Neutral Citation Number: [2009] IEHC 49

THE HIGH COURT

2008 92 MCA

IN THE MATTER OF THE ARBITRATION ACTS 1954 - 1990

AND

IN THE MATTER OF AN ARBITRATION AWARD OF KEVIN BRADY ARCHITECT DATED 21ST MAY 2008

BETWEEN

S.J.W. FACADES LTD

PLAINTIFF

AND

BOWEN CONSTRUCTION LTD

AND

KEVIN BRADY

DEFENDANTS

JUDGMENT of Mr. Justice John MacMenamin dated the 3rd day of February, 2009.

1. In these proceedings the plaintiff ("S.J.W.") seeks orders pursuant to s. 38(1)(a) of the Arbitration Act 1954 and O. 56, r. 4(e) of the Rules of the Superior Courts:

> (i) setting aside an arbitration award (interim award no. 1) of the second defendant Kevin Brady (the arbitrator) made on 21st May, 2008, on the grounds of alleged misconduct in these proceedings;
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> (ii) for the removal of the arbitrator on grounds of misconduct; and
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> (iii) for the appointment of a person to act as arbitrator in place of the second defendant.

2. The case relates to a building contract arbitration arising from the construction of student accommodation at Victoria Hall, Victoria Cross in Cork where the first defendant ("Bowen") was the main contractor. S.J.W. was a nominated sub-contractor. It was to carry out cladding works on the building being constructed by Bowen. S.J.W. said that Bowen caused delay and disruption which caused S.J.W. serious losses. The dispute could not be resolved. The matter was remitted to arbitration. S.J.W. made a claim *inter alia* for delay and disruption in the sum of €406,300.00. S.J.W. says that the arbitrator dismissed this aspect of the claim, relying on a case that was neither pleaded nor put to the applicant, and upon evidence of delays found in letters (which it is said) were not in evidence in the case. S.J.W contends that the arbitrator thereby exceeded his jurisdiction, breached rules of natural justice, failed to observe or apply due process and brought about a "procedural mishap". The total of S.J.W.'s claims in the arbitration under all headings amounted to €1,409,109.93. The total sum recovered by them on foot of the award of the arbitrator was €59,126.18. It will be seen therefore that the outcome of the arbitration was not favourable to S.J.W. in the overall. Calderbank letters had been exchanged. These may have a bearing on the issue of costs of this nine day arbitration including a counterclaim by Bowen which will be dealt with later.

3. The judgment focuses on the two main issues under the claim of S.J.W. for delay and disruption; the first a question of fair procedures; the second whether S.J.W. was "entitled" to a finding in its favour in the alleged absence of counter evidence from Bowen on S.J.W.'s claim for loss caused by delay.

4. Prior to consideration of the facts it is appropriate briefly to outline the considerations and principles applicable.

Legal principles in arbitration law applicable to this case

a) The desirability of finality

5. It has been frequently observed that finality is a keystone principle in the law of arbitration. The dictum of McCarthy J. in the Supreme Court in *Keenan v. Shield Insurance* [1988] I.R. 89 at p. 96 is so well known as to almost require no repetition;

> "Arbitration is a significant feature of modern commercial life.…It ill becomes the courts to show any readiness to interfere in such a process; if policy considerations are appropriate as I believe they are in a matter of this kind, then every such consideration points to the desirability of making an arbitration award final in every sense of the term."

6. This dictum has been applied by the High Court repeatedly, most recently by Kelly J. in *Irish Golf Design Ltd v. Kelcar Developments Ltd*. [2007] I.E.H.C. 468 and by Laffoy J. in *Clancy and Kehoe v. Nevin & Ors*. [2008] I.E.H.C. 121. In the

former decision, Kelly J. characterised the task of a party seeking to set aside an arbitrator's award as "an uphill struggle".

b) The construction of arbitral awards and reasons

7. The second principle relates to the manner of the construction of arbitration awards in general. They are not to be minutely parsed or analysed but to be seen from the overall point of view so as to observe whether the arbitrator has properly dealt with the issues before him.

8. In *Limerick City Council v. Uniform Construction Ltd*. [2007] 1 I.R. 30, Clarke J. observed at p. 59:

> "The approach to construing an award of an arbitrator by the courts is illustrated by *Stillorgan Orchard Ltd. 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."* [Emphasis added]

9. There is little dispute between the parties as to the principles applicable to a consideration of whether an arbitral award can be set aside. It may be challenged only in limited circumstances, those of misconduct or improper procurement of an award. These general principles are set out in s. 38 of the Arbitration Act 1954 ("The Act of 1954"). It is unnecessary to consider the courts' common law jurisdiction to set aside an award as no such challenge is made by the applicant.

