Neutral Citation Number: [2011] IEHC 184

THE HIGH COURT

2011 88 SP

IN THE MATTER OF THE ARBITRATION ACT 2010

AND

IN THE MATTER OF THE ARBITRATION AWARD OF JOHN GORE GRIMES DATED 12th JANUARY, 2011

BETWEEN

FBD INSURANCE PLC

PLAINTIFF

AND

JAMES CONNORS AND JOHN GORE-GRIMES

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 14th day of March, 2011.

1. The proceedings

1.1 These proceedings were one of two matters which were before the Court on 7th March, 2011 for determination arising out of arbitration proceedings before the second defendant (the arbitrator), as arbitrator, in which the first defendant (the claimant) was claimant and the plaintiff (FBD) was respondent. The claimant's claim against FBD was on foot of a policy of insurance in respect of the loss which the claimant sustained when his dwelling house in Kilcullen, County Kildare and its contents were completely destroyed by fire on 25th November, 2009. The reasoned award of the arbitrator, which was dated 12th January, 2011 and which was clearly intended to be a final award, awarded sums aggregating €156,369.75 to the claimant, together with interest thereon at the rate of 8% per annum from 25th April, 2010 up to the date of payment. In addition, costs were awarded against the respondent in favour of the claimant.

1.2 Chronologically, the earliest proceedings before the Court on 7th March, 2011 were proceedings under Record No. 2011/25MCA entitled "In the matter of the Arbitration Acts 1954 – 2010" between the claimant, as plaintiff, and FBD, as defendant, which were initiated by an originating notice of motion dated 2nd February, 2011 (the claimant's application), which was first returnable for 21st February, 2011. The reliefs sought on the claimant's application were:

> (a) an order pursuant to s. 41 of the Arbitration Act 1954 (the Act of 1954) or otherwise compelling FBD to comply with the arbitrator's award; and
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> (b) an order directing FBD to pay to the claimant the sum of €156,369.75 plus interest at the rate of 8% from 25th April, 2010 and the costs of the arbitration, to include witness costs.

The claimant's application was grounded on an affidavit of his solicitor, Gerard F. Burns, sworn on 2nd February, 2011 and the exhibits referred to therein and a supplemental affidavit sworn by Mr. Burns on 10th February, 2011.

1.3 Before the claimant's application was first returnable before the Court, FBD had initiated these proceedings by special summons which issued on 4th February, 2011 (FBD's application), in which FBD sought:

> (a) an order pursuant to Order 56, rule 4 of the Rules of the Superior Courts 1986 (the Rules), as amended, setting aside what was referred to as the "purported award" of the arbitrator dated 12th January, 2011; and
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> (b) an order remitting the dispute between FBD and the claimant to arbitration for formal adjudication thereon.

1.4 A number of issues arise in relation to the form of FBD's application, namely:

> (a) whether they are proceedings properly brought under the jurisdiction conferred by the Arbitration Act 2010 (the Act of 2010), as the title suggests;
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> (b) whether the arbitrator should have been joined as a defendant in the proceedings; and
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> (c) whether the manner in which the proceedings were initiated complies with the Rules.

1.5 On the first issue, s. 3(1) of the Act of 2010 provides that the Act shall not apply to an arbitration made under an arbitration agreement concerning an arbitration which has commenced before the operative date. The operative date was 8th June, 2010. As will be demonstrated later, the arbitration at issue here commenced before the operative date and, accordingly, the Act of 2010 does not apply to it.

1.6 In relation to the second issue, since Order 56 of the Rules was amended by the Rules of the Superior Courts (Arbitration) 2006 (S.I. No. 109 of 2006), an application by any party to a reference under an arbitration agreement, *inter alia*, to remit an award to an arbitrator or umpire (para. c), or to set aside an award (para. e), or to enforce an award pursuant to s. 41 of the Act of 1954 (para. f) may be made –

> "by originating notice of motion to which the other party or parties to the reference (and in the case of an application under paragraph (b) or paragraph (d), the arbitrator or umpire) shall be respondents."

FBD is not invoking the relief provided for in either paragraph (b) or paragraph (d) of rule 4 of Order 56 and, accordingly, the arbitrator is not a necessary party in these proceedings. I will return to the consequences of this aspect of the matter later.

1.7 Notwithstanding that FBD should have initiated this application by originating notice of motion, rather than by special summons, I consider that it was appropriate to hear the application and to treat it as having been properly brought. In fact, there was no opposition to the Court adopting that approach.

