Neutral Citation Number: [2008] IEHC 121

THE HIGH COURT

2008 No. 35 MCA
2008 No. 36 MCA

BETWEEN

DAVID CLANCY AND AVEEN KEHOE

APPLICANTS

AND
JAMES NEVIN (SENIOR)

RESPONDENT

AND

2008 No. 43 MCA

BETWEEN

JAMES NEVIN (SENIOR)

APPLICANT

AND
DAVID CLANCY AND AVEEN KEHOE

RESPONDENTS

Judgment of Miss Justice Laffoy delivered on 25th April, 2008.

The proceedings

1. This judgment deals with the following proceedings:

(1) An application initiated by originating notice of motion dated 4th March, 2008 (Record No. 2008 35 MCA) in which David Clancy and Aveen Kehoe (the Claimants) seek against James Nevin (Senior) (the Contractor) the following orders:

(a) an order pursuant to s. 41 of the Arbitration Act, 1954 (the Act of 1954) and O. 56, r. 4(f) of the Rules of the Superior Courts, 1986 (the Rules) giving the Claimants leave to enforce in the same manner as a judgment or order the award of Ms. Joan O'Connor (the Arbitrator) made on 11th July, 2007;

(b) leave to enter judgment for the sum of €508,027.36, being the total amount found by the Arbitrator due and owing to the Claimants from the Contractor, together with interest on the said sum from 11th July, 2007; and

(c) leave to enter judgment for the sum of €64,885.16 (including VAT) against the Contractor, being the Arbitrator's fees as paid by the Claimants to the Arbitrator.

(2) An application initiated by originating notice of motion dated 4th March, 2008 (Record No. 2008 36 MCA) in which the Claimants seek relief similar to the relief referred to at 1(a) and (b) above in respect of the sum of €220,033.34, being the claimants' costs of the reference to arbitration as taxed by the Arbitrator on 5th December, 2007.

(3) An application initiated by originating notice of motion dated 26th March, 2008 (Record No. 2008 43 MCA) wherein the applicant seeks the following orders:

(a) an order pursuant to O. 56, r. 4 of the Rules to extend the time in which to apply to set aside the arbitration award made by the Arbitrator on 11th July, 2007 and the taxed award of costs; and

(b) an order pursuant to s. 38 of the Act of 1954, as amended, and O. 56, r. 4(e) of the Rules to set aside the said arbitration award and the said taxed award of costs.

2. Initially, the Claimants sought the reliefs referred to at (1) and (2) above by way of two special summonses, the first of which was issued on 12th November, 2007 and was returnable before the Master on 18th January, 2008. The Claimants' solicitors entered an appearance to that special summons on 23rd March, 2007. The relief sought at (3) above was originally claimed by way of special summons which issued on 1st February, 2008, but was not served. It is common case that the incorrect procedure had been adopted by the moving party in each of the applications initially and that the correct procedure was by way of originating notice of motion.

Outline of factual background

3. By a building agreement dated 3rd March, 2003, the Contractor agreed to execute certain building works for the Claimants, that is to say, extensions and alterations to a coach house for conversion to a dwelling house with associated site works at Kellystown House, Kellystown, Slane, County Meath, at the price of €602,411.74 (including VAT). The agreement provided for completion in March, 2004. The Claimants had hoped to move into the property, which was to be their home, in the summer of 2004. It was not to be. A dispute as to the performance by the Contractor of his obligations under the contract arose. Notice of the dispute was served by the Claimants on 4th May, 2005. The Claimants sought to have the dispute referred to conciliation. under the terms of the agreement. Conciliation did not produce a resolution and the dispute was referred to arbitration. The Arbitrator's appointment was by nomination of the President of the Royal Institution of Architects of Ireland by letter dated 11th January, 2006. The terms on which the Arbitrator accepted the nomination, which were agreed by the Claimants and the Contractor, provided, inter alia, that the costs of the reference and the award should be at the discretion of the Arbitrator and that she might tax or settle the amount of costs to be paid or any part thereof and that she might make interim orders for security for any party's own costs and/or to secure all or part of any amount in dispute in the arbitration.