10. These principles have recently been summarised by McMahon J. in the case of *Galway City Council v. Kingston & Anor*. (Unreported, High Court, McMahon J., 17th October, 2008). As that judge points out, s. 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…"

11. The term "misconduct" has a special meaning. As outlined 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" (see also *Williams v. Wallis & Cox* [1914] 2 K.B. 478).

12. However it is apposite to emphasise the manner in which the misconduct threshold is expressed in recent Irish authority. In *McCarthy v. Keane & Ors.* [2004] 3 I.R. 617, Fennelly J. observed at pp. 626-7:-

> "Not surprisingly, cases in which arbitral awards have been set aside for misconduct are few and far between. We can leave aside obvious or extreme cases of financial misbehaviour or personal misconduct, such as simple neglect of the arbitrator to perform his task. Real cases of misconduct may arise in the conduct of the arbitration, where the arbitrator acts unfairly either by clear acts of favouritism towards a party or adopts procedures which place one or other party (perhaps even both) at a clear disadvantage."

The judge continued:-

> "It seems to me that the standard or test of misconduct of such a nature would be something substantial, something that smacks of injustice or unfairness. In *re Arbitration between Brien and Brien* [1910] 2 I.R. 84 there is an example of an arbitrator inspecting the farm he was to value in the presence of one party and in the absence of the other party or of any representative of the other party. This was considered by Wright J. (at p. 93 of the report) to be 'improper and inconsistent with the judicial character of an arbitrator"'.

But he concluded:-

> "There is a sharp distinction between acts committed in the course of the arbitration and its result. *Mere error is not misconduct. Parties submit disputes, including disputes as to the law, to arbitration. They expect the arbitrator to rule on all matters in dispute, but they do not have any guarantee that the arbitrator will reach the correct result. An arbitrator may err in his interpretation of the law or of the facts, without being guilty of misconduct".* [Emphasis added]

The applicable test therefore is that the conduct impugned must be substantial, indicative of real injustice or unfairness, or such that one or other party or both have been placed at a clear disadvantage.

13. English authorities in which the courts have seen fit to intervene include cases where the arbitrator in effect "gave evidence himself" (*Société Franco-Tunisienne d'Armement-Tunis v. Government of Ceylon* [1959] 3 All E.R. 25;) where the arbitrator took a view on the law as applied to the facts which involved a radical departure from the cases as presented by the parties; or where an arbitrator actually gave evidence in contradiction of the evidence given by expert witnesses (*Fox v. Wellfair* [1981] 2 Lloyd's Rep. 514.). *A fortiori* a court might intervene where an arbitrator proceeded to make an award in circumstances such as those outlined above, when, in addition to such impugned conduct, there was also substantial evidence which could, or should have been laid before him. (*Pacol Ltd. v. Joint Stock Co. Rossakhar* [2000] 1 Lloyd's Rep. 109).

The relief claimed

14. S.J.W. submits that were it to succeed, the relief granted should be the removal of the arbitrator and his substitution (now after the nine day hearing) with a replacement. While counsel for S.J.W. refined his position on this point so as to countenance the possibility of a remittal to the present arbitrator, if the Court were persuaded there had been misconduct it is apposite to outline the reasons for the stance originally adopted. These were first, that the plaintiff had

lost confidence in the arbitrator in the light of the award (and the statement of reasons therefor) and second, that the arbitrator was by now aware of the fact that Calderbank letters had been exchanged which might have a bearing on the issue of costs.

15. The judgment will also consider the extent of the application to this case of the decision of Herbert J. in *McCarrick v.The Gaiety (Sligo) Ltd* [2001] 2 I.R. 266. There the court remitted an award back to an arbitrator because the subject of the reference had been ruled upon without the benefit of submissions from both sides and where it was held that it would have been inequitable to allow the award to stand. I turn to the next legal principle.

c) Can a court look to reasoning separate from the award?

16. In this case the arbitrator's award was accompanied by a separate document, issued on the same day headed "Reasoning for my award". Can a court have recourse to this document in construction of the award or in ascertaining whether there has been serious irregularity which might justify a finding of misconduct?

