Neutral Citation No. [2009] IEHC 117

THE HIGH COURT

2008 5 MCA

IN THE MATTER OF THE ARBITRATION ACTS 1954 TO 1998

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN/

J.J. RHATIGAN & COMPANY LIMITED

PLAINTIFF

AND

PARAGON CONTRACTING LIMITED

AND

DERMOT F. ROUGHAN

DEFENDANTS

JUDGMENT of Mr. Justice Roderick Murphy delivered on the 13th day of February, 2009.

1. Arbitration Award

The plaintiff, J.J. Rhatigan & Company Limited (Rhatigan) was the contractor and Paragon Contracting Limited, the first named defendant (Paragon) was the steel work subcontractor for the CSCB Building at University College, Dublin.

The second-named defendant (the arbitrator) made an award on 6th February, 2007, determining Rhatigan's liability to Paragon and the former's counterclaim. The reasons related to the credibility of the witness rather than to the quantum of claim and counterclaim.

The award found five issues having not been settled by the parties and which were put before the arbitrator for determination. The award noted the claimant's (Paragon's) claim being €305,347 plus VAT and the respondent's (Rhatigan's) counterclaim being for €388,418 plus VAT.

The arbitrator awarded and directed that Rhatigan pay Paragon the sum of €175,000. The award itself did not give reasons but indicated on an accompanying compliment slip that reasons would follow under separate cover. The reasons and background to the final award of 6th February, 2007, were listed in a separate document. That document gave a précis and assessment of the evidence of four witnesses.

In these present proceedings Rhatigan alleges misconduct by the arbitrator and seeks to have the award set aside and/or the arbitrator removed pursuant to sections 27 and 38 of the Arbitration Act 1954 and Order 54 Rule 4 of the Rules of the Superior Courts. Alternatively, the plaintiff seeks to have the award remitted to the arbitrator pursuant to s.36 of the Arbitration Act 1954.

2. Factual background

The first named defendant, Paragon, was the specialist contractor to the plaintiff, Rhatigan, pursuant to a sub-contract agreement made between the parties on 18th May, 2004. It was agreed that Paragon would provide drawings, and would supply, install and fabricate structural steelwork for the proposed CSCB building at University College Dublin. The subcontract price was €247,000. It was alleged by Rhatigan that Paragon failed to carry out the works in accordance with the sub-contract, and failed to rectify those failures. Rhatigan terminated the employment of Paragon on 29th October, 2004, pursuant to paragraph 19 of the sub-contract. A dispute arose between the parties and in accordance with paragraph 25 of the subcontract, this matter was referred to arbitration. The parties agreed to appoint the second named defendant to act as arbitrator.

On 22nd January, 2006, the arbitrator directed, *inter alia*, that the rules governing the arbitration would be the Institution of Engineers of Ireland Arbitration Procedure 2000 (hereinafter the IEI rules) and that there would be a reasoned award at the conclusion of the arbitration. There was no evidence before the court as to what the parties sought in this preliminary meeting leading to the directions of the arbitrator.

Rule 20 of the IEI rules provides:

> "20.1 The Arbitrator shall not provide reasons for the award unless requested to do so by at least one of the parties. If so requested and unless both parties request that reasons form part of the award, the Arbitrator shall have a discretion as to whether such reasons form part of the award or are provided in a separate document not forming part of the award.
>
> 20.2 The Arbitrator shall not be required to provide reasons for a summary award."

Paragon, as claimant in the arbitration, submitted its Statement of Case on 6th February, 2006. A defence and counterclaim was served by Rhatigan on 23rd February, 2006. The counter-claim was based on the loss suffered arising out of the alleged default and delay of Paragon, which included, inter alia, the extra cost incurred by Rhatigan by having to employ an alternative sub-contractor, Bisset Engineering Ltd (hereinafter referred to as Bisset.)

The arbitrator heard the dispute on 5th, 6th, 7th, 8th and 14th September, 2006. Extensive submissions were then made by both Paragon on 13th October and Rhatigan on 16th October, 2006.