1.8 FBD's application was grounded on the affidavit of its solicitor, Gerard M. Gannon, sworn on 17th February, 2011. In response to FBD's application, the following affidavits were filed on behalf of the claimant:

> (a) an affidavit of his solicitor, Mr. Burns, sworn on 23rd February, 2011;
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> (b) an affidavit sworn on 22nd February, 2011 by Martin J. Mulhall, the loss assessor instructed by the claimant's solicitor, sworn on 22nd February, 2011; and
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> (c) an affidavit of Augustus Cullen, solicitor, sworn on 1st March, 2011.

The purpose of the affidavit sworn by Mr. Cullen, as I understand it, was to support the contention of the claimant's solicitor that FBD deliberately delayed and obstructed the resolution of the claimant's claim, by outlining Mr. Cullen's experience in acting for clients, whom I understand to have no connection with the claimant, in relation to an insurance claim, which I understand to have no connection with the claimant's claim. In my view, the contents of Mr. Cullen's affidavit are wholly irrelevant to the issue the Court has to decide and I have had no regard to it.

1.9 The arbitrator was represented on FBD's application, to which he was a defendant, by the firm of Charles BW Boyle & Son, Solicitors. Mr. Peter Boyle, the principal in that firm, swore an affidavit on 2nd March, 2011 in answer to FBD's contentions. Mr. Gannon swore a further affidavit on 3rd March, 2011, the purpose of which was expressed as being "to highlight and clarify the dates as of which the arbitration process was invoked and to deal with the factual position as to the nomination of [the arbitrator]".

1.10 It seems to me that the logical approach to the two applications before the Court is to deal with FBD's application first, which is the course I intend to adopt. However, I propose to base my decision on that application on the totality of the evidence before the Court on both applications.

1.11 As regards the evidence, a number of observations are apt. First, while I will set out the circumstances in which the arbitrator was appointed, issues raised by Mr. Gannon in his grounding affidavit in relation to the appointment of the arbitrator, in my view, are fairly described as "red herrings", because FBD submitted to the jurisdiction of the arbitrator. Secondly, although, as I will outline, Mr. Mulhall's affidavit was designed to cast doubts on the veracity of Mr. Gannon's affidavit, the claimant did not seek to have Mr. Gannon cross-examined. In fact, the affidavits filed on behalf of the proponents in the matters before the Court, the claimant and FBD, are replete with allegations and counter-allegations giving rise to conflicts of evidence which the Court cannot resolve.

2. Factual basis of FBD's application

2.1 The claimant initiated plenary proceedings in the High Court against FBD (Record No. 2010/3920P) seeking specific performance of the relevant contract of insurance in relation to the fire incident. By order of the Court (Murphy J.) made in the proceedings on 28th April, 2010 it was ordered, pursuant to s. 5 of the Act of 1954, that the proceedings be stayed. The controversy as to the appointment of an arbitrator then ensued. Each side nominated individuals to fill the role. The solicitors for the claimant did not find the nominees of FBD to be acceptable and requested the President of the Law Society to nominate a person to act as arbitrator. The President nominated Mr. Gore-Grimes. The solicitors for FBD contended that, under the arbitration clause in the relevant policy document, the President of the Law Society had no function in relation to the appointment of an arbitrator. The claimant applied to Court in the plenary proceedings for the appointment of Mr. Gore-Grimes as arbitrator. By order of the High Court (McMahon J.) made on 12th August, 2010 it was ordered that Mr. Gore-Grimes be appointed as sole arbitrator for the purposes of the arbitration process.

2.2 The arbitrator held a preliminary meeting on 13th September, 2010. Thereafter pleadings were exchanged between the parties and issues in relation to particulars and discovery were addressed.

2.3 At some time prior to 22nd November, 2010, but on the evidence it is not clear precisely when, the arbitrator fixed Monday 13th December, 2010 as the date of the arbitration hearing. It is clear on the evidence that both parties were preparing for the hearing on that date.