4. It is not necessary to refer to the rather tortuous and contentious process which led to the intended hearing date of 16th May, 2006. Following a pre-hearing meeting on 16th May, 2006, there were discussions between the Claimants and the Contractor and their respective legal advisers and a settlement agreement was executed. The settlement agreement also involved an architect (the Architect) who had been employed by the Claimants to supervise the building works and against whom the Claimants were pursuing a claim arising from alleged breach of contract and negligence. The terms of the settlement agreement were as follows:

1. That the Architect would pay the Claimants the sum of €232,500 on or before 26th May, 2006, in full and final

settlement of any and all claims by the Claimants against him. That sum was duly paid.

2. That the Contractor would pay to the Claimants no later than 27th June, 2006, the net sum of €207,500, which, subject to the proviso in clause 3, would constitute full and final settlement of all claims arising between the Claimants and the Contractor.

3. That in the event that payment was not made by the Contractor, the Claimants should remain entitled to pursue their claims in the arbitration and to notify the Arbitrator accordingly without prior reference to the Contractor.

4. The Contractor agreed to discharge the Arbitrator's fees in the arbitration up to and including 16th May, 2006.

5. It was further provided that unless payment was made by the Contractor in accordance with clause 2, the Claimants reserved all rights, including those arising at common law, as against the Contractor.

6. Following the settlement agreement the Arbitrator furnished a fee note to the solicitors for the Contractor in the sum of €17,000 inclusive of VAT. The Contractor paid neither the sum due to the Claimants under the settlement agreement nor the Arbitrator's fees. By letter dated 28th June, 2006, the Claimants' solicitors wrote to the Arbitrator intimating that the arbitration was proceeding and seeking an expeditious hearing date. A copy of the settlement agreement was furnished to the Arbitrator with that letter. The Arbitrator fixed 26th July, 2006 as the date for the hearing. This led to the following correspondence to the Arbitrator, each item of which was copied by the sender to the opponent:

(a) A letter of 19th July, 2006 from the Contractor's solicitors. Three issues were raised in the letter. First an adjournment of the hearing was requested. Secondly, the solicitors repeated their "grave concerns" as to the manner in which the arbitration had proceeded and the "clear bias" which it was alleged the Arbitrator had exhibited in favour of the Claimants. Reference was made to previous correspondence in which those concerns were voiced. The solicitors requested that the Arbitrator withdraw immediately from the arbitration. The stance adopted on behalf of the Contractor before the court was that correspondence in relation to the conduct of the arbitration prior to July, 2006 is irrelevant to his current application to set aside the Arbitrator's award, which is based on the disclosure of the contents of the settlement agreement to the Arbitrator and the conduct of the arbitration following the disclosure. Thirdly, the Claimants' solicitors complained that the Claimants were seeking to "cherry pick" certain parts of the settlement agreement and disregard other parts thereof and submitted that the Claimants were not entitled to enforce certain parts of the settlement agreement and disregard other parts thereof. There was no complaint that the terms of the contents of the settlement agreement should not have been disclosed to the Arbitrator.

(b) The Claimants' solicitors wrote to the Arbitrator on 31st July, 2006, referring to the letter at (a) above and suggesting that the Contractor should be required to make an application to court under s. 39 of the Act of 1954 seeking the Arbitrator's removal on the grounds of bias.

(c) Following an informal meeting of the parties and the Arbitrator on 26th July, 2006, the Contractor's solicitors wrote again to the Arbitrator on 3rd August, 2006 reiterating their request that she step down forthwith from the arbitration, referring again to the pre-July, 2006 correspondence and raising a matter which was "a cause for even greater concern". That was the fact that the Claimants' solicitor had furnished the settlement agreement to the Arbitrator and had advised the Arbitrator of the Contractor's failure to comply with its terms. It was submitted that on any objective analysis it would not be possible for the Arbitrator to continue to arbitrate the dispute in an impartial and unbiased manner. It was suggested that the Arbitrator should take legal advice.

(d) The reaction of the Claimants' solicitors was to suggest again, in their letter of 8th August, 2006, that, if the Contractor wished to remove the Arbitrator, an application should be made to the High Court.