3. Award

By e-mail of 5th February, 2007, the arbitrator informed the parties that he intended to publish the award "followed on shortly by the reasons for the award." The arbitrator published his final award, save as to costs and interests, on the following day, 6th February, 2007. Having recited preliminary matters, the award continued as follows:

> "I, NOW, having considered the documentary and oral evidence and the submissions of the advocates at the hearing, FIND the remaining issues not settled by the Parties and put before me for determination to be as follows:-
>
> (i) The quality and phasing of the steel fabrication drawings,
>
> (ii) The quantity of steel fabricated for the project,
>
> (iii) The Bisset contract and the Paragon cut-off point,
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> (iv) The steel tender documents including the question of drawing approvals,
>
> (v) And the counterclaim of the respondent.
>
> The Claimant's claim is for €305,347 plus costs plus VAT.
>
> The Respondent's counterclaim is for €388,418 plus interest plus VAT.
>
> AND ACCORDINGLY I AWARD AND DIRECT THAT:-
>
> 1.01.1 The Respondent shall pay to the Claimant the sum of €175,000.00 (one hundred and seventy five thousand euro plus VAT) in full and final settlement of all claims referred to me herein. The Respondent shall pay to the Claimant the amount of the Award within four weeks of receipt of this Award.
>
> 1.01.2 The parties' costs in the arbitration shall be paid by such party or parties as I may direct in a future award after hearing both parties on that issue."
>
> A compliments slip accompanying the award stated:-
> "Herewith my final award save as to costs and interest. Reasons to follow under separate cover."
> The award itself made no reference to reasons being given at a later date.

4. Reasons

On 20th March, 2007, the arbitrator sent the parties a document entitled "Reasons and background for final award 6th February, 2007" which purported to list the reasons behind the award. That document purported to list the reasons behind the Award. It summarised the evidence of the four witnesses (4.1 – 4.4 following) and commented on the appointment of the successor to Paragon whose contract had been terminated by Rhatigan (4.5).

4.1 The arbitrator commented negatively on the style and substance of the answers of Rhatigan's contracts manager. The arbitrator questioned what he termed inaccuracy in some of his answers. The arbitrator believed that some of the answers were invasive. In the arbitrator's view more site meetings should have been called.

The arbitrator found it inexplicable that Rhatigan, as management contractor, did not write a clear and unambiguous letter to Paragon as subcontractor informing Paragon of certain key events so as to ensure that there was no room for doubt particularly in relation to important issues.

4.2 The arbitrator found that Paragon's Contracts and Production Manager to be overworked and unusually busy at most times, but found him to be candid in his answers. The arbitrator regarded him as a very truthful witness, as at times his replies were clearly not helpful to his employers. When queried about the performance of Paragon the witness described it as one of the most problematic of the 400 Paragon projects with which he was involved. The arbitrator further found that due to arguments and rows with the Contracts Manager, the duration of a site supervisor engaged by Paragon was short-lived.

4.3 The arbitrator noted that the witness on behalf of the consulting engineers agreed that a one-sided statement had been provided. That witness was not aware whether Rhatigan had sought written approval of their client in assigning work to Paragon. That witness referred to a discussion which took place at a meeting with Rhatigan regarding the production for approval of fabrication drawings. The arbitrator noted the recording of a failure to tell Paragon what was required for the fabrication process. The arbitrator noted comments at a meeting of 14th June, 2004, where a comment was made that matters did not seem to have been acted upon by the consulting engineers as the date of the transmission of the fabrication drawing seeking approval was 28th May.

4.4 The fourth witness referred to by the arbitrator was a technician engaged by Paragon. The arbitrator noted that both parties relied on the fact that not all the information in connection with the project was contained on the fabrication/design drawings. The arbitrator commented:-

> "This may well have been true, but it is in my opinion that each party is guilty of breach in this regard to roughly

the same extent as each other."

He commented that the information could have been ascertained by the simple device of telephone communications. The arbitrator further noted that the consulting engineer had said that she could not approve incomplete drawings.

4.5 The arbitrator found that the Bissett contract was awarded correctly by Rhatigan though the amount of tenderers could have been increased, for a more competitive result. The steel cut-off points were marked up on a hard copy in brown colours.