17. This issue was considered by the High Court in *Uniform Construction Ltd. v. Cappawhite Contractors Ltd*. [2007] I.E.H.C. 295, where Laffoy J. made a number of observations as to the manner in which a court should approach such a separate statement of reasons when a question of misconduct arises. Laffoy J. stated:-

> "More recently the question whether, and, if so, and in what circumstances, a party to arbitration proceedings who seeks to challenge the award may rely in support of his application on reasons published by the arbitrator separately from the award and expressly on terms that no use shall be made of them in any proceedings relating to it, was considered by the Queen's Bench Division (Commercial Court) in *Tame Shipping Ltd. v. Easy Navigation Ltd.* (The "Easy Rider") [2004] 1 Lloyd's Rep. 626. The question was considered in the context of an application under s. 68 of the [U.K.] Arbitration Act, 1996 to set aside an award for serious irregularity. In dealing with that question, Moore-Bick J. stated as follows (at p. 634):
>
> > 'The principle of party autonomy in relation to arbitration proceedings is clearly recognised by the Act and it is both consistent with that principle and with the general public interest in securing finality in arbitration proceedings that arbitrators should be free to publish reasons that do not form part of the award if the parties to the proceedings so agree. On the other hand, it is difficult to see what public interest there could be in allowing either arbitrators or the parties themselves to suppress evidence of serious irregularities, whether that evidence is to be found in the arbitrator's reasons or elsewhere."'

18. The relief claimed by the applicant is statutory, pursuant to s. 38 of the Arbitration Act, 1954. No claim is made at common law. I conclude from the observations of Laffoy J. that having regard to the public interest in ensuring that justice is seen to be done, a court may look to an award made separately in order to ensure that no serious irregularity affected the award, whether to be found in the arbitrator's separate reasons or elsewhere. This conclusion must be seen in light of the overarching principle that it is not open to a court to parse or analyse an arbitrator's award. The test must be confined to ascertaining whether there are *irregularities*, as illustrated by Fennelly J. in *McCarthy v. Keane*, such as might provide a basis for a finding of misconduct. The exercise must not become an excuse for a form of "appeal" necessitating minute consideration of the evidence – itself a matter for the arbitrator.

The works in question

19. S.J.W. specialises in cladding works (known as terracotta rainscreen cladding) carried out by clipping terracotta tiles to an aluminium frame and fixings which are attached to the elevation of a building. The main contract was subject to the normal Royal Institute of the Architects of Ireland's ("R.I.A.I.") conditions.

20. S.J.W. was invited to quote for the cladding works as a nominated sub-contractor. This invitation was issued by the architect Derek Tynan & Associates by letter dated 12th September, 2003, with enclosed specifications and other documents.

21. On 26th September, 2003, S.J.W. submitted a tender to Victoria Hall Developments Ltd. ("the employer") in the sum of €1,481,191.51. After clarifications to the tender, the architect appointed S.J.W. as nominated sub-contractor by letter dated 19th November, 2003.

22. Thereafter Bowen sent S.J.W. a "letter of intent" dated 22nd December, 2003, and the cladding works proceeded on the basis of this document. The letter of intent contained an arbitration clause, (clause 9) as follows:-

> "any dispute or difference arising between the parties to this letter of intent shall be and as hereby, refer to the arbitration and final decision of such persons as the parties hereunto may agree to appoint as arbitrator or failing agreement as may be nominated on the request of either party by the president for the time being of the Royal Institute of Architects of Ireland and the award of such arbitrator shall be final and binding on the parties. The arbitrator shall have the power to open up, review and revise any opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him and of which notice shall have been given as aforesaid in the same manner as if no such opinion, decision, or requisition or notice had been given and every or any such reference shall be deemed to be submitted to arbitration within the meaning of the Arbitration Acts 1954 and 1998 or any Act amending any of them."

23. S.J.W. claimed that extra works and variations were ordered by Bowen and that completion was delayed and disrupted by the latter as a result. In total S.J.W. claimed in the arbitration €464,726.93 in respect of unpaid works; €500,508.00 in respect of a delay to the start of the works; the identified claim for €406,300.00 in respect of delay and disruption during the execution of the works and €37,575.00 in respect of extra design costs. These amounted to a total of €1,409,109.93, almost equivalent to the overall contract price of €1,477,000.00. Bowen counterclaimed in the sum of €164,531.87 based on S.J.W.'s alleged failure to perform the works and the necessity for Bowen to provide labour to S.J.W. in order to complete the contract.