7. No such application was made and the arbitration proceeded. A preliminary meeting was held on 22nd November, 2007, which was attended by the solicitors for the Contractor. The Arbitrator recited in her award that, at the time, the solicitors for the Contractor did not intend to seek a court revocation of her appointment. Subsequent to that meeting the solicitors for the Claimants sought, *inter alia*, an interim order for security of the Claimants' costs. On 27th February, 2007 the Arbitrator made an order that the Contractor pay an amount of €45,000 into an escrow account by way of security for the Claimants' legal costs. Although the escrow account was set up, the Contractor never made any payment into it and gave no security for the Claimants' legal costs. In May, 2007 the Arbitrator fixed 11th June, 2007 and the following day for the hearing of the arbitration and notified the parties. Prior to that, the solicitors for the Contractor had, by letter of 2nd May, 2007, informed the Arbitrator that they had not been able to obtain any instructions whatsoever from the Contractor for a long time and were unsure whether or not any of the witnesses would be in attendance but the solicitor and counsel would be available to attend. Subsequently, by letter dated 15th May, 2007, the solicitors for the Contractor reiterated what had been stated in their letter of 2nd May, 2007.

8. The hearing commenced at 11 a.m. on 11th June, 2007. Following the opening of the case by the solicitor for the Claimants, at 12.55 p.m. counsel for the Contractor requested an adjournment on the basis of a bereavement in the Contractor's family which prevented him from attending. When, following a recess of one hour, counsel for the Contractor was unable to provide the information sought in relation to the bereavement, the Arbitrator decided to proceed with the hearing. She heard legal argument from counsel for the Contractor. As appears from the summary in the award, one of the arguments advanced was that the Arbitrator's knowledge of the terms of the settlement agreement prejudiced her role as Arbitrator, so that she could consider only the amount of the settlement agreement and the points of claim as of May, 2006. In a further submission, after the solicitor for the Claimants had responded, counsel for the Contractor submitted that the settlement agreement must be construed in its entirety and that, if the Arbitrator were to make an award in excess of €207,000, the award would be invalid and open to challenge in that such an award would prejudice the Contractor. The award also records that counsel for the Contractor, in concluding his argument, requested clarification as to whether the Arbitrator could proceed with the arbitration in the knowledge of the terms of the settlement agreement. The Arbitrator decided to proceed with the arbitration on the basis that she had yet to assess liability and quantum. Counsel for the Arbitrator acknowledged that the Arbitrator was not biased in the matter but that there would be a probable perception of bias in the circumstances. Thereupon, counsel and the solicitor for the Contractor intimated their intention to withdraw from the hearing, stating that their instructions were to make legal arguments only, witnesses for the Contractor would not be called, the Claimants' witnesses would not be cross-examined and the settlement agreement was not an admission of liability. Finally, counsel for the Contractor formally requested the right to address the Arbitrator on the matter of costs at a separate hearing and then withdrew. The hearing proceeded in the absence of legal representation of the Contractor.

9. On 11th July, 2007 the Arbitrator wrote to the solicitors for the Claimants and the solicitors for the Contractor indicating that she

had made her award on that day, and that it was available for collection on receipt by her of the costs of the award in the sum of €64,885.16 inclusive of VAT and expenses. The Contractor did not pay or contribute to the costs of the award. The Claimants raised the money and paid the costs, whereupon, on 11th October, 2007 the Arbitrator sent the award to the solicitors for the Claimants and the solicitors for the Contractor. In the award, the Arbitrator awarded the sum of €508,027.36 to the Claimants, together with further interest at the rate of 5% from 11th July, 2007. She directed that the Contractor pay the sum of €64,885.16 being the costs of the award and she further directed the costs of the reference should be paid by the Contractor and that the Claimants' costs were "recoverable on a solicitor and client basis, i.e. based on actual costs incurred but without any unreasonable claims".

10. Following the hearing and prior to the making of the award, the solicitors for the Contractor, by letter dated 14th June, 2007, requested that a separate hearing on costs be held. As the award records, on 27th June, 2007, the Arbitrator advised the parties as follows:

> "… the award of costs is in my discretion which I will exercise judicially and according to settled principles: the dominant principle is that, in the absence of circumstances justifying some other order, costs should follow the event. As part of the arbitral process, I must consider the outcome of the proceedings to decide what the event is which costs should follow."

