Neutral Citation [2012] IEHC 551

THE HIGH COURT

[2012 No. 102 MCA]

IN THE MATTER OF THE ARBITRATION ACTS 1954 – 1998

AND

IN THE MATTER OF ORDER 56, RULE 4 OF THE RULES OF THE SUPERIOR COURTS

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

DONALD McINTYRE AND ANNA McINTYRE

APPLICANTS

AND

ALLIANZ PLC,

FIRST NAMED RESPONDENT

AND

MALACHI CULLEN

SECOND NAMED RESPONDENT

Judgment of Ms. Justice Laffoy delivered on 18th day of December, 2012.

The proceedings

1. These proceedings arise out of an arbitration in which the applicants were claimants and the first respondent (Allianz) was the respondent and the second respondent (the Arbitrator) was arbitrator.

2. The proceedings were initiated by an originating notice of motion dated 21st March, 2012 in which the following reliefs were claimed:

> (a) an order pursuant to s. 37 of the Arbitration Act 1954 (the Act of 1954) removing the Arbitrator as arbitrator on the basis that he has misconducted himself and/or has misconducted the arbitration proceedings;
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> (b) in the alternative, an order pursuant to s. 24(1) of the Act of 1954 removing the Arbitrator for his failure to use all reasonable dispatch in entering on and/or proceeding with the reference and/or making his award;
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> (c) in either case an order setting aside the awards of the Arbitrator –
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> > (i) on liability dated 30th December, 2011 (the Award) and
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> > (ii) on costs dated 26th February, 2012 (the Costs Award);
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> (d) an order pursuant to s. 40(2)(i) of the Act of 1954 appointing another person to act as arbitrator in place of the Arbitrator; and
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> (e) an order, if necessary, extending the time for bringing the application.

3. At the hearing of the proceedings, counsel for the applicants informed the Court that the applicants were not pursuing the relief sought at paragraph (b) in the notice of motion.

4. When the proceedings came on for hearing, the evidence before the Court was affidavit evidence. The affidavits filed on behalf of the applicants comprised two affidavits sworn by Kevin McElhinney, a solicitor in the firm of Gibson & Associates, the applicants' solicitors, which were sworn on 20th March, 2012 and 10th October, 2012. The affidavits filed on behalf of Allianz comprised two affidavits sworn by Brian Ó Longaigh, a solicitor in the firm of Crowley Millar, the solicitors for Allianz, which were sworn on 11th May, 2012 and 4th October, 2012, and three affidavits sworn by Kevin Clabby, a loss adjuster in the firm Thornton & Partners, Loss Adjusters, who was an expert witness called on behalf of Allianz at the arbitration, which were sworn on 11th May, 2012, 28th June, 2012 and 30th November, 2012. An affidavit sworn by the Arbitrator on 29th September, 2012 had been filed him in person.

5. One of the many curious features of these proceedings was that, while the Arbitrator was present in Court on the first day of the hearing, he was not present on the second day and he did not make any submissions to the Court.

6. On Sunday, 2nd December, 2012, a subpoena which had issued on 19th November, 2012 was served on Ms. Mary O'Rourke requiring her attendance to give evidence on behalf of the applicants at the hearing on 6th December, 2012. At the commencement of the hearing, counsel appeared on behalf of Ms. O'Rourke and furnished to the Court a medical certificate certifying that because of

illness she could not attend Court on that day. I excused Ms. O'Rourke from attending on that day on the basis of the medical certificate. Counsel for the applicants sought an adjournment so that the attendance of Ms. O'Rourke to testify could be procured. That application will be dealt with later in this judgment. No party sought to cross-examine the other's deponent or deponents. Moreover, the applicants' notice of motion preceded the coming into operation of the Rules of the Superior Courts (Arbitration) 2012 (S.I. No. 150 of 2012), which provides that in, *inter alia*, proceedings for an order setting aside an arbitration award, on the return date the Court shall give directions and make orders for the conduct of the proceedings as appear convenient. Accordingly, no such directions were sought or made in these proceedings.

7. Prior to the commencement of the arbitration process, the applicants had initiated proceedings in this Court against Allianz (Record No. 2009 No. 8617P) (the 2009 Proceedings). By order of the Court (O'Neill J.) made on 7th February, 2011, on foot of the applicants' motion dated 27th May, 2010 for judgment in default of appearance, it was ordered that the motion and the action be struck out and the costs of the 2009 Proceedings to that date "be reserved to Arbitration".

The course of the arbitration process
8. On 14th January, 2011 the Arbitrator accepted his appointment, which was by agreement of the parties, as arbitrator. He is a highly qualified engineer, and a fellow of the Institute of Engineers of Ireland and a member of the Institute of Consulting Engineers of Ireland.