Preliminary steps in the arbitration

24. S.J.W. was the claimant and Bowen the respondent in the arbitration. The second defendant was appointed by the president of the R.I.A.I. in December, 2005. The arbitration took place over nine days between 5th February, and 31st March, 2008. Both sides were represented by solicitors and counsel experienced in the field of arbitration.

The award
25. On 21st May, 2008, the arbitrator made his interim award no. 1 ("the award"). He also furnished a separate document to the parties headed "Reasoning for my award". These reasons were not part of the award itself. However in reliance on the authorities cited earlier, I conclude that a court may look to the separate reasons in order to see whether *serious* irregularities arose in the course of the arbitration which would be sufficient to justify the removal of an arbitrator. The court will not parse and analyse the award, still less put itself in the position of criticising an arbitrator in his assessment of the evidence.

S.J.W.'s case in these proceedings
26. In pursuance of its unfair procedure point S.J.W. fundamentally relies on the proposition that the arbitrator relied on 28 identified documents in the course of his reasoning. It contends that these documents (letters, minutes and memoranda exchanged in the course of the work) were appended to a report of Mr. O'Leary an expert witness for Bowen which were not "in evidence" in the arbitration as they had not been produced by the authors thereof. They say that the facts in the documents were not validated in evidence, nor was there agreement that the documents were evidence of the facts stated in them. S.J.W. claims that even if "bundles" of documents were "agreed" for the arbitration, which bundles included these documents, this was so only for the purpose of *potential* production or reference in the arbitration hearing not as evidence. The plaintiff says that it was inappropriate and wrong for the arbitrator to rely on anything in a document not specifically referred to in evidence to support any deferral by Bowen of culpable delay by S.J.W. in the delay and disruption claim.

How the issue of delayed disruption was pleaded
27. To place these contentions in context it is necessary first to consider the manner in which the issue of delay and disruption came before the arbitrator. S.J.W.'s plea in the statement of claim was headed "Delays and Disruption caused to the Claimant's works by the Respondent". It states:-

> "17. The work which the claimant had to do pursuant to the letter of intent was delayed and disrupted by four critical events namely:-
>
> (i) The piecemeal handover of work areas by the respondent to the claimant.
>
> (ii) The structural steel frame of the main contract works being out of tolerance.
>
> (iii) The failure of the respondent to properly allow for deflection on the installed cantilever section of the Main Contract Building causing it to sag when the claimants' terracotta Rainscreen Works were being installed.
>
> (iv) Inadequate provision by the respondent of hoisting and access facilities for the claimant.
>
> 18. Each of the above events is dealt with separately below. The claimant contends that the said events were factually interlinked in such a way that it is not possible to allocate costs individually to each, but that taken together the effect of all four was to significantly extend the claimant's cost and expenses."

28. S.J.W. contended that the extent of the interlinking between the four issues was such that it was not possible to allocate costs individually under each heading; instead these four headings were to be taken together as a "global claim". Bowen pleaded in their defence:-

> "30. It is denied that any such delay or disruption occurred. If, however, such delay or disruption did occur (which is denied), the claimant was wholly responsible for, or in the alternative contributed to any loss sustained by it. Further, and or, in the alternative if the claimant did sustain any loss as a result of the alleged delays in or disruption to construction (which loss delay and disruption are denied by the respondent) the claimant failed to mitigate the said loss by its actions and omissions. Accordingly the respondent denies that it is responsible for any claim arising in this respect whether on the basis of the claim advanced in the statement of claim or at all."

29. There followed particularised pleas and defences in relation to each of the four headings. Bowen also denied that the claimant was entitled to make any claim on a *quantum meruit* basis. In fact no such claim was made in relation to these four headings by the plaintiff.

Procedural hearing and directions
30. The arbitrator held a number of preliminary hearings to deal with procedural matters. On foot of these he made a series of what are called "orders for directions".

31. On 20th December, 2007, he directed that witness' statements and experts' reports should be exchanged. This was done. He expressly stipulated that those experts' reports which had been exchanged should stand as evidence-in-chief. He directed that experts of like discipline should meet two weeks before the hearing to agree a note of the facts and opinions on which they concurred and those upon which they did not. A copy of each note was to be exchanged and delivered to the arbitrator one week before the hearing. The arbitrator made a further order which falls for close consideration. His order no. 9 stated:-

> "The parties shall agree a bundle of documents *for use at the hearing* and a core bundle of those documents perceived as *likely to be most frequently referred to*. The bundle or bundles of documents are to be delivered to the arbitrator no later than seven days before the hearing and each party is to inform the arbitrator as to which documents they require the arbitrator to read before the hearing." [Emphasis added]

The terms "*for use*" and "*likely to be most frequently referred to*" are consistent with his approach to the admissibility of material in evidence generally.