11. The Arbitrator indicated that there would be no separate hearing on the issue of liability for costs but she reserved the jurisdiction, on application, to tax costs, if costs cold not be agreed between the parties. On 5th December, 2007 the Arbitrator assessed the Claimants' costs, including VAT, in the sum of .€220,033.34.

Contractor's claim for an extension of time

12. Order 56, r. 4(e) of the Rules, which is invoked by the Contractor, requires that an application by a party to a reference under an arbitration agreement to set aside an award be made by originating notice of motion to which the other party or parties to the reference shall be respondent and goes on to provide:

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

13. The first question which arises on the Contractor's application for an extension of time is when was the award "made and published to the parties" within the meaning of the rule. A similar question was considered recently in this Court by Kelly J. in an *ex tempore* judgment delivered on 19th December, 2007 in *Kelcar Developments Ltd. v. M.F. Irish Golf Design Ltd*. [2007] IEHC 468. Kelly J. stated that the matter is dealt with succinctly in the 19th edition of Russell on *Arbitration* and he quoted the following passage:

> "'Publication to the parties' of an award (as distinct from 'publication' of it simply) entails both completion of the award, so that the arbitrator has finally adjudicated and retains no power of altering it, and also notice to the parties that this has been done. It is immaterial, however, whether or not the parties are then made acquainted with the contents of the award or receive copies of it."

14. Kelly J. observed that two authorities dating from 1840 and 1844 respectively are cited as authority for that proposition and concluded that it is plain that publication of an award to the parties arises when the Arbitrator makes his award and notifies the parties of that fact.

15. On that basis, in this case the award of the Arbitrator was made and published to the parties on 11th July, 2007. Therefore, the six weeks period within which the Contractor should have initiated his application to set aside the award commenced on 11th July, 2007.

16. The next question which arises is what test should the court apply in determining whether to grant an extension of time. In *Bord na Mona v. John Sisk & Son Ltd* (the High Court, Unreported, 31st May, 1990) Blayney J., having commented that the provision in rule 4(e) was difficult because the criterion to be applied is very general, went on to quote the following passage from the judgment of Mustill J. in *Citland Ltd. v. Kanchan Oil Industries PVT Ltd*. [1980] 2 Lloyds Reports 274 on the question of granting an extension of time for setting aside an award:

> "The reported cases show that the period can in appropriate circumstances be enlarged. It is often convenient, for the purposes of discussion, to extract from these decisions a list of factors which are relevant to the question whether an extension of time should be granted. Such a list does not lay down a rigid test. The only criterion is whether the interests of justice require that the time should be enlarged, and the weight to be given to each factor will depend on the circumstances of the case."

17. Blayney J. then went on to quote the list of factors to which Mustill J. referred, which were detailed in Commercial Arbitration, (2nd edition), which Mustill J. co-authored with Boyd, (at p. 568) as follows:

> "1. The desirability of adhering to time limits prescribed by rules of court.
>
> 2. The likelihood of prejudice to the party opposing the application if time is extended.
>
> 3. The length of delay by the applicant.
>
> 4. Whether the applicant has been guilty of unreasonable or culpable delay.
>
> 5. Whether the applicant has a good arguable case on the merits."

18. Blayney J. stated that, in the case before him, the weight to be given to each of the factors varied greatly, with the most weight being given to the last factor, whether the applicant had a good arguable case on the merits.

19. Before applying the foregoing principles to the facts of this case, it is necessary to consider what transpired after the award was made and published to the parties on 11th July, 2007 in greater detail. As I stated, following the discharge of the costs of the award by the Claimants in early October, 2007, the Arbitrator sent the award to the solicitors for the Claimants and the solicitors for the Contractor. On 16th October, 2007 the Contractor's solicitors sent him a copy of the award and, having stated that it might be open to challenge the award, asked for instructions. By letter dated 8th November, 2007, which was in response to a letter of 5th November, 2007 which has not been exhibited, the Contractor stated that he supposed that the only option was "to appeal this

unjust decision". An appearance was not entered to the Claimants' proceedings, albeit procedurally incorrect proceedings, to enforce the award until 23rd January, 2008 and the Contractor's first proceedings, again procedurally incorrect, to set aside the award were not initiated until 1st February, 2008. The Contractor has sought to justify and excuse the delay on the following grounds:

> (a) That until he received a letter of 10th December, 2007 from his solicitors sending him a copy of the Arbitrator's letter of 5th December, 2007 setting out the Arbitrator's assessment of the Claimants' costs, he was not aware of "the amount of the final award";
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> (b) that due to personal circumstances and, in particular, family illness, of which particulars were not set out, he was not able to instruct his solicitors further in the matter until January, 2008, resulting in their being "a relatively short period of delay" since he received a copy of the award and a copy of the taxed award of costs, which he suggested is not unreasonable in the circumstances, and
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> (c) that the Claimants are not prejudiced by that period of delay, pointing out that there was "a delay of three months" on their part in taking up the award.