2.4 Mr. Burns has averred that he was contacted by telephone by the arbitrator on 7th December, 2010, who advised him that due to personal matters beyond his control he was not in a position to sit on 13th December, 2010, but suggested that the arbitration hearing should take place on 14th December, 2010. Mr. Burns has also averred that he had informed the arbitrator that the claimant was returning from Australia for the hearing and would be flying back to Australia on 16th December, 2010 and he was eager to ensure that the arbitration would take place without any adjournment. It would appear that the arbitrator contacted Mr. Gannon on the same day. There is reference in a letter dated 9th December, 2010 from Mr. Gannon to the arbitrator to a letter of 7th December, 2010 from the arbitrator, but that letter has not been exhibited. In any event, it is clear that Mr. Gannon was informed of the arbitrator's intention to postpone the hearing for one day on 7th December, 2010. In his letter of 9th December, 2010 to the arbitrator, Mr. Gannon pointed out that the senior counsel who had been instructed by Mr. Gannon on behalf of FBD had allocated 13th December, 2010 for the arbitration hearing, but had commitments on 14th December but that he would be available on 16th December at 9.30am. Mr. Burns received a copy of that letter by fax on the day it was written. He wrote to the arbitrator on 9th December, 2010 pointing out that the claimant had travelled from Australia and was available and all of the claimant's witnesses of fact were available for the hearing on 14th December. Mr. Burns asserted that the matter had been "the subject of continuous delays for one reason or another" and he asked the arbitrator to confirm that the arbitration hearing would proceed on 14th December, 2010. By a further letter of 9th December, 2010, Mr. Burns notified the arbitrator that the claimant was due to fly back to Australia on 16th December and requested that this be noted when the arbitrator was arriving at his decision.

2.5 By letter dated 10th December, 2010 the arbitrator notified the solicitors for the claimant and for FBD that the arbitration would proceed on Tuesday, 14th December. He stated that the claimant had travelled from Australia for the hearing and it would be unjust

to adjourn the hearing in circumstances where there were so few days left between that date and "the Christmas break". It was indicated that the arbitration hearing would be sitting late on Tuesday evening, if that was required. Confirmation was sought that both parties would attend.

2.6 In response to the arbitrator's letter of that day, by letter dated 10th December, 2010 to the arbitrator, which was copied to Mr. Burns, Mr. Gannon asked the arbitrator to review his decision in the light of what was stated in the letter. Mr. Gannon's problem, as set out in that letter, was that the senior counsel he had instructed was not available for 14th December. Mr. Gannon stated:

> "In many cases there might be no difficulty engaging alternative Counsel at this notice but in this case we have had a number of consultations with our senior Counsel in the matter and he has been heavily involved in the matter over a period of months. It would be an injustice to our clients to require and to engage alternative Counsel at this stage particularly as our Counsel had cleared his diary to make himself available for the 13th."

Mr. Gannon suggested that any injustice to the claimant could be adjusted "by way of costs order in relation to any expenses arising to the claimant depending on the outcome of the issue" or as the arbitrator might in the exercise of his powers and discretion consider appropriate. Receipt of a faxed copy of that letter by Mr. Burns at 4.35pm on 10th December provoked another letter from him to FBD's solicitors alleging that it was "simply a further attempt to frustrate and/or delay" the arbitration process. The letter was copied to the arbitrator. It would appear that the arbitrator did not respond to Mr. Gannon's letter of 10th December, 2010.

2.7 From 6th December, 2010 onwards there was intensive correspondence between the claimant's solicitors and FBD's solicitors dealing with issues which arose on the pleadings and on requests for, and replies to, notices for particulars. For instance, by letter dated 9th December, 2010, the claimant's solicitors informed FBD's solicitors of the witnesses who would be called to give evidence at the arbitration hearing. Reference was made to meetings between the claimant's loss assessor, Mr. Mulhall, and FBD's loss adjuster, Mr. Maurice Cunningham, and it was stated that no final agreement had been reached between them and that, if final agreement was not reached, it might be necessary for the claimant to call a witness from an engineering firm. Similarly, on 13th December, 2010 FBD's solicitors informed the claimant's solicitors that their witnesses would include Mr. Cunningham and two other named experts.

2.8 It would appear that the final communication from FBD's solicitors to the claimant's solicitors, which was copied to the arbitrator, was sent by fax on the afternoon of 13th December, 2010. In it, Mr. Gannon adverted to the fact that he would be travelling by public transport to Dublin having regard to weather conditions, which were undoubtedly severe, and he pointed out that, while the train was scheduled to arrive in Dublin at 9am, he would not have control over the timing and, if he was delayed, he anticipated that the position would be understood and he would be facilitated.