9. Prior to the hearing before the Arbitrator, the parties had exchanged comprehensive pleadings. The applicants had delivered amended points of claim on 15th September, 2012. Their claim against Allianz was on foot of a policy of insurance, which covered their family home in County Offaly and its contents, and which, incidentally, is not before the Court. It was pleaded that in July or August 2008 they noticed severe dampness on a rear bedroom wall close to floor level on the ground floor and reported the problem to Allianz. They alleged delay on the part of Allianz in addressing the problem, which resulted in their young children aged four and three being unable to live in the premises for a period. They further alleged that Allianz negligently and in breach of the terms of the policy advised that only the ground floor of the property should be dried out, and persisted in that view, thereby refusing to accept liability for comprehensive drying out and remedial works. The applicants' loss adjusters produced a bill of quantities itemising the necessary reinstatement and repair costs in the sum of €299,689.20, which was submitted to Allianz on 20th August, 2009 together with a claim for €13,864.83 in respect of the loss adjusters' costs and for damages for loss of use/amenity of the property and consequential losses referable to the delays of Allianz. It was also pleaded that the state of the property had a deleterious effect on the health of the applicants and their children, which was both ongoing and economically avoidable, but despite numerous requests Allianz had refused to re-house the applicants and their children pending the resolution of their claims, which was the basis of the claim for damages in respect of loss of amenity. The applicants' claim was itemised as follows:

> (a) €313,554.03, which represents the reinstatement costs and the loss adjusters' costs;
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> (b) damages for breach of contract;
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> (c) damages for negligence;
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> (d) damages for loss of amenity;
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> (e) interest on all sums awarded to the date of publication of the award as damages and/or pursuant to statute and/or statutory instrument;
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> (f) interest on all sums awarded from the date of such awards to payment thereof;
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> (g) the costs of and incidental to the arbitration, including the reserved costs of the 2009 Proceedings.

10. In the points of defence and counterclaim delivered by Allianz, there was a complete traverse in the defence of all of the wrongdoing alleged by the applicants against Allianz. The counterclaim related to the costs of the 2009 Proceedings.

11. The arbitration was at hearing for six days over the period from 6th December, 2011 to 21st December, 2011. There is no transcript of the hearing. Both parties furnished comprehensive written closing submissions to the Arbitrator.

12. The Arbitrator's Award on the issues before him, other than costs, was dated 30th December, 2011. It was received by the applicants on 27th January, 2012. There was then correspondence between the applicants' solicitors and the Arbitrator, which I will outline later.

13. The Arbitrator's Costs Award was dated 26th February, 2012. In advance of making that award, the Arbitrator had further written submissions from both parties. The submissions on behalf of the applicants were made on a without prejudice basis.

The Award
14. In the introduction to the Award the Arbitrator stated that he had determined the dispute between the parties "based only on the evidence and submissions of each of the parties". He then stated that he intended to deal with each item listed in the applicants' amended points of claim separately and he did so as follows:

> (a) He recorded that the applicants' claim for the loss adjusters' costs was not being pursued, because it related to costs prior to the arbitration, which were excluded by the policy. Counsel for the applicants confirmed to the Court that that was the position. Therefore, the first issue for the Arbitrator was whether the applicants were entitled to the reinstatement costs claimed. He also recorded that it had been agreed at the hearing that the amount of the claim for reinstatement costs was €287,301.49. Counsel for the applicants confirmed to the Court that that was the case. The Arbitrator then stated:
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> > "Having considered the evidence submitted to me and advanced by the technical experts by both parties during the Arbitration hearing, I say as follows, that:
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> > (i) any purported damage to the first floor;
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> > (ii) any purported damage to the ceilings;
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> > (iii) any purported or future damage to the exterior roadway; and

(iv) any purported damage to the fireplace (save for its protection during any works to be carried out to the ground floor)

have not been proven to be damage caused by the water leak and therefore the works purportedly needed to be carried out or items that need to be replaced in relation thereto have not been included by me in my calculation of the claim amount due under the Insurance Policy".

As I understand that paragraph, the Arbitrator was dismissing the elements of the applicants' claim in relation to the portions of the property specified by him on the ground that causation had not been established by the applicants. The next paragraph clearly dealt with what remained of the applicants' claim for reinstatement, that is to say, the damage to the ground floor. He stated:

"The [applicants'] claim under the heading of reinstatement costs is based upon the removal, scrappage and replacement of all kitchen units, all fitted wardrobes, all sanitary ware, the fireplace and the staircase complete. Based on the evidence submitted at the Arbitration hearing I am satisfied that all of the preceding items can be either carefully removed, stored and reinstated or adequately propped and protected on site during any works to be carried out. I have therefore made such monetary allowance for same together with a contingency sum for breakages or damages in my award below."

The award in relation to reinstatement costs was set out in the next paragraph as follows:

"With regard to the above and on review of all other items listed in the re-inspection of [the first applicant] dated 9th December, 2011 I have considered all evidence heard by and submitted to me and have calculated a total amount of €108,000 as being the total amount due by [Allianz] to the [applicants] pursuant to claim made under the Insurance Policy. This amount calculated is inclusive of the reinstatement costs to the Property, temporary accommodation during the period of reinstatement and any professional fees to be incurred relating to the reinstatement of the Property."

(b) The Arbitrator stated that, based on all the evidence heard by him, and submitted to him, no award of damages was being made for breach of contract.

(c) He stated a similar conclusion in relation to damages for "breach of negligence".

(d) He also stated that he was making no award pursuant to paragraph 14 of the amended points of claim, that is to say, in respect of the loss of amenity claim.

(e) He stated that no interest should apply to the awarded sum "pre the date of" the Award.