20. Returning to the factors listed by Blayney J. in *Bord na Mona v. John Sisk & Son Ltd.*, I find as follows:

> (1) On the desirability of adhering to time limits, in the *Kelcar* case Kelly J. quoted the oft cited passage from the judgment of McCarthy J. in *Keenan v. Shield Insurance Ltd*. [1988] I.R. 89, in which "the desirability of making an arbitration award final in every sense of the term" is emphasised and expressed the view that, insofar as arbitration is concerned, it is of general importance to seek to ensure that time limits are adhered to. I agree.
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> (2) It is clear on the evidence that the Claimants have been severely prejudiced by the conduct of the Contractor to date and that prejudice will be compounded if time is extended. The property the subject of the agreement was to be the Claimants' family home. The Claimants have been endeavouring to have their dispute with the Contractor resolved since May, 2005. Just short of two years ago the Contractor compromised with the Claimants but failed to honour the compromise. Under the terms of the compromise, the Claimants, as they were entitled to do, demolished the works and started reconstruction. The home they had planned for themselves and their three young children, the oldest of whom is three years of age, is not yet completed. It is absolutely clear on the evidence that, because of the delay in implementing the resolution of the dispute, the Claimants have been under severe personal strain and a huge financial burden.
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> (3) On the length of the delay, three matters fall for consideration.
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> The first is that, as I have already found, the award was made and published to the parties on 11th July, 2007. The fact that the measurement of the costs did not take place until December, 2007 does not render the award of 11th July, 2007 less than final. On the making of the award the Arbitrator was *functus officio*, except in relation to taxation of costs.
>
> Secondly, both the Claimants' legal advisers and the Contractor's legal advisers overlooked the procedural changes which the amendment of O. 56 of the Rules brought about when S.I. No. 109 of 2006 came into operation on 31st March, 2006. While it is true that the Claimants were not under a six-week time limit in relation to the initiation of the application to enforce the award, nonetheless, I think it appropriate to take a benign view, as Kelly J. did in the *Kelcar* case, and regard the Contractor's application to have commenced on 1st February, 2008 when the Contractor's special summons was issued.
>
> Thirdly, I consider that on the facts this case is distinguishable from *Vogelaar v. Callaghan* [1996] 1 I.R. 88. Therefore, I do not think that the justice of the situation requires that the limitation period should run from the date on which the parties received copies of the award or became aware of its contents. The distinguishing feature is that the judgment of Barron J. in *Vogelaar v. Callaghan* records (at p. 91) that, having received notice of the making of the award, both parties sent a moiety of the Arbitrator's costs to the Arbitrator. On the basis that the award was taken up jointly on a date when the six weeks period had already run, Barron J. held that it would be unfair to enforce the rule, since this would have required the issue of proceedings before it would have been known whether or not there was a need to do so. In this case, it was the Contractor who was constrained by the six weeks limitation period. Despite that, the Contractor did not take the step necessary, the payment of the costs of the award, as a precondition to the taking up of the award. On the contrary, the Contractor left it to the Claimants to take the necessary step, which necessitated the Claimants having to raise finance in circumstances in which it would have been obvious that it was the Contractor who would be liable for all or part of the costs of the award, having regard to the fact that it was made clear to the Arbitrator on 16th May, 2006 that it was the Contractor who was liable for the costs of the arbitration up to that date.
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> Having regard to the foregoing factors, in my view, the delay in this case was a delay of in excess of six and a half months from 11th July, 2007 to 1st February, 2008.
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> (4) On the facts of this case, I have no doubt that the Contractor was guilty of both unreasonable delay and culpable delay. The only reasonable inference which can be drawn is that the Contractor, who reneged on the settlement agreement over a year earlier, was prepared to sit back and allow the Claimants to take the necessary step to take up the award and to initiate the proceedings to enforce the award. In my view, it is reasonable to infer a deliberate policy on the part of the Contractor not to move until he had to. Even after he became aware of the contents of the award it took him in excess of three and a half months to initiate the procedurally incorrect proceedings to set the award aside.
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> (5) The conduct of the Contractor since the award was made and published to the parties on 11th July, 2007 is not suggestive of any real belief on his behalf that he has a good arguable case for setting aside the award. The case made on his application is that the award was the result of misconduct on the part of the Arbitrator for the following reasons and ought to be set aside:
>
> > (a) The Arbitrator proceeded to hear the reference in circumstances where the terms of the settlement agreement had been disclosed to the Arbitrator by the Claimants' solicitors, she had been informed that the Contractor had defaulted in his obligations thereunder, and she had been made aware that the Contractor had failed to discharge her fees. It was contended that those facts gave rise to the appearance of partiality on the part of the Arbitrator or the conclusion that there was a real likelihood of bias on her part.