2.9 A transcript of the proceedings before the arbitrator on 14th December, 2010 has been exhibited. When the proceedings opened, junior counsel on behalf of FBD applied for an adjournment on the basis that an essential witness for FBD was not available that day, namely, Mr. Cunningham. Counsel told the arbitrator that FBD would pay the claimant's reasonable additional air fare if he was unable to travel back to Australia on 16th December. FBD would be in a position to proceed with the arbitration hearing on the 16th December and on the following day, if necessary. Counsel advanced two other reasons for seeking the adjournment. One was an alleged failure on the part of the claimant's solicitors to furnish particulars sought in relation to the "occupation of the claimant and spouse" of the house which had been burned down. In its notice for particulars dated 20th October, 2010 FBD had sought detailed particulars of the occupation of the claimant and his spouse, in relation to the claimant seeking details of his employer from 1st January, 2007, the nature of his employment, the duration of his employment, his net earnings from such employment and the tax form P60 furnished in relation to each such employment was sought. On 22nd November, 2010, the claimant's solicitors responded that the claimant was self employed. In an accompanying letter, the claimant's solicitors stated that they were awaiting the claimant's self assessment tax returns from a named individual, whom I assume was the claimant's tax adviser or accountant, who had moved office. As a result there had been a delay in obtaining the copy documentation sought, but the claimant's solicitors stated it would be available for examination by FBD in advance of the hearing. Counsel for FBD explained to the arbitrator why the information sought was important and intimated that he considered that he did not have full details "of the applicant's travel abroad". The second reason concerned counsel's own personal situation. Due to a family illness, he had been unable to attend important consultations in relation to the matter and there were huge gaps in his knowledge. In fact, the senior counsel who was leading him had borne the brunt of the case up to that point in time.

2.10 As appears from the transcript, senior counsel for the claimant queried the genuineness of Mr. Cunningham's inability to attend, but intimated that the claimant's legal team would be quite prepared to facilitate Mr. Cunningham's attendance on another day, if he had a genuine reason for not being there on 14th December. In relation to the issue of the self assessment income tax returns, counsel for the claimant submitted that they were totally irrelevant to the arbitration, as there was no claim for loss of earnings. That submission was rejected by counsel for FBD, who pointed out that their relevance was that the tax returns would be corroborative of the length of time the claimant was working abroad, that is to say, not occupying the house which had burned down. In relation to the ability of Mr. Cunningham to attend, counsel for FBD told the arbitrator that Mr. Gannon had not been able to attend the pre-hearing consultation the previous day, because of weather conditions. At the consultation Mr. Cunningham told counsel that he was not available on the 14th December but counsel did not pry into the reasons why he was not available. Counsel for the claimant having stated that the claimant was anxious to go ahead, the arbitrator ruled on the application to adjourn the hearing until Thursday, 16th December.

2.11 In ruling, the arbitrator addressed the reasons for FBD's application. In relation to the non-availability of Mr. Cunningham, he intimated that he was quite prepared to interpose him at any stage that suited Mr. Cunningham. However, he wished to proceed with the claimant's case that day. If necessary, with the agreement of the parties, he would sit the following week, that is to say, the week commencing 20th December. At that point, counsel for FBD informed the arbitrator that his instructions were absolutely clear – that FBD was not in a position to proceed and was withdrawing. In the exchanges which ensued between counsel and the arbitrator, counsel stated that FBD did not bring the situation about; it was ready to proceed the previous day. Counsel then stated that he wanted Mr. Cunningham to hear the claimant's evidence; a transcript would not suffice. He wanted the expert sitting beside him while the evidence of the opposition was being given. At that point the arbitrator indicated that the matter should go ahead. Counsel for FBD and Mr. Gannon and the FBD representatives then withdrew from the arbitration, which proceeded in their absence. It appears from the transcript that the arbitrator had some misgivings at that stage about the propriety of proceeding, which I will outline later, but he was urged by senior counsel for the claimant that the arbitration should proceed in the absence of FBD.

2.12 In relation to the evidence before the Court on this application as to the reason FBD sought an adjournment, Mr. Gannon has averred that on 13th December, 2010 he was informed by Mr. Cunningham that he could not attend and, in the circumstances, he instructed junior counsel to apply for a short adjournment until 16th December, when FBD would be in a position to proceed and he would have all the relevant witnesses for FBD in attendance. He specifically averred that FBD required Mr. Cunningham to be present at the hearing to give his expert assistance in dealing with the evidence of the claimant and his witnesses. He also raised the issue of

the absent tax returns of the claimant in the context of an assertion that there are "serious underwriting issues here which should have been explored" and that FBD needed to consider the tax returns with reference to amendment of the points of defence "to plead non-disclosure of material facts". It would appear that the issue of the amendment of the points of defence had not arisen prior to that averment.