(f) He stated that interest of eight per cent should apply to the award of €108,000 from the date of the Award until the date of payment by Allianz.

(g) In addressing the costs of the 2009 Proceedings, the Arbitrator quoted the following clause from the policy:

"Disagreement over a Claim – all differences arising out of this Policy shall be referred to an Arbitrator or if necessary to two Arbitrators, one to be appointed by each of the parties within one month after having been requested. The Arbitrators shall appoint an Umpire who shall sit with the Arbitrators and in case of disagreement the Arbitrators shall submit to the decision of the Umpire. The making of an award shall be a condition precedent to any right of action against Us (Allianz). Differences not referred to arbitration within 12 calendar months form (sic) the date on which the difference occurred will be deemed to have been abandoned."

The Arbitrator then went on to state that it was clear that an arbitration clause existed and no High Court proceedings should have been instigated by the applicants, save in respect of the appointment of an arbitrator under s. 18 of the Act of 1954. Accordingly, the applicants' claim for their High Court costs of €11,000 was refused. Further, due to the delay in Allianz appointing an arbitrator, the counterclaim of Allianz for costs in respect of the High Court proceedings was refused.

Correspondence between the applicants' solicitors and the Arbitrator in relation to the Award

16. By letter dated 31st January, 2012 from the applicants' solicitors to the Arbitrator, it was asserted that at the commencement of the proceedings it was agreed between the parties that the Arbitrator would provide a reasoned decision in support of his determination, and it was noted that the Award failed to address "the breakdown of the award or any reasoning for refusal of the various heads of claim which have been rejected by you". There was also a reference to a statement in the Award to the effect that ". . . all of the preceding items can be carefully removed, stored and reinstated or adequately propped and protected on site during any works to be carried out". It was stated that that was at variance with the indication and comment made by the Arbitrator during the course of the arbitration, when he specifically stated ". . . you can take it from me, I don't accept that the kitchen can be propped". The applicants' solicitors asked the Arbitrator to furnish his reasons as to why he considered propping an adequate course of action. The applicants' solicitors requested that the question of costs be deferred pending receipt by all parties of "a reasoned award as previously agreed".

17. The response of the Arbitrator was by e-mail dated 2nd February, 2012, in which he dealt with two elements of the Award. First, the Arbitrator acknowledged that he had said at the arbitration hearing that he did not accept that the kitchen could be propped. He then referred to what he had stated in the Award and continued;

"I consider that the kitchen units can be carefully removed, stored and reinstated when the floors are replaced. You will remember at the hearing that your Mr. Peter Turley stated that this was the method adopted on a previous project of his. He further went on to state that the kitchen marble top was broken in that case. You will note that I have included in my Award a contingency sum for breakages or damages. The reference to 'adequately propped' was included to deal with the stairs."

The Arbitrator then went on to summarise some of the evidence on the question whether wardrobes and the like had to be scrapped in total and replaced. The second element of the e-mail dealt with the first floor. The Arbitrator stated that it was contended at the hearing that the movement and cupping of the oak flooring at the first floor was due to the leak that occurred under the flooring to the ground floor. He stated that no moisture readings of the first floor oak timbers had been presented by the applicants to support that contention. He then went on to outline some of the evidence adduced at the hearing before him. He concluded by stating that he stood over his determination.

18. There was a further letter dated 6th February, 2012 from the applicants' solicitors to the Arbitrator asserting that there had been "no reasoning" provided at all in the Award in relation to the Arbitrator's refusal to award under several heads of claim submitted by the applicants. It was stated that the question of costs should be deferred "to allow detailed consideration of the reasoned determination which we continue to await regarding the various heads of claim submitted". The Arbitrator responded by e-mail dated 8th February, 2012, in which he stated that he was satisfied that his determination had dealt with all the points of claim raised in the arbitration and the only matter to be resolved was costs.

Costs Award
19. The Costs Award contains three pages of narrative. The two pages which precede the discussion and determination on the costs issue are not directed to the issue of costs, save to a limited extent, and I think it is reasonable to infer that they are a reaction to the correspondence from the applicants' solicitors. Those two pages contain discussion on the evidence as to the dispute between the parties as to the extent of the damage and the remedial work necessary to reinstate items of furniture and fittings situated on the ground floor and whether any damage was caused to the fabric and timber flooring located on the first floor of the property. The shortcomings in the evidence adduced on behalf of the applicants are outlined, in contrast to the evidence of the firm of Loss Adjusters retained by Allianz and the engineers who were engaged by the Loss Adjusters, which it is clear that the Arbitrator preferred. Certain interaction between the professionals on each side was also outlined. The narrative is only relevant to the issue of costs at the point at which the Arbitrator outlined the making of an open offer of settlement in the sum of €120,000 on behalf of Allianz and the rejection of that offer by the applicants prior to the arbitration. The offer of €120,000 was first made on behalf of Allianz by its solicitors in a letter of 8th February, 2010, which was headed "Without Prejudice". However, the Court was told that privilege was waived.

