the neighbouring jurisdiction, both of which are based on the common Directive).

Moreover, the instance was given by the trial judge in that case of a hindering of the consumer's right to exercise a legal remedy. As has already been found in the present case, there was not such a hindering given the interpretation of the court in relation to clauses 12 and 16.

In *Bryen and Langley Limited v. Boston* [2004] QBD EWHC 2450 (TCC) the defendant engaged the plaintiff to tender for the conversion of two flats into one which was to be on the basis of JCT 1998 which was, in fact, never signed by or on behalf of the defendant. The architect issued interim certificates in the course of the contract. Significant extra work was ordered. The defendant made a payment requesting that the plaintiffs should not seek any further payment. The plaintiff commenced adjudication against the defendant claiming a balance and the adjudicator decided that the contract was on JCT 98 terms which gave him jurisdiction. It was held that JCT terms were not incorporated into the contract and that the adjudicator had not jurisdiction. It was further held that it could be possible to argue that the building contract in which the employer was a consumer was affected by the unfair terms in Consumer Contracts Regulation but this would involve showing that there was unfairness and lack of good faith on the particular facts of the case. The facts of the case would not have passed this test. A form of contract had been put forward by the employer who was professionally advised.

It seems to me that this decision has relevance, not alone in terms of the representation that the plaintiff had, but also that there was no proof of unfairness or, indeed, lack of good faith in relation to the reference.

7.16 Reasoned Award
7.16.1 There is no requirement under Irish Law that the arbitrator's award needs to be reasoned. Indeed, it was agreed between the parties at a preliminary meeting with the arbitrator that they did not require a reasoned award. The award itself which is formal and extensive both in relation to the substantive and the issue of costs does not, accordingly, give reasons.

7.16.2 The power to call for reasons is specifically provided for in the English Arbitration Act, 1979 is introduced simply as a vehicle for the prosecution of an appeal there is no such provision in Irish Law though clearly, as in the present case it is better practice to ask the parties if they require a reasoned award. There is no duty to give reasons and no power in the court to order reasons where the parties have agreed that the arbitrator should make an award without reasons. This is not to say, as remarked by Mustill and Boyd: Commercial Arbitration, 2nd Ed. (1989) that the arbitrator should not give any reasons:

> "We are concerned with the duty to make reasoned award, ie. an award in which the reasons are set out or incorporated in such a way as to make them part of the award, not with reasons which do not form part of the award. Even in the simplest type of arbitration each party, and particularly the losing party, is entitled to a rational explanation for the decision."

It does not seem to me that this can apply to an agreement between the parties not to have a reasoned award.

Moreover, under the English Act an arbitrator need not furnish reasons if

> (a) the award is the subject of a valid exclusion agreement, or
>
> (b) the dispute is solely concerned with an issue or issues of fact, or
>
> (c) the arbitrator has decided the issues of fact in such a way that the question of law raised by the dispute has become academic.
>
> (d) Neither party had given notice, before the award was made, that a reasoned award would be required (unless there was "some special reason" for not doing so).

Most recent statutes on international arbitration do require the arbitrators to state the reasons for their decision in their award. Such a requirement is found, for example in the Belgian Judicial Code (Article 1701(6)), in the Netherlands Code of Civil Procedure, except for awards by consent and awards in quality arbitrations (Article 1057 (4)(e)) and in the German ZPO (new Article 1054 (2) in force since January 1st, 1998). Even in the English tradition, which has long been in favour of not giving not grounds for awards, the advantage of stating reasons is gaining recognition in international arbitration.

Lord Justice Bingham reviews the position in the comprehensive article entitled "Reasons and reasons for reasons: difference between a court judgment and an arbitration award" in Arbitration International 141 (1988)".

The position most often taken is that adopted in Article VIII of the 1961 European Convention:

> "[t]he parties shall be presumed to have agreed that reasons shall be given for the award unless they are
>
> > (a) either expressly agreed that reasons should not be given; or
> >
> > (b) have assented to an arbitral procedure under which it is not customary for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given."

The approach of the UNCITRAL model law is similar, allowing the parties to choose that no reasons be given, but presumes that, in the absence of an indication to the contrary their intention was that the arbitrators should state the grounds for their award (Article 31 (2)).

The provision that the grounds for an award need only be given where the parties do not provide otherwise is self evident. Arbitration rules, by definition, are only binding because the parties have chosen to adopt them and the parties can agree to depart from them as they see fit. The autonomy of the parties is fundamental not only with regard to the appointment of an arbitrator, or the adherence to a mode of appointment, such as is contained in condition 16 in the present case and, to their agreement as to whether reasons be given in the award or not. It is clear from the recitals in the preliminary orders that it was agreed that no reasons needed to be given by the arbitrator. In the present case the plaintiff was represented by solicitor and barrister. Following the unsuccessful

outcome of the award, the plaintiff cannot now require, either for himself nor, a *fortiori*, in a general way, whether in the public interest or not, that reasons be always given.