2.13 Mr. Mulhall in his affidavit averred that on the afternoon of Friday, 10th December, 2010 he had a meeting with Mr. Cunningham. During the course of the meeting Mr. Cunningham indicated that he was aware that the arbitration hearing had been arranged for 14th December, 2010, but, as far as he was aware, the arbitration might be postponed as either the arbitrator, or the solicitor acting for FBD, or counsel for FBD would not be available. However, at no stage during the meeting did Mr. Cunningham intimate to Mr. Mulhall that he would not be in a position to attend the arbitration. The purpose of Mr. Mulhall's affidavit was patently to cast doubt on Mr. Gannon's evidence.

2.14 Finally, taking an overview of the evidence, I consider that there is some merit in the claimant's contention that there were attempts on the part of FBD to delay or frustrate the arbitral proceedings, particularly prior to 6th December, 2010, but that is not a significant factor in determining FBD's application.

3. The legal principles applicable to FBD's application.

3.1 Both counsel for FBD and counsel for the plaintiff referred the Court to the decision of the Supreme Court in *Galway CC v. Kingston Ltd.* [2010] 2 ILRM 348 and, in particular, to the passage in the judgment of O'Donnell J. in which he quoted with approval, subject to certain comments, the portion of the judgment at first instance in which McMahon J. dealt with the legal principles on which arbitral awards can be challenged. In dealing with the principles applicable to the setting aside of an award, McMahon J. stated:

> "First, section 38 of the Act of 1954 provides for the setting aside of an award where 'an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured…'. The term 'misconduct' has a special meaning in this context. As explained by Jenkins L.J. in *London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.* [1958] 1 W.L.R. 661 at p. 665, misconduct is 'used in the technical sense in which it is familiar in the law relating to arbitrations as denoting irregularity, and not any moral turpitude or anything of that sort'. Similarly, Atkin J., in *Williams v. Wallis and Cox* [1914] 2 K.B. 478 stated, at p. 485, that the expression 'does not necessarily involve personal turpitude on the part of the arbitrator' and that it 'does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice'. This passage was recently cited by Fennelly J. in *McCarthy v. Keane* [2004] 3 I.R. 617, who went on to say, at p. 627, that 'the standard or test of misconduct … would be something substantial, something that smacks of injustice or unfairness'. Examples of misconduct from the case law include refusing to hear evidence on a material issue, adopting procedures placing a party or parties at a clear disadvantage, acting with clear favouritism towards one party, deciding a case on a point not put to the parties or failure to resolve an issue in the proceedings. However, in order to provide the basis for a successful challenge to the arbitral award, the misconduct must reach the high threshold set out above."

In my view, the comments subsequently made by O'Donnell J. do not bear on the application of those principles to the issues now before the Court.

3.2 Of the authorities cited by counsel for the parties, two Irish authorities addressed factual scenarios in which an arbitration award was made following a hearing at which only one of the parties was present.

3.3 The first was *Grangeford Structures Ltd. v. S.H. Ltd.* [1990] 2 I.R. 351. In that case, the Supreme Court was concerned with an application to set aside an arbitrator's award in circumstances where, the defendant's solicitor having walked out in protest when his application for an adjournment was refused, the hearing continued and an award was made. The facts in that case, which, in my view, are distinguishable from the facts in this case, were that the dispute between the parties was referred to the arbitrator on 12th March, 1985. As Griffin J., recorded in his judgment, from early on the arbitrator encountered delay most of which he attributed to the defendant. In any event, points of claim and points of defence were delivered by the parties. The arbitrator offered the parties a number of dates in November 1985 for the hearing, but before a date was finally agreed on, the defendant's solicitor wrote to the arbitrator confirming that his firm was "formulating a substantial counterclaim against the plaintiff". On 7th January, 1986, the arbitrator wrote to the solicitor stating that his letter was, in effect, "an application to amend the defence and make a counterclaim" and that he was in the circumstances agreeable to allow the application, on the basis, *inter alia*, that, in view of the considerable delays in bringing the dispute to hearing, a period of twenty one days from the date of the letter would be allowed for the filing of the amended defence and counterclaim and a period of thirty five days from the date of the letter from the date of the letter would be allowed for filing the list of documents. The letter then stated that no extension to the period stipulated would be allowed except for grave reasons and that, if no amended defence and counterclaim was received within the period stated, the arbitrator would proceed. On 4th February, 1986 the arbitrator wrote to the parties stating that, as he had not received any amended claim or other communication from the solicitor for the defendant, he proposed to proceed to a hearing at 10.30am on 7th March, 1986. Nothing further was heard from the defendant's solicitor until 5th March, 1986, when he wrote to the arbitrator stating that his firm was not yet in a position to file the counterclaim and that he would be looking for an adjournment of the arbitration on 7th March, 1986. No reason for, or explanation of, the alleged inability to deliver the counterclaim was furnished then, nor, indeed, as Griffin J. commented in his judgment, at any time thereafter. On 7th March, the arbitrator opened the hearing and the defendant's solicitor sought an adjournment to permit the preparation and submission of a counterclaim. The solicitor for the plaintiff objected to any adjournment. The arbitrator peremptorily adjourned the hearing to 2.15pm on the same day, so that the defendant's solicitor could consult with his client. When the hearing resumed, the solicitor for the defendant once again applied for an adjournment and withdrew from the hearing when the application was refused. The hearing continued in the absence of the defendant's solicitor, the arbitrator heard such evidence as was offered to him, concluded the hearing and then subsequently made an award directing the payment of a sum of money to the plaintiff. On those facts, the Supreme Court upheld the decision of the High Court (Costello J.), who had refused to set aside the award pursuant to section 38.