(b) The absence of proper control of the arbitration procedure by the Arbitrator made it impossible for the Contractor to properly present his case, gave rise to the appearance of partiality on the part of the Arbitrator and was contrary to the requirements of natural justice.

(c) The Arbitrator failed to exercise her discretion in relation to costs judicially. In particular, it was asserted that the failure of the Arbitrator to allow the Contractor to make submissions in relation to the issue of costs was in breach of natural justice and that the award of costs was improperly made.

21. Dealing with each of those grounds in turn I make the following observations and findings:

(a) The existence of the settlement agreement was made known to the Arbitrator by both sides. She was told by counsel for the Contractor on 16th May, 2006 that her fees to that date were for settlement by the Contractor. She furnished a fee note but received no payment. It was a matter of basic deduction that the Contractor was in default. It may be that it would have been preferable if the amounts which the Contractor and the Architect respectively agreed to pay to the Claimants had not been disclosed to the Arbitrator. It is the case that a deduction was going to have to be made for the amount which was actually paid by the Architect but a mechanism could have been agreed to postpone that until after the award was made.

22. The issue which has been raised about the disclosure of the terms of the settlement agreement is analogous to the sealed offer issue considered in *Tobin and Twomey Services Ltd. v. Kerry Foods Ltd*. [1999] 3 I.R. 483. In my judgment in that case I quoted from *Handbook on Arbitration Practice* by Bernstein and Mees (2nd Ed.), where guidelines were suggested for dealing with a situation in which an offeror requests the arbitrator to resign because the offeree has disclosed to the arbitrator the content of a without prejudice offer. The guidelines suggested that, if one party to the arbitration requests the arbitrator to resign, but the other opposes that, the arbitrator should give each an opportunity of making submissions on the matter. The guidelines continued:

"In the light of those submissions he should consider whether the information has created a serious risk that he will be unable to approach the substantive issues in the arbitration with an open mind. For example, if the substance of the arbitration is the assessment of damages, and the arbitrator is told by the claimant of a substantial offer made 'without prejudice' by the respondent, the arbitrator may think that it will be impossible for him not to be influenced by the offer when arriving at his figure; and moreover that the respondent will not be able to believe that he has not been influenced by it."

23. In my judgment (at p.526) I expressed the view that those guidelines accord with principle and are in line with the policy considerations set out in *Keenan v. Shield Insurance Company Limited* referred to earlier.

24. The most recent edition of Bernstein's *Handbook of Arbitration and Dispute Resolution Practice* (the 4th edition) replicates the first sentence in the passage quoted above and continues (at p. 268):

"But arbitrators should be robust. Obviously parties try to settle arbitrations for very good reasons, which have to do with the uncertainty, risk and cost of the process. The mere fact that the arbitrator is told by the claimant of a substantial offer made 'without prejudice' by the respondent, ought not to mean that the arbitrator cannot put the matter to one side in formulating his award, as in most cases the arbitrator should be able to disregard the knowledge of the actual amount when reaching a decision, considering as he must all the evidence and the weight to be given to it."