20. The Arbitrator's determination on the costs issues was as follows:

> (a) In relation to the costs of the reference, he awarded costs of the reference to the applicants up to 8th February, 2010 and he awarded the costs of the reference thereafter to Allianz.
>
> (b) In relation to the costs of the Award, on the basis of the rejection by the applicants of the offer of €120,000 which was greater than the Arbitrator's determination at €108,000, and stating that the usual order is that costs follow the event, the Arbitrator awarded the costs of the Award to Allianz.
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> (c) As regards the costs of the 2009 Proceedings, for the reasons set out in the Award, the Arbitrator said he was not prepared to award any costs in the matter. In other words the outcome was that each side bore their own costs, which was merely a reiteration of what had been found in the Award.

21. In addressing the costs of the reference, the Arbitrator referred to the quantum of the applicants' claim (€287,301l.49) and continued:

> "The basis for the magnitude of this claim was that everything supported by the ground floor should have to be removed and scrapped and that the first floor boarding would also have to be removed and scrapped. M.J. Turley & Associates measured the claim on the above basis but stated that they were not professionally qualified to confirm whether this was totally necessary. Thornton and Partners Loss Adjusters did not agree with the magnitude of this claim and engaged the services of professional experts to verify the extent of the damage caused to the Property and its contents."

The Arbitrator stated that it was "with the knowledge of the findings of their experts" that the offer of 8th February, 2010 was made on behalf of Allianz.

The issues
22. The issues which the Court has to address on the basis of the application as advanced at the hearing are:

> (a) whether an order should be made extending the time for bringing the application; and
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> (b) whether the Award and the Costs Award should be set aside on the grounds that the Arbitrator misconducted himself or the arbitration proceedings.

In relation to the issue at (b), the Court's jurisdiction to make that order is derived from s. 38 of the Act of 1954. In essence, the allegation of misconduct was advanced on two grounds, namely: that the Award was not a reasoned award and bias.

Extension of time
23. Order 56, rule 4 of the Rules of the Superior Courts provides that an application to remit or set aside an award under an arbitration agreement shall be made "within six weeks after the award has been made and published to the parties, or within such further time as the Court may allow". Counsel for the applicants properly acknowledged that the six week period in this case ran from 30th December, 2011, although the Award was not received by the applicants' solicitors until 27th January, 2012, following discharge of the Arbitrator's fees. Therefore, it is necessary for the Court to determine whether an extension of time should be allowed. Counsel for the applicants pointed out that following receipt of the Award on 27th January, 2012, the applicants' solicitors, in their letter of 31st January, 2012 complained to the Arbitrator about the lack of reasons in the Award. The final response from the Arbitrator on that line of correspondence was dated 8th February, 2012. The originating notice of motion initiating these proceedings was issued within six weeks of that date, that is to say, on 21st March, 2012.

24. The application of Order 56, rule 4 was considered by the High Court in *Bord na Mona v. John Sisk & Son Ltd*. (Unreported, High Court, Blayney J., 31st May, 1990). In that case, Blayney J. listed the factors which are relevant to the question whether an extension of time should be granted by reference to Mustill and Boyd on *Commercial Arbitration* (2nd Ed.) (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 the time is extended.

3. The length of the 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."

25. In *Kelcar Developments Ltd. v. MF Irish Golf Design Ltd*. [2008] 1 I.R. 407, the approach adopted in *Bord na Mona v. John Sisk & Son Ltd*. was followed on an application for an extension of time, which was refused. In that case, Kelly J. stated (at para. 31):

> "There is a desirability of finality in arbitration. The extension of time here would involve a period in excess of 50% more than that allowed under the rules of court. To accept the applicant's argument that the award was published when it took it up would involve setting aside a century and a half of legal authority which would not be justified. The chronology subsequent to the award being made and the notification of intention to apply to set aside the award was demonstrative of a reaction on the part of the applicant to the respondent's application to enforce. The delay in this case was both culpable and unreasonable and amounts to a prejudice to the respondent. On the merits of the application to set aside I am of the view that the applicant would face an uphill struggle having regard to the material placed before the court both by way of affidavit and submissions. The justice of the case does not warrant time being extended."

As I have recorded above, counsel for the applicants in this case acknowledged that time ran from the making and publication of the Award, and could hardly have done otherwise, given the observations of Kelly J. in that passage. However, counsel for the applicants submitted that the factors which influenced the decision of Kelly J. do not exist in this case.

26. In *Bord na Mona v. John Sisk & Son Ltd*., having outlined the relevant factors, as quoted above, Blayney J. stated:

> "In the present case it seems to me that the weight to be given to each of these factors varies greatly, with the most weight being given to the last factor, whether the applicant has a good arguable case on the merits."

In my view, the position in this case is similar. Therefore, the outcome of the application for an extension of time turns primarily on whether the applicant has a good arguable case on the merits. As regards the first four factors, I would observe as follows:

> (i) Obviously, a court should always bear in mind the desirability of adhering to the time limits prescribed in relation to setting aside or remitting an award on foot of an arbitration agreement. However, in this case, the claim on the insurance policy had been notified to Allianz over two years before the arbitration commenced and over three years before the Award was made and published. The six weeks time limit has to be considered in that context.
>
> (ii) There is no evidence of the likelihood of prejudice to Allianz if the time is extended.
>
> (iii) The length of the delay on the part of the applicants, approximately eleven weeks, has to be considered in the overall context.
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> (iv) In the overall context I do not think it would be appropriate to find that the applicants have been guilty of unreasonable or culpable delay.