3.4 In delivering his judgment, Griffin J. stated (at p. 356) that there was no basis for holding that the arbitrator acted unreasonably or arbitrarily in refusing the adjournment or that this resulted in an unfair procedure. He held that more than sufficient time had been afforded to the defendant to prepare any counterclaim which it wished to have included in the arbitration. During the four months between 7th November, 1985 and the date of the hearing nothing whatever, not even an acknowledgment, had been heard from the defendant, despite reminders and the fixing of times for submission of the counterclaim, until two days before the date fixed for the actual hearing. On the question whether, in the circumstances, the arbitrator had jurisdiction to continue the arbitration in the

absence of the defendant, Griffin J. held that the arbitrator did have jurisdiction, referring to submissions made on behalf of the defendant by reference to the decision of the House of Lords in *Bremer Vulkan v. South India Shipping* [1981] A.C. 909. Griffin J. stated (at p. 357):

> "That case does not in my view offer support to the defendant. What Lord Diplock and Lord Scarman said the arbitrator had power to do is precisely what the arbitrator did in this case. He made an award on the evidence presented to him. This did not include any evidence in relation to any counterclaim of the defendant, since no such counterclaim was in fact before him. His award which is expressed to be in full settlement of all claims by each of the parties against the other in the reference must be confined to the matters properly before him and evidence which he heard and determined."

3.5 McCarthy J. was also of the view that the award should not be set aside. He stated (at p. 359):

> "There is to be implied into every agreement establishing a forum for the resolution of disputes that there will be fair procedures. Such are not the prerogative of one side or the other. Just as one side is entitled to the opportunity of stating and making his case, the other is entitled to expedition in the determining of the dispute. It is for the arbitrator to balance one against the other insofar as they affect the timing of his decision. Equally fundamental to the principle of fair procedures is that the arbitrator will only decide what is before him. There was no counterclaim before the arbitrator and his award was therefore confined, as Griffin J. says, to the matters properly before him and evidence which he heard and determined. …
>
> In my judgment, an arbitrator has an inherent power to issue directions requiring the parties to submit details of their claim or claims, to fix a date or dates for the hearing of the reference and, in a proper case, to proceed on such date or dates despite the absence of one or other party, where such party has been refused any further adjournment. There is no sanction that the arbitrator can properly impose upon a party to a reference where he has failed to present his claim in a formal fashion or refuses to participate in the hearing. To proceed in his absence is not a punishment no more than it is such to make an award in such circumstances."

3.6 The other Irish authority cited by the parties in which an arbitration proceeded in the absence of one party and in which an application was brought to set aside the award made was the decision of the High Court (Murphy J.) in *Lennon and Harvey Ltd. v. Margaret Murphy and Brian Whelan* [2004] IEHC 402. In that case after the arbitrator was appointed, there was some prospect of the settlement of the dispute, which involved the determination of a new rent on a review, being negotiated. The parties sought an adjournment, one side seeking that the matter be adjourned *sine die* and the other that it be put back for two weeks. The arbitrator's response was that he most emphatically was not prepared to adjourn it *sine die*. On 17th July, 2003 he wrote to the parties advising them that unless the matter was resolved between them on or before 5th August, 2003, he would be hearing the reference on 15th August, 2003 at 10.30am. On the intervention of solicitors for the plaintiff, by letter dated 13th August the arbitrator adjourned the hearing until 4th September, 2003 but he advised that no further adjournments would be considered. Two weeks later, on 1st September, the plaintiff's solicitors intimated that they would not be in a position to deal with the matter on 4th September and suggested that the matter be put back to the end of September. The solicitors for the defendant notified the arbitrator that any attempt to adjourn the matter further would be strongly resisted. The arbitrator did not reply to the letter of 1st September. The plaintiff did not appear before the arbitrator on 4th September, 2003, but the arbitrator proceeded to hear the defendant's evidence in his absence and subsequently made an award on the basis of that evidence.