32. It will be helpful here to briefly summarise what lies at the centre of the applicant's complaint. One of the witnesses brought to the arbitration by Bowen Construction was a Mr. David O'Leary B.S.C., A.S.C.S., M.R.I.C.S., A.C.I.R.B., Barrister-at-law. He furnished a report of some 78 pages, the last 28 of which consisted of two appendices. The first appendix dealt with a review of the claim for construction phase delay and disruption, the second, dealing with delays and inefficiencies alleged against S.J.W. on the progress of the works. Counsel for S.J.W. says now that Mr. O'Leary's report dealt with both issues of liability and quantum, and that the arbitrator ruled (as he did) that he was to be seen as a witness to quantum only and that "liability issues", although dealt with by Mr. O'Leary in his report, were in fact matters for the arbitrator.

33. At the heart of this case is the plaintiff's contention that these reports and memoranda were effectively "adopted" by the arbitrator from the second appendix to Mr. O'Leary's report and that the arbitrator thereby "gave his own evidence", in effect, by relying on the documents appended by Mr. O'Leary as evidence without any opportunity being given to deal with these documents.

34. There is no doubt that if all of the documents so referred to by Mr. O'Leary were adopted, recited and relied on without notice to the parties, S.J.W.'s argument would have considerable substance. However, on analysis, I find the true position to be considerably more nuanced.

The origin of the documents
35. There are four preliminary points. First, to say simply that the documents "came from Mr. O'Leary's report" would suggest they had no other provenance within the arbitration. But this was not so. In fact all the documents in question were already before the arbitrator. They were comprised in bundles prepared in accordance with his order no. 9. The bundles so compiled were prepared by S.J.W.'s solicitors.

36. Second, the issue of the evidential status of certain documents, in the delay and disruption claim was raised on more than one occasion in the arbitration. In particular, the arbitrator considered whether the admission of other quite different documents was proof of their contents. The way in which he dealt with this issue is of significance. He indicated to counsel that he considered that such documents *were accurate in so far as he was concerned unless somebody said that they were not accurate and that were there an issue in relation to the accuracy of the contents of a document the matter might be dealt with on re-examination*. This point arose on more than one occasion. The arbitrator outlined his approach in similar terms. I consider that this placed a specific onus on the parties to indicate whether the contents of any documents referred to were in dispute or not.

The arbitrators stance in these proceedings
37. Third, the stance of the arbitrator in these court proceedings is consistent with his approach in the arbitration. The arbitrator himself did not participate at this hearing. However he was represented by a solicitor who made no submissions but was in attendance throughout. Through him I requested that the arbitrator indicate to the Court what he said was the evidential status of the witness statements (and *ipso facto* the O'Leary reports and appendices). The Court was informed that he took the view that the witness statements, and the accompanying documents submitted to him were "in evidence". I allowed counsel to make any additional submissions that they might wish in the light of this indication.

On whom did the onus lie to object?
38. Fourth, the arbitration was by no means a "paper" arbitration. Expert witnesses were cross-examined in some detail in relation to the statements which they submitted as evidence-in-chief. At no stage did either party seek an overarching ruling in relation to the evidential status of the expert reports or the appendices. Thus the onus of objection to admissibility remained on the parties, the arbitrator having made his approach clear.

39. In my view this onus was the higher in the light of the order for directions no. 9. There the arbitrator had clearly indicated the type of documents which were to be in the bundles. They were clearly those to which *reference* would frequently be made. If any party had a difficulty with these there was surely a higher onus on that party to make that clear. Such a duty of clarification applied *a fortiori* in the circumstances where the arbitrator had outlined his general approach to reports as outlined. No such objection to admissibility was made in relation to the appendices of Mr. O'Leary's report.

Was there misapprehension?
40. Finally, though it was not submitted in these proceedings, it may be that some misapprehension arose as to whether certain parts of Mr. O'Leary's evidence were, in fact, in relation to liability or quantum. Insofar as it related to liability his report was ruled out by the arbitrator. But the proof of *causation* is not confined to liability; it goes to quantum. Consequently if Mr. O'Leary's evidence was relevant and admissible as to quantum (as the arbitrator held it was) there was an onus upon any party seeking to dispute any evidential material relied on in relation to proof or negation of quantum in the course of cross-examination. To take the simplest example by analogy, even in a personal injury action where the issue of liability is abandoned, the onus remains upon the plaintiff to prove that the injuries and losses which he suffered were attributable to the accident. A defendant may hotly dispute this issue of causation. But this is not a dispute on liability. The evidential nexus between cause and effect must be established in quantum - as well as in liability. But proof of loss was not a liability issue.