I will return to the fifth factor later.

Adequate reasons in award?

27. The applicants' case is that the parties had agreed that the Arbitrator would give a reasoned award. That is not in dispute. What is in dispute is whether, as the applicants contend, the parties were entitled to reasons for the findings made on every matter of contention and the Arbitrator failed to meet this requirement.

28. The authority relied on by counsel for the applicants in support of his contention that the Arbitrator has failed to furnish a proper reasoned award was an Australian authority – a decision of the Court of Appeal of the Supreme Court of Victoria in *Oil Basins Ltd. v. BHP Billiton Ltd. & Ors*. (2007) 18 VR 346. The arbitration in that case arose out of a royalty agreement made in 1960 between the parties named in the title, which was to be interpreted and applied in accordance with the law of the State of New York, under which BHP has assigned "an overriding royalty to Oil Basins on hydrocarbons produced and recovered by BHP from a defined area of Bass Strait". The issue between the parties was arbitrated before three arbitrators, one being a retired State Supreme Court Judge, the second being a US oil and gas lawyer, and the third being a retired Federal Court of Australia Judge. For the purpose of illustrating the difference between what was at issue there and what was at issue before the Arbitrator here, it is worth recording that the head note in the report states that the central issue in the arbitration was whether the expression "overriding royalty" in the agreement was used as a term of art, as BHP contended (with the result that any right to royalty ceased upon surrender of the tenement to which it related (a title-based royalty)), or whether the expression meant simply an additional royalty, as Oil Basins argued (with the result that the royalty was payable in respect of production derived by the respondents from within the area regardless of surrenders (an area-based royalty)). It is also recorded in the head note that the arbitrators, by a majority, made an interim award on liability in favour of Oil Basins. The majority's consideration of the expert evidence in their reasons was confined to a short remark adverting to the existence of a difference of opinion among the witnesses and a conclusion that, "having read and considered" the written and oral evidence, the majority "generally" preferred the evidence of one of the experts. The award was set aside at first instance and there was a similar outcome to the appeal to the Court of Appeal.

29. Before considering the judgments of the Court of Appeal, it must be emphasised that in that case the arbitration and the appeal were regulated by statute: the Commercial Arbitration Act 1984. That Act provided that arbitrators were to include in their award a statement of reasons for making the award. It also provided that an appeal lay from an award on any question of law arising out of an award with leave of the Court, which was not to be granted unless the determination of the question of law could substantially affect the rights of one or more parties to the arbitration agreement and there was a manifest error of law on the face of the award or strong evidence that the arbitrator made an error of law and that the determination of the question might add substantially to the certainty of commercial law.

30. The Court of Appeal, in its judgment, compared the judicial obligations to give reasons and the obligations of an arbitrator to give reasons and stated that each derives from the fundamental conception of fairness that a party should not be bound by a determination without being apprised of the basis on which it is made. It followed that, in arbitration, the requirement is that the

parties not be left in doubt as to the basis on which an award had been given. To that extent, it was stated that the scope of an arbitrator's obligation to give reasons is logically the same as that of a judge (para. 56). The judgment continued (at para. 57):

> "As has been noticed, what is needed to satisfy that requirement will depend upon the particular circumstances of the case. If a dispute turns on a single short issue of fact, and it is apparent that the arbitrator has been chosen for his or her expertise in the trade or calling with which the dispute is concerned, a court might well not expect anything more than rudimentary identification of the issues, evidence and reasoning from the evidence to the facts and from the facts to the conclusion. . . . Contrastingly, however, in complex commercial arbitrations, it may appear that the determination of the dispute demands reasons considerably more rigorous and illuminating that the mere *ipse dixit* of a 'look-sniff' trade referee. And in cases like the present, which involve an intellectual exchange with reasons and analysis advanced on either side, conflicting expert evidence of significant nature and substantial submissions, the parties to the dispute are almost certain to be left in doubt as to the basis on which an award has been given unless the reasons condescend to an intelligible explanation of why one set of evidence has been preferred over the other; why substantial submissions have been accepted or rejected; and, thus, ultimately why the arbitrator prefers one case to the other. Hence, in our view, the reasons in this case should have been of that standard."

31. Counsel for Allianz referred the Court to the helpful commentary on the level of detail that an arbitrator should provide in his reasons in Dowling-Hussey and Dunne on *Arbitration Law* (Thomson Round Hall, 2008) where it is stated (at para. 5-19):

> "If the reasons provided by the arbitrator for his award are inadequate or incomplete, it is conceivable that the parties could apply to the High Court to remit the award to the arbitrator so that the arbitrator can elaborate on the reasons for his award. The courts have stressed that arbitration awards are not equivalent to the written judgments of a court and should not be parsed or viewed in a literal, pedantic or overcritical fashion. . . . It is sufficient if the stated reasons demonstrate why the arbitrator has found in favour of the successful party rather than the unsuccessful party. There is no need for the arbitrator to deal with every single argument made by the parties and there is no need for the arbitrator to explain why the arbitrator attached greater weight to some parts of the evidence rather than the other parts of the evidence. The arbitrator is also not obliged to recite at length all evidence given or all submissions made by the parties."