3.7 In his judgment, Murphy J. quoted various passages from Mustill and Boyd on *Commercial Arbitration* including the following passage (at p. 303):

> "It is of no value to give a party notice of a hearing, if the arrangements are such that he has no reasonable opportunity to be present in person, with such legal advisors and witnesses that he wishes to bring with him. Thus, the arbitrator should ensure that the date for the hearing is not so close that the case cannot be properly prepared. Similarly, he should try to accommodate any party who is placed in a difficulty by the absence abroad, illness or competing engagements of himself or of an important witness. But a party has no absolute right to insist on his convenience being consulted in every respect. The matter is within the discretion of the arbitrator, and the Court will intervene only in the cases of positive abuse. In each case the arbitrator must balance the legitimate interests of each party against the general purpose of arbitration, which is to provide a speedy method of resolving disputes."

On the facts, Murphy J. held that the arbitrator misconducted the reference and made an order under s. 38 of the Act of 1954 setting aside the award. He pointed out in his judgment that, although the arbitrator was entitled to fix a date and grant a final adjournment to 4th September, 2003, to proceed without the respondent on that day raised potential problems relating to fairness of procedure, and a possible partiality, which outweighed the duty of diligence. There had been no evidence of any attempt to contact the respondent on the day nor any consideration of making a costs order against the respondent for his failure to attend.

4. Conclusion on FBD's application

4.1 I am of the view that in this case the arbitrator misconducted the arbitration in the technical sense in which that expression is used in connection with arbitrations. The combined effect of the refusal to adjourn the hearing for two days and to proceed with the arbitration in the absence of FBD resulted in the dispute between the parties being determined without FBD having been heard. In my view, conducting the process in that manner and producing an award reaches the high threshold set out in the authorities, in that it is undoubtedly "something substantial, something that smacks of injustice or unfairness".

4.2 I consider that it was unreasonable of the arbitrator not to accede to the request of FBD for a two day adjournment in the circumstances in which FBD found itself. It is not disputed that FBD had arranged matters so that it could appear and defend the claim on the date originally fixed by the arbitrator for the hearing, 13th December, 2010. Less than a week before that date, the arbitrator, unilaterally and without consulting the parties, postponed the hearing for one day. That, in my view, is a crucial factor in determining whether FBD was afforded a reasonable opportunity to be present at the hearing of the arbitration with its legal advisers and with its witnesses.

4.3 While counsel for the claimant stated that the claimant was not challenging the veracity of Mr. Gannon, he complained that no explanation was given at any time as to the reason for Mr. Cunningham's unavailability. He characterised the reliance of FBD on the unavailability of Mr. Cunningham as a coy presentation. Moreover he submitted that, as a witness, Mr. Cunningham, a loss adjuster, was of very limited relevance. It was submitted that this is not a case of "positive abuse", which would entitle the Court to interfere with the exercise of the arbitrator's discretion. Further, it was submitted that it would open the "floodgates" if the award were set

aside in this case.

4.4 Obviously, this Court cannot have any view on the relevance of Mr. Cunningham as a witness. However, having regard to the evidence before the Court, the Court must conclude that FBD considered Mr. Cunningham's presence at the hearing as being of importance. The claimant certainly cast doubts on the non-availability of Mr. Cunningham being the real reason for the application to adjourn. Given that Mr. Gannon, who is an officer of the Court, was not cross-examined on his grounding affidavit, the Court must accept that the difficulty which FBD encountered and which gave rise to the application for an adjournment was the unavailability of Mr. Cunningham.

4.5 The claimant had a legitimate interest in having the arbitration processed expeditiously. In particular, given that he had returned from Australia for the hearing, he had a legitimate interest in having the hearing dealt with so that he could return to Australia without undue delay or expense. The request of FBD was to postpone the hearing merely for two days. Such a postponement would not have resulted in unreasonable delay. The offer of FBD to pay reasonable additional travel expenses incurred by the claimant as a result of the postponement would have ensured that the claimant would not have incurred extra expense. In short, the legitimate interest of the claimant would not have been prejudiced if the adjournment had been granted.