41. Thus the arbitration ruling as to the status of Mr. O'Leary's evidence did not absolve S.J.W. from disputing his evidence as to causation of the loss. It was the evidence on *liability* which had been ruled inadmissible not quantum. Thus insofar as S.J.W. wished to dispute this evidence, or raise any question as to reliance on documents relating to quantum the onus was on it to do so. Even if there had been misapprehension on this point I do not consider that it would constitute misconduct on the part of the arbitrator. I do not consider that such a possible misapprehension would constitute a form of procedural mishap either.

Consideration of the documents
42. Even at risk of transgression into the realm of the arbitrator I have examined the way in which the documents were referred to by the arbitrator and Mr. O'Leary. The plaintiff faces a more fundamental problem. Having considered the documents in some detail I find that the plaintiff's contentions are as a matter of fact fundamentally flawed.

43. To carry out an analysis of the *content* of the 28 documents would be to go beyond the jurisdiction of this Court in an application of this type. I have however carried out an analysis of the *manner* in which Mr. O'Leary on the one hand refers to the documents in the appendix as compared to the way in which the arbitrator deals with them in his statement

of reasons.

44. In fact the arbitrator's quotations from the letters, correspondence and memoranda are different. They are very much the fuller. The arbitrator simply could not have relied on quoting the documents which in fact were only briefly summarised in the "O'Leary report". The fuller nature of the arbitrator's quotations shows, at the very minimum, it would have been necessary for him to go back to the original documents in the bundles in order to quote from them in the manner he did in his statement.

45. Next, if the arbitrator had engaged in a process of adoption one might assume that the documents would have appeared in the same sequence in the statement of reasons as in Mr. O'Leary's report. In fact they appear in a quite different sequence. Were there substance in the plaintiff's case, one would expect a total correlation or overlap between each document referred to in the report and those in the arbitrator's statement. This is not so. The arbitrator refers to a significant number of documents which are not referred to in the appendices to the O'Leary report at all. Of the total of twenty eight letters and minutes referred to by the arbitrator, in fact just fifteen are referred to in the second appendix of the report. A lesser number are also referred to in the first appendix to Mr. O'Leary's report but this is not the focus of the plaintiff's complaint.

46. A small point is perhaps the most revealing. The arbitrator refers to a letter from S.J.W. to Stanta, a firm engaged in external insulation systems on the project. In his "statement of reasons" he refers to this letter as having been dated *10th* May, 2004. This was an incorrect date. In fact the letter was dated *11th* May, 2004. But in the appendix to Mr. O'Leary's report the letter is correctly dated, that is to say, *11th* May, 2004. If a document was simply copied or "adopted" then one would expect that an error contained in one document would be carried on into the other.

47. For these reasons, I cannot conclude that S.J.W.'s central allegation is made out at all. The allegation made against the arbitrator is a serious one. It is a matter of procedural bias. But it is not supported by the facts.

Decision on the first issue
48. I do not consider the fact that there may have been a procedural misapprehension as sufficient basis for a court to intervene on the grounds of misconduct. Certainly there is nothing here redolent of an arbitrator inspecting a subject property in the presence of one party and in the absence of another. I am unable to find evidence of the arbitrator having acted unfairly by any clear act of favouritism. The evidence does not bear out the contention that the arbitrator adopted a procedure which placed one party at a clear disadvantage. Had there been some apprehension of bias in the course of an arbitral hearing one would envisage that counsel would have insisted that reasons be given as part of the award. No such application was made. I do not consider that this facet of the case has been made out therefore. I turn to the second main point.

S.J.W.'s claim of entitlement to a finding in its favour in the delay and dispute claim
49. Alternatively S.J.W. says that there occurred a procedural mishap. It contends that it was "entitled" to findings in its claim for delay as there had been no real challenge to its evidence. S.J.W. refers to four witness statements served by it in the arbitration which dealt with the claim for delay and disruption. These were witness statements of Shay Wheelock, Isaac Wheelock, Slawomir Jnkoviak (the plaintiff's foreman) and Kenneth O'Connor (the plaintiff's quantum expert). It is very difficult to avoid the conclusion that this point would be a question for an "appeal" rather than the basis of setting aside an arbitral award. As a preliminary, I find that it is not an issue which should fall for consideration at all in the light of the authorities cited. A question of "entitlement" to a finding is one for the arbitrator and for his determination. Even if that were not so I would find as follows.