The authors cite authorities for each of the foregoing propositions. They also refer to the decision of Hargrave J. at first instance in *BHP v. Oil Basins Ltd*. [2006] V.S.C. 402, in which a distinction was drawn between a "straightforward trade arbitration before a trade expert" and a "large scale commercial arbitration" and the point was made that a higher standard of reasons is to be expected in the latter, especially so where, as in that case, the arbitrator was a retired judicial officer.

32. In *Limerick City Council v. Uniform Construction Ltd*. [2007] 1 I.R. 30, in the High Court Clarke J. stated (at para. 87) that he had come to the view that an arbitrator does not, necessarily, have to answer each issue raised at the hearing, whether by pleading, written submissions, oral argument, or on an "issue paper" prepared by the parties unless that issue is necessary to resolve the case which he is hearing. Later (at para. 90) he addressed the approach to construing the award of an arbitrator stating:

> "The approach to construing an award of an arbitrator by the courts is illustrated by *Stillorgan Orchard Limited v. McLoughlin and Harvey* [1978] I.L.R.M. 128, where Hamilton J. came to the conclusion that an award of an arbitrator will be sustained although the arbitrator may have omitted in his award to notice some claim put forward by a party if according to a fair interpretation of the award it is to be presumed that the arbitrator is taking the claim into consideration in making the award. The overall principle is that it is not appropriate to parse and analyse an arbitrator's award but rather to consider from an overall point of view whether it may be said that the arbitrator has dealt properly with each of the matters referred to him."

Clarke J. applied that approach to the case before him, finding that the arbitrator had not failed to decide a matter referred to him. He added that, unless required by the arbitration agreement, an award will not be set aside because the arbitrator has not found separately on each matter referred to him, citing *Whitworth v. Hulse* (1886) L.R. 1 Exch. 251.

33. In this case, the Arbitrator was proposed by the solicitors for Allianz and accepted by the solicitors for the applicants on the basis that the appropriate expertise in the matter was engineering expertise. That is the expertise he brought to the task reposed in him and the Award must be given a fair interpretation having regard to that fact and the adequacy of the reasons he has given must be considered against that background.

34. I have outlined the amended points of claim in some detail earlier and I have also itemised the various elements of the applicants' claim. It can be seen from a comparison of the Award, which I have also outlined in detail, and the applicants' claim, that the Arbitrator primarily gave reasons for merely awarding €108,000 against the plaintiffs' claim for a liquidated sum of €287,301.49. Even though the Arbitrator did not give a breakdown of the sum of €108,000 which he allowed, the components of that sum are quite clear. It does not include compensation for damage to the first floor, to ceilings, to the exterior roadway, or, except to the extent outlined, the fireplace and the reason why those elements were excluded was because the Arbitrator was of the view that causation was not established. As regards the damage which the Arbitrator considered the applicants should be compensated for, he gave a reason as to why he did not accept the assessment of the applicants of the cost of remedial works. It was because he considered that the removal, scrappage and replacement of the various fittings he itemised was not necessary and the fittings in question could be dealt with in the manner he suggested. However, he made it clear that he did include a contingency sum for breakages or damage to the fittings. He also made it clear that the sum of €108,000 covered temporary accommodation during the period of reinstatement and any professional fees incurred. Although, in my view, he was not obliged to do so the Arbitrator elaborated on those reasons in his e-mail of 2nd February, 2012, which I have outlined in some detail, and also in the observations in the Costs Award, which I have categorised as not going to the issue of costs. I consider that the contents of the e-mail and the contents of the Costs Award are not in any way inconsistent with what is stated in the Award itself.

35. It is true that the Arbitrator's rejection of the applicants' claim for damages for breach of contract and negligence and damages in respect of loss of amenity (para. 14 of the amended points of claim) is little more than a blanket rejection and no reason is expressed in relation to any of the heads of claim. However, when the Closing Submissions in writing furnished to the Arbitrator by the applicants' legal representatives are considered, it becomes clear that, in reality, there was only one head of claim, which was for alleged loss of amenity based on either alleged breach of contract or negligence on the part of Allianz. The basis of the claim for loss of amenity was that the applicants had been deprived of the use and enjoyment of their home in a properly repaired condition from 2008 to the end of 2011. The claim was put forward as a claim for €500 per week, representing weekly rental of a suitable alternative property, together with a further sum of €200 per week to reflect the inordinate delay on the part of Allianz. It was also submitted that the resulting figure should be topped up so that the alleged contract breaker, Allianz, could not benefit from its own breach of contract by the application of reduced current rates. The figure suggested as being the measure of the damages for loss of amenity

was €169,136.