25. In my view, the more robust approach advocated in that passage still accords with principle and the jurisprudence in this jurisdiction.

26. In this case, of course, there was a concluded agreement between the parties, not merely a without prejudice offer by the Contractor. The Arbitrator had been apprised by counsel for the Contractor of the existence of the agreement and of the liability of the Contractor for the Arbitrator's costs to date. After the full terms of the settlement agreement were disclosed, the issue as to whether the Arbitrator could come to the arbitration with an open mind was raised by the solicitors for the Contractor. Subsequently, the Arbitrator was apprised of the views of each side on whether she should proceed with the arbitration. She decided she should. The issue was regurgitated from time to time on behalf of the Contractor and finally it was raised in the submissions of the Contractor's counsel at the hearing on 11th June, 2007, as I have already outlined. In her comprehensive award the Arbitrator stated as follows:

"In making my award I have disregarded the Settlement Agreement and the [Contractor's] failure to honour his obligations thereunder, save insofar as the Claimant has advised that he is happy to discount the sum received from [the Architect] from the amount of his claim."

27. As regards the quantum of the Contractor's liability, the fact that the amount awarded by the Arbitrator against the Contractor is almost twice the sum the Contractor agreed to pay under the settlement agreement is corroborative of that statement.

28. The jurisprudence to set aside an award under s. 38(1) arises where the arbitrator has misconducted himself or the proceedings or the award has been improperly procured. As Fennelly J. said, speaking on behalf of the Supreme Court, in *McCarthy v. Keane* [2004] 3 I.R. 617 (at p. 627), the standard or test of misconduct of such a nature as to justify setting aside an award would be "something substantial, something that smacks of injustice or unfairness". I have no hesitation in concluding that the Contractor does not have a good arguable case on the merits by reference to that standard.

(b) The allegation of the absence of proper control of the arbitration procedure by the Arbitrator does not stand up to scrutiny. It is true that after the Contractor failed to honour the settlement agreement the solicitors for the Claimants adopted a very trenchant approach to the prosecution of the arbitration proceedings. However, on the evidence before me, I am of the view that the Arbitrator acted properly and within the authority conferred on her by the arbitration agreement in dealing with procedural matters including applications on behalf of the Claimants for interim relief. In fact, the only interim order made by the Arbitrator after the settlement agreement broke down was the order for security of the Claimants' costs. That order was totally ignored by the Contractor.

(c) The allegation that the Arbitrator failed to exercise her discretion in relation to costs in a manner consistent with natural justice does not stand up to scrutiny either. The Arbitrator considered the request of counsel for a separate hearing on costs and, having elicited the Claimants' views, decided not to hold a separate hearing on the issue of liability but indicated the basis on which she would approach the award of costs, stating her understanding of the dominant

principle, namely, that, in the absence of circumstances justifying some other order, costs should follow the event. Counsel for the Contractor referred to a passage from the judgment of Donaldson J. in *Tramountana v. Atlantic Shipping* [1978] 2 All E.R. 870 (at p. 879) to the effect that, although a determination of what "the event" is is the usual rule, it may only be the starting point. Quite frankly, having regard to the conduct of the Contractor in this case, it is difficult to see what considerations other than "the event" the Arbitrator should have had regard.

29. In my view, the Contractor has not demonstrated that he has a good arguable case on the merits that the award should be set aside on any of the grounds advanced.

Conclusion on the extension of time application

30. Having considered the individual factors which one is entitled to have regard to in determining whether time should be extended for the initiation of an application to set aside the award of the Arbitrator, I conclude that it should not. When I consider the sole criterion on which the court should act, that is to say whether the interests of justice require that the time should be enlarged, I am strongly of the view that, having regard to the conduct of the Contractor in relation to the resolution of the Claimants' dispute, it should not. The Contractor was given every opportunity to make his case in the arbitral process. He was even invited to initiate proceedings to remove the Arbitrator, but did not do so. I think it is not unreasonable to infer that his whole approach was, as the saying goes, to "put off the evil day". I consider his application for an extension of time to be wholly unmeritorious.

Orders

31. The Contractor's application for an order extending the time to set aside the arbitration award will be dismissed.

32. The Claimants will be granted the reliefs they seek on their applications for orders under s. 41 of the Act of 1954 and for leave to enter judgment.