50. S.J.W. says that Bowen did "little" to contradict the weight of their evidence on the delay issues. It contends that there was "minimal" cross-examination on the specific detail of the evidence. It suggests that in particular the evidence of its quantum expert, Kenneth O'Connor should effectively have "bound" the arbitrator. 51. But Mr. O'Connor stated that the plaintiff had correctly priced his tender, that there had been no increases in labour costs, no failings or inadequacies on the part of management which would have affected labour costs and that the costs of delay and disruption were €409,000.00, a figure in excess of the pleaded figure of €406,300.00. But that was all he said. The plaintiff says that it is at a loss to comprehend how the arbitrator made no findings on the plaintiff's case as to why and how much it was delayed and disrupted and the cost of that delay and disruption. S.J.W. suggests that the arbitrator should have made findings concerning the claim and should have stated and demonstrated that it was significant and sensibly discounted the value of this against the plaintiff's proven costs in order to arrive at a proper amount to be awarded to the plaintiff in respect of this claim. These claims too, must be seen in the light of the submission that the arbitrator not give reasons.

52. One cannot even consider these contentions without having regard to the role of a court in dealing with an arbitration. The clear line of demarcation which has been established repeatedly in case law is applicable here. It is not for a court to engage in any form of minute mandatory supervision of an arbitrator or as to the manner in which he carries out his function. The issue is whether there was irregularity amounting to misconduct.

53. Even were this not the case, in fact the "statement of reasons" explains the arbitrator's approach. The arbitrator considered the 28 letters to which reference has been made earlier. A substantial number of these were between Bowen and S.J.W. None of the documents therefore came "out of the blue". They were part of the documents which had been submitted by S.J.W.'s solicitors to the arbitrator. The letters concerned delay by S.J.W. in carrying out the work. They also raised issues involving other parties in the performance of the contract. It is not for this Court to weigh this evidential material. The point is whether there was misconduct.

54. A significant number of the letters involved disputes between Bowen, S.J.W. and Stanta about the rate at which the work was being done. Bowen said that S.J.W. were simply not devoting sufficient labour resources to the performance of the contract. In a letter of 8th April, 2004, it was said that the S.J.W. site team allocated to Bowen had been taken to "a more important" job in Killarney which had a higher priority than the Victoria project. Bowen said that S.J.W. appeared not to have a full appreciation of the high priority nature of the contract for them. Fifteen of the letters and memoranda emanated from S.J.W. themselves. All of them were documents adduced by S.J.W. and within their possession or procurement.

55. For the reasons I have outlined earlier it cannot be said either that the documents lay outside the parameters of the arbitrator's consideration. They were before him: no application was made to rule them out. No application was made to place in dispute the contents of these documents which related to causation of loss, not liability.

56. In dealing with the construction stage delay and disruption, the arbitrator identified the four different events pleaded in the statement of claim before him. He commented that "no attempt is made to quantify the costs" against any particular item or event. It was in effect therefore a global claim.

57. What then was his duty? It was to direct himself as to how such a claim should be dealt with in accordance with decided authority. That is what he did. He adverted to two legal authorities in relation to how a global claim should be approached. These were to the effect that to establish a global claim a claimant must identify first the existence of one or more events for which the employer is responsible, second, the existence of loss or expense suffered by the contractor and *third, a causal link between the event or events and the loss and expense*. He said that normally individual causal links must be demonstrated between each of the events for which the employer is responsible with particular items of loss and expense. However, frequently such loss and expense result from delay and disruption and may be caused by a number of different events in such a way that it is impossible to separate the consequences of each of the events. In that case, the events for which the employer is responsible may interact with one another in such a way as to produce a cumulative effect. If however, the contractor is able to demonstrate that all of the events on which he relies are in law the responsibility of the employer, it is not necessary for him to demonstrate causal links between individual events and particular heads of loss. In such a case because all the causative events are matters for which the employer is responsible, any loss and expense that is caused by those events and no others must necessarily be the responsibility of the employer. The arbitrator further directed himself that if a global claim were to succeed, whether or not it is a total cost claim or not, the contractor must eliminate from the causes of his loss and expense all matters that are not the responsibility of the employer.