4.6 On the other hand, FBD had a legitimate interest in being able to defend the claim in the manner which it considered to be appropriate including with the benefit of the advice and evidence of the experts it considered necessary. It had made preparations to do so on the date originally fixed by the arbitrator. Its legitimate interest was defeated by the postponing of the hearing by the arbitrator and his subsequent refusal to accede to the application for a further postponement for two days, which would not have extended the arbitration process to an unreasonable degree.

4.7 I should make clear that the conclusion I have reached that the arbitrator acted unreasonably in refusing the application of FBD for a two day adjournment is based solely on the crucial difficulty of the non-availability of Mr. Cunningham. It is not based on the subsidiary issue of the failure of the claimant's solicitors to furnish the claimant's self assessment tax returns to FBD's solicitors.

4.8 The arbitrator should not have proceeded with the arbitration after the withdrawal of the legal advisers and representatives of FBD. Indeed, as appears from the transcript, after they withdrew he observed that he could not proceed with the arbitration, because he could not hear one side and not the other side; it was against natural justice. Following submissions from counsel for the claimant that the arbitration should proceed, he decided to proceed, I suspect against his own better judgment. In consequence, the outcome, the award, is tainted with unfairness and injustice and cannot stand.

4.9 There will be an order setting aside the award. In relation to FBD's application for an order to remit the dispute to arbitration for formal adjudication thereon, if both parties are agreeable that an order be made to remit the matter to the arbitrator, who was appointed by the Court, I will make that order. Otherwise, the parties are, to use a colloquialism, "back to square one" – back to the arbitration agreement.

4.10 It follows that the claimant's application must be dismissed.

5. The position of the arbitrator

5.1 Counsel for the arbitrator informed the Court that the reason the replying affidavit filed on behalf of the arbitrator referred to the Act of 2010 was because FBD invoked the Act of 2010 in the title of the proceedings. Counsel accepted that the arbitration is governed by the Act of 1954.

5.2 However, it was submitted on behalf of the arbitrator that he should not have been joined as a party on FBD's application. In this connection, counsel referred to the decision of the High Court (Gilligan J.) in *Redahan v. Minister for Education* [2005] 3 I.R. 64. In that case, the plaintiff, in a plenary action, had sought a number of reliefs arising out of an arbitration, including a declaration that the thirteenth defendant, who had been the arbitrator, had acted *ultra vires* and an order remitting the matters before him to arbitration. The plaintiff also sought damages in negligence against the arbitrator. In dealing with the issue as to whether the arbitrator should have been joined in the proceedings on the application by the arbitrator to be discharged, Gilligan J., having quoted from Forde on *Arbitration Law & Procedure* (Round Hall Press 1994) to the effect that, once a final award is made, generally the arbitrator becomes *functus officio* and no longer has any authority to deal with the matter, stated (at para. 14):

> "Consequently, I take the view that if proceedings are to be brought pursuant to ss. 36 or 38 of the Arbitration Act 1954, as amended (remit, set aside, an award), the arbitrator should not be joined as a party to the proceedings. Not only would it appear to be inconsistent with the procedure that is envisaged by O. 56, r. 4, but it is also in conflict with the doctrine of *functus officio*."

5.3 Counsel for the arbitrator also referred to the consideration by Gilligan J. in the *Redahan* case as to whether an arbitrator is immune from suit, an issue which arose in that case because of the claim for damages against the arbitrator. Gilligan J. stated (at para. 32):

> "I take the view that the thirteenth defendant was acting as an arbitrator in an arbitration governed by the Act of 1954, as amended and that he was acting in a *quasi*-judicial capacity sufficient to attract immunity from suit at common law in the absence of having acted in bad faith, which is conceded not to have been the case."

5.4 What was alleged against the arbitrator by FBD, as averred to in paragraph 9 in the grounding affidavit of Mr. Gannon was that he acted "unreasonably and contrary to all recognised principles of natural justice" in refusing the adjournment which, it was submitted on behalf of the arbitrator, was not an allegation of bad faith, so that the arbitrator is entitled to a full indemnity. Indeed, counsel for FBD intervened to clarify that there was no allegation of bad faith against the arbitrator.

5.5 In the circumstances, in my view, the arbitrator should not have been joined on FBD's application. There will be an order discharging him from that application and awarding him his costs against FBD on an indemnity basis.