36. Reading paragraph 14 of the points of claim in conjunction with paragraphs 8 and 9 thereof, indicates that the deleterious effect on the health of the applicants and their children and the loss of amenity in respect of which the applicants' claim was alleged to be a consequence of the view adopted by Allianz that only the ground floor of the property should be dried out, with the result that, when the applicants and their children resumed habitation, mould grew quickly around the house, it being implicit that that was a consequence of Allianz's refusal to accept liability "for comprehensive drying out and remedial works". Dealing with the claim for the liquidated sum, as I have pointed out, the Arbitrator specifically found that the water damage for which Allianz was liable under the insurance policy did not include damage to the first floor and to ceilings. In rejecting what I consider to be a single claim for damages, whether based on breach of contract or negligence, for loss of amenity, adopting the view adopted by Hamilton J. in *Stillorgan Orchard Ltd. v. McLoughlin and Harvey*, I think, on a fair interpretation of the Award, it is to be presumed that the Arbitrator was rejecting that claim on the same basis as he rejected the element of the claim for a liquidated sum other than the part thereof which related to the ground floor.

37. Finally, in relation to the claim for pre-Award interest, while the Arbitrator has given no explanation for rejecting that aspect of the claim, I see no basis advanced anywhere in the pleadings or in the closing submissions in writing which would support a claim for pre-award interest in accordance with s. 34 of the Act of 1954, as substituted by s. 17 of the Arbitration (International Commercial) Act 1998. Therefore, I consider that no weight is to be attached to the lack of an explanation for rejection of that aspect of the claim.

38. In general, I have come to the conclusion that the Arbitrator has sufficiently outlined the reasons which demonstrate why he assessed the applicants' claim at €108,000. The requirement that the parties not be left in doubt as to the basis of the award, in my view, has been complied with. Accordingly, I am of the view that the applicants have not made out a case to have the Award set aside on the grounds that it is not a properly reasoned award.

39. As regards the Costs Award, the Arbitrator has set out the reasons for his decisions on the issue of costs, including the costs of the 2009 Proceedings, which he had also addressed in the Award.

Alleged bias on the part of the Arbitrator

40. In his grounding affidavit on this application sworn on 20th March, 2012, Mr. McElhinney averred that a matter of considerable procedural gravity "had come to light since the conclusion of the arbitration hearing on 21st December, 2011". He averred that the chief witness for Allianz was Mr. Clabby of Thornton and Partners, the Loss Adjusters retained by Allianz. He averred that the Arbitrator and Mr. Clabby had been members of the same yacht club and the same GAA club for years and that they might have sat on at least one joint committee. It was further averred that "they are very well known to each other and have been for years and there is clearly the objective possibility that they may even be friends". It was asserted that it was incumbent on the Arbitrator to make known his longstanding acquaintanceship with Mr. Clabby at the earliest opportunity, so that both parties might consider whether they wished him to continue to act as arbitrator, but he had not done so.

41. In response to the allegation of bias, in his first replying affidavit sworn on 11th May, 2012, Mr. Ó Longaigh entered into a debate as to who the chief witness on behalf of Allianz was, which I do not propose to comment on. Mr. Ó Longaigh then averred as to direct contact between the first named applicant and the Arbitrator after the Arbitrator's appointment in January 2011, during which the first named applicant had raised the issue that Mr. Clabby was known to the Arbitrator. He also referred to a discussion he had with Mr. McElhinney on 3rd February, 2011 during which he was informed by Mr. McElhinney that the applicants intended to object to the Arbitrator on the basis that he knew Mr. Clabby. In the event, the applicants did not raise any objection regarding the appointment of the Arbitrator or to his embarking on the conduct of the arbitration.

42. The first affidavit of Mr. Clabby sworn on 11th May, 2012 was filed on behalf of Allianz. In that affidavit Mr. Clabby averred that he was a member of St. Bridget's GAA Club, County Roscommon, for many years, but to the best of his knowledge, the Arbitrator was not a member of that Club. He was also a member of Lough Ree Yacht Club between the years 2000 and 2009 and he was also involved in the Executive Committee and the Development Committee of that Club between the years 2004 and 2007. He was aware that the Arbitrator was also a member of Lough Ree Yacht Club but, to the best of his knowledge, the Arbitrator was never a member of any committee whilst he was a member of the Club. He had never any engagement with the Arbitrator at any time at the Club. He averred that the Arbitrator and himself were not well known to each other and that they were not friends. He had never dealt with the Arbitrator in a professional capacity, but he knew of him as the owner of the largest, and probably the best known, engineering firm in Athlone. Mr. Clabby supplemented that affidavit in his second affidavit of 28th June, 2012 which was filed on behalf of Allianz. It is not necessary to go into the detail of that affidavit but the clear inference to be drawn from it is that a private investigator, who was pursuing Mr. Clabby in May 2012 in a very inappropriate fashion, had been retained by the applicants.

43. In his affidavit sworn on 29th September, 2012 and filed in these proceedings by him, the Arbitrator has averred that he has taken great exception to the averment in Mr. McElhinney's affidavit in which he contended that Mr. Clabby was very well known to the Arbitrator and might even be his friend. He stated emphatically that that was not correct. Until receipt of Mr. McElhinney's affidavit he was unaware that Mr. Clabby was a member of Lough Ree Yacht Club and he had never sat on any committee with Mr. Clabby. He stated emphatically that he had no relationship with Mr. Clabby and had nothing to inform or disclose at the arbitration hearing. He also outlined e-mails and phone calls which he had received from a person who stated that he was a private detective inquiring about his relationship with Mr. Clabby. The Arbitrator also exhibited an e-mail dated 3rd August, 2012 which he had received from the brother of the first named applicant and an e-mail of the same date from the first named applicant. Those e-mails and a copy of a letter from the solicitors for Allianz to the applicants' solicitors dated 15th August, 2012 were also exhibited in an affidavit sworn by Mr. Ó Longhaigh on 4th October, 2012. The Arbitrator had sent the two e-mails he had received on 3rd August, 2012 to both the applicants' solicitors and the solicitors for Allianz. He stated that he found being contacted in that manner both intimidating and threatening and that he had filed the correspondence for the attention of An Garda Síochána.