(See Fouchard Gaillard Goldman on International Commercial Arbitration (1999) at 1392 – 1395).

7.16.3 In this jurisdiction as already stated above, an arbitrator is not obliged to give reasons for his decisions, unless he has agreed to do this in his terms of appointment. In general, it is the practice in Ireland for an arbitrator to give no reasons for his award. In the case of *Vogelaar v. Callaghan* [1996] 2 I.L.R.M. 226 the court upheld the validity of the practice of an arbitrator in not giving a reason. Barron J. stated at 231 as follows:

> "The plaintiffs having had the opportunity to ask the arbitrator to state his award in the form of the opinion of the court or, alternatively, to give reasons for what he had done, it is now not open to them to complain that this was not done."

The court further pointed out that if an arbitrator is asked to state a case or give reasons after the reference has been made he is not obliged to so do. However, it is clear that where the arbitration agreement requires an arbitrator to give reasons or, the parties, at a preliminary meeting require the arbitrator to do so, he is obliged.

In *Manning v. Shackelton* [1997] 2 I.L.R.M. 26 the court did not require the arbitrator to give reasons. In *Keenan v. Shield Assurance* [1998] I.R. 89, the Supreme Court, McCarthy J., stated:

> "It ill becomes the court to show any readiness to interfere in such a process; if policy considerations are appropriate as I believe they are in a matter of this kind, then every such consideration points to the desirability of making an arbitration award final in every sense of the term. A reasoned award provides a possibility that a losing party may apply to the court to have the award set aside on the basis of 'an error on the face of the award'."

7.17 The arbitrator's decision is final. There is no appeal. It is the end of the legal process. Section 27 of the 1954 Act provides:

> "Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the person claiming under them respectively."

The court has a common law jurisdiction to set aside an award of an arbitrator where an error of law appears on the face of the award. Such an error must be so fundamental that the court cannot stand aside and allow it to remain unchallenged. Where a specific question of law is referred to an arbitrator for decision the award will not be set aside merely because the decision on the question of law is an erroneous one as the parties are deemed to have agreed to abide by the decision of the arbitrator. That does not mean, of course, that a fundamental error can be overlooked. Neither does it excuse the non-application of law or the failure to grant the parties a hearing in accordance with natural and constitutional justice.

Section 27 of the Arbitration Act, 1954, provides that

> "Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision of the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively."

This is, of course, a universal feature of arbitration: there is no appeal on the merits.

7.18 The court, notwithstanding, has power, under s. 36 to remit the matters back for the reconsideration of the arbitrator.

The court has also the power to set aside the award on the grounds of the misconduct of the arbitrator.

In that regard s. 38 provides as follows:-

> "38-(1) Where –
>
> (a) an arbitrator or umpire has misconducted himself or the proceedings, or
>
> (b) and arbitration or award has been improperly procured, the court may set the award aside.
>
> (2) Where an application is made to set aside an award, the Court may order that any money made payable by an award shall be brought in to Court or otherwise secured pending the determination of the application."

This is the relief which the plaintiff seeks in the present case.

The term misconduct is most inappropriate because of its connotation of wilful wrongdoing. Section 38 which empowers the court to set aside an award for misconduct, includes "misconducting the proceedings" misconduct includes acting without or outside jurisdiction where the arbitrator was not validly appointed or there was no binding agreement entered into between the parties. That is, of course, not the case that the plaintiff is making.

Misconduct also includes not following the general rules of evidence, not hearing relevant evidence or not affording a party sufficient opportunity to make submissions on a material point. See *O'Sullivan v. Joseph's Woodworld and Company* [1987] I.R. 255 and *Geraghty v. Rowan Industrial Estates* [1988] I.R. 419.

Making an error of fact or of law, or inconsistency of reasoning, do not fall under this heading, (*Moran v. Lloyds* [1983] QB. 542 and *Church and General Insurance Company v. Connolly* (Costello J. 7th May, 1981).

7.19 The plaintiff does not allege that the arbitrator failed to follow the general rules of evidence nor declined to hear relevant evidence nor, indeed, afforded him, his solicitor and/or barrister a sufficient opportunity to make submissions on a material point.

There is no evidence before this Court that the arbitrator so misconducted himself or the proceedings. The plaintiff is not entitled to set aside the awards and to have leave to have the matter retried. The court cannot, therefore, make the order sought.