58. Having referred to these principles and the correspondence, he observed:-

> "It would appear to me from all this correspondence that there are a myriad of reasons for the delays…"

He identified a number of parties as being the potential cause. He found that manpower was clearly a problem. This was evidenced by the correspondence. He commented:-

> "This could not be laid at the door of Bowen".

59. He commented that the disruption claim of €406,300.00 was to be seen in the context of a total contract price of only €1,477,000.00, which is 27.5% of the cost. He found that no direct causal link had been established by S.J.W. between the losses claimed and the delays. He added:-

> "Also no proof was produced as to what the effect of any delay was on the cost of the product apart from the quantity surveyor for the plaintiff."

60. The arbitrator referred to the evidence of Mr. Kenneth O'Connor, the quantum expert of S.J.W. He found that Mr. O'Connor calculated the loss by:-

> "comparison between the original tender labour allowance and the actual labour costs incurred in completing the works. In my opinion this method is an accurate way to assess the cost of delay and disruption which has already been proved to have occurred."

But he found this statement was insufficient to prove the claim. That evidence did not establish events for which the employer was responsible or any causal link between such events and any loss.

61. The arbitrator referred to documents with regard to manpower. This was in the context of S.J.W.'s claim for acceleration of the works. He referred to a letter of the 17th February, 2004, from S.J.W. requesting an extension of time and stating the number of persons who S.J.W. had identified as being necessary for the works at that stage, that is "one site manager, one engineer, one supervisor, six fitters and two labourers". He commented:-

> "The actual manpower used, was way in excess of this and it would appear to suggest that S.J.W. underestimated the demands of such a product with such a tight programme."

62. In fact the arbitrator's award makes clear the rationale for his decision. It was simply that S.J.W. had not made out its global claim for loss on the evidence. The legal authorities to which he referred clearly establish the necessity to identify the existence of one or more events for which the employer was responsible; the existence of loss and expense suffered by the contractor; and a causal link between the event or events and the loss and expense. He warned himself that if a global claim was to succeed whether or not it is the total claim, the contractor must "eliminate from the causes of his loss and expense all matters that are not the responsibility of the employer". It is clear that he concluded that this is precisely what S.J.W. had failed to do in the course of the arbitration.

63. I do not accept that it was incumbent on the arbitrator to make findings concerning each heading of delay or that it was significant, or that there was an obligation upon him to discount the value against the plaintiff's proven cost.

64. In fact what he actually did was to find that the chain of causation between the alleged quantum of the global claim had not been established and therefore he disallowed it. I consider that this was entirely within his remit, whether or not there was a *quantum meruit* claim made by S.J.W. under this heading. There was therefore no obligation on him to put some, or any, value on the remainder of the claim.

The counterclaim

65. In the light of these findings one may easily discern why the arbitrator decided who should succeed in that counterclaim based on S.J.W.'s failure to perform the works in accordance with the contract. It was found necessary that Bowen assign labour to achieve completion which caused loss as found in the "statement of reasons".

Result

66. This aspect of the claim cannot succeed. I do not consider any basis has been established to remit the claim to the arbitrator. I cannot find that there was any procedural mishap. If the arbitrator committed an error I do not consider it comes within the realm of those which would justify the removal of an arbitrator for misconduct. The central factual contention relied on by the plaintiff fails. The subsidiary point in "entitlement" to a finding fails also.

67. I would add finally that relief under s. 38 of the Act of 1954 is a discretionary remedy. The manner in which the arbitrator approached this task was clearly outlined by him at the outset of his hearing. He stated that he intended to furnish an award and would furnish his reason on a separate document. In fact counsel for S.J.W. specifically requested at the conclusion of the hearing that the arbitrator not furnish reasons at all for a number of objectives which he outlined, including the necessity for a speedy award and the desirability for finality and the avoidance of mischief which might be caused by a statement of reasons which might in turn become the subject matter of proceedings being brought to court. One might be forgiven for observing that these submissions now have an ironic ring.

68. In the light of the arbitration clause, I consider that S.J.W. and Bowen are bound by the award. On the ninth day of the case, counsel for S.J.W. submitted that even if a court were to disagree with the arbitrator's finding on a legal point it would not make any difference as "the law is quite clear that unless the arbitrator says something completely outrageous which goes against every common law convention we hold dear, we have made our bed and must lie in it and whatever finding on the law we must live with". Of course this submission was not binding on S.J.W. But however informally put, one cannot help but note the contrast between those sentiments expressing a fundamental principle and the basis of this application, brought now with the benefit of hindsight.

69. For the reasons outlined, I consider this application fails.