44. Mr. McElhinney swore a further affidavit on 10th October, 2012, which was filed on behalf of the applicants. In that affidavit Mr. McElhinney outlined a telephone conversation he had with Ms. O'Rourke on 7th September, 2012, which he had instigated. The first mention of Ms. O'Rourke in the papers before the Court was in the e-mails of 3rd August, 2012 from the brother of the first named applicant, Alistair McIntyre, and from the first named applicant to the Arbitrator. The thrust of what was stated in those e-mails was that Ms. O'Rourke had confirmed that Mr. Clabby and the Arbitrator were friends. The purpose of Mr. McElhinney's call to Ms. O'Rourke was to ascertain whether she would swear an affidavit confirming that the Arbitrator and Mr. Clabby were well known to each other. Ms. O'Rourke was not prepared to swear an affidavit as requested. It was for that reason that the applicants decided to have a subpoena served on her. In that affidavit, Mr. McElhinney averred that he did not at any time engage a private investigator or suggest to the applicants that they should do so.

45. The last affidavit filed was the third affidavit of Mr. Clabby, which was sworn on 30th November, 2012. In that affidavit he set out the limited contact he has had with Ms. O'Rourke. Mr. Clabby confirmed that he had no previous history with the Arbitrator.

46. The issue of alleged bias by reason of a connection between the arbitrator and one of the parties, John Sisk & Son Ltd., was the basis on which it was sought to have the arbitration award set aside in *Bord na Mona v. John Sisk & Son Ltd*. In that case, Blayney J. agreed with the following statement of the law set out in the judgment of the High Court (Murphy J.) in *Dublin & County Broadcasting Ltd. v. Independent Radio and TV Commission, Radio 2000 and Capital Radio Productions* (Unreported, 12th May, 1989):

> "Certainly it does seem to me that the question of bias must be determined on the basis of what a right minded person would think of the likelihood, of the real likelihood of the prejudice, and not on the basis of a suspicion which might dwell in the mind of a person who is ill informed and did not seek to direct his mind properly to the facts. It seems to me the crucial part of the test would be the approach of a right minded person to the facts and circumstances of the case, and with the view which he would form as to the likelihood of bias not to the fact of the bias being operative in fact, and I entirely accept it would be irrelevant and immaterial if in a case such as the present it was established as a matter of fact the bias was non-operative or that the particular person accused of the bias was outvoted or whatever. If it is shown that there is on the facts circumstances which would lead a right minded person to conclude that there was a real likelihood of bias, that this would be sufficient to invalidate the proceedings of the tribunal."

Blayney J. stated that he proposed to apply the test laid down in the final sentence of that quotation and he expressed the question to be answered as:

> ". . . have the plaintiffs a good arguable case on the merits to establish that a right minded person with full knowledge of the facts would have been led to conclude that there was a real likelihood of bias in [the arbitrator] acting in the arbitration between the plaintiffs and Sisk?"

On the facts Blayney J. concluded that the plaintiffs did not have a good arguable case on the merits. Returning to the extension of time issue, he refused to extend the time.

47. In this case, both the Arbitrator and Mr. Clabby have sworn affidavits in which they have denied the existence of any friendship, relationship or acquaintanceship between them, notwithstanding that they are both members of Lough Ree Yacht Club. As I have already recorded, the applicants have not sought to cross-examine either of them on their affidavits. What is averred to in Mr. McElhinney's second affidavit as to what he was told by Ms. O'Rourke of the connection between the Arbitrator and Mr. Clabby is hearsay. In my view, the justice of this case does not require that the applicants be given an adjournment to enable them procure the attendance of Ms. O'Rourke on subpoena to testify to the Court. The applicants' application for an adjournment for that purpose is refused.

48. Adapting the question posed by Blayney J. in *Bord na Mona v. John Sisk & Co. Ltd*. to the facts of this case, the question for the Court is whether the applicants have a good arguable case on the merits to establish that a right minded person with full knowledge of the facts would have been led to conclude that there was a real likelihood of bias in the Arbitrator acting in the arbitration between the applicants and Allianz, in which Mr. Clabby was a witness for Allianz. Given that there is no evidence before the Court to support a connection or relationship between the Arbitrator and Mr. Clabby of a type which a right minded person would conclude would give rise to a real likelihood of bias, I am satisfied that, insofar as the applicants seeks to have the Award set aside on the grounds of bias, they do not have a good arguable case on the merits.

Application for extension of time revisited
49. There will be an order refusing the applicants' application for an extension of time under Order 56, rule 4, on the ground that the applicants do not have a good arguable case on the merits to have the Award set aside.

Order
50. The application is dismissed.