5. The plaintiff's submission

Counsel for Rhatigan argues that the award was not reasoned as the arbitrator used two separate documents in setting out the award and the reasons behind it. In these circumstances, it is submitted that the award cannot stand. Counsel submits that the issuing of reasons in a separate document does not form part of the award and that prejudice is caused to Rhatigan as it is unaware of how the figure of €175,000 was arrived at and to what extent Rhatigan was successful in its counterclaim in the arbitration proceedings.

Alternatively, if the reasons are considered by the Court to form part of the award, counsel for Rhatigan argues that it is not a reasoned award as the reasons given are wholly inadequate, and the award is ambiguous and inaccurate, failing to deal with the central issues in the case. It is submitted that the arbitrator failed to deal with the issue of whether the contract between the parties was validly terminated by Rhatigan, failed to address the counterclaim, and that it is impossible to determine how the arbitrator arrived at the figure of the final award.

Lastly, counsel for Rhatigan alleges that the arbitrator failed to act impartially, based on four grounds of challenge:

(a) wrongly admitting or taking into account privileged information generated for the purpose of a conciliation process between the parties;

(b) making inappropriate references to and asking inappropriate questions of Rhatigan's witnesses;

(c) failure to send the reasons document to Rhatigan's solicitors, where it was sent directly to their client;

(d) indicating his view of liability at the outset of the proceedings by stating that he was strongly minded to issue a summary award against Rhatigan, as a result of taking privileged information into account.

6. The first named defendant's submission

Counsel for Rhatigan submits that the arbitrator retained a discretion under the IEI rules as to whether he would provide reasons with the award or in a document separate to the award. Paragon maintains that the arbitrator provided reasons for the final award and was not guilty of misconduct in that respect.

Counsel for Paragon further submits that the IEI rules permitted the arbitrator to consider issuing a summary award at any stage of the arbitration.

Paragon concedes that privileged information arising from a conciliation process was inadvertently included in its Reply to Defence and Counterclaim. However, the parties and the arbitrator agreed a procedure to resolve the difficulty which involved the provision of an amended Reply to Defence and Counterclaim.

With regard to the allegations of bias by the arbitrator in dealing with Rhatigan's witnesses, Paragon argues that the remarks made were understood by all to not be intended in a disparaging sense. Further, the arbitrator is entitled to ask whatever questions he deemed appropriate of any witness to the arbitration.

Counsel for Paragon disagrees that the arbitrator failed to deal with the fundamental issues in this case. It is submitted that the grounds of misconduct alleged by Rhatigan are a subjective critique of certain aspects of the way the arbitrator conducted the hearing. None of the alleged grounds amount to misconduct or demonstrate a misprocurement of the arbitration or the award.

7. The second named defendant's submission

Counsel for the arbitrator submits that the arbitration is at an end and that the arbitrator is now *functus officio*, save in so far as costs and interests are concerned. Consequently, it is submitted that Rhatigan cannot seek relief under s.37 or s.40 of the Arbitration Act, 1954. Counsel for the arbitrator submits that an order under s.38 of the Arbitration Act, 1954 would not be justified as there is no "misconduct" on the part of the arbitrator within the meaning of the Act.

Counsel for the arbitrator argues that there was no deviation from procedure and the requirement that there would be a reasoned award. It is submitted that it was not necessary that the reasons should be given contemporaneously and in the same document as the award. It is submitted that Rhatigan is *estopped* from complaining where it failed to alert the arbitrator to its objection that reasons be issued in a separate document following upon the award. Counsel for the arbitrator argues that the arbitrator did not breach the IEI rules or Order for Directions in providing reasons separately to the final award. It is submitted that no prejudice was caused to the plaintiff by the arbitrator's decision to issue the reasons for the award in a separate document.

With regard to the allegations of bias on the part of the arbitrator, counsel for the arbitrator submits that the arbitrator was fully entitled to consider the application for a summary award pursuant to the IEI rules, and to ask questions he believed to be relevant to determination of the matters before him. It is further argued that Rhatigan waived its right to object on grounds of bias as he did not seek to have the arbitrator removed in the course of the arbitration, but waited until the award had issued before relying on actual apparent bias to challenge the award. With regard to the allegedly inappropriate comment made by the arbitrator in relation to a witness, it is submitted that exchanges between the parties

and the arbitrator demonstrate unambiguously that there was no bias in the comment made.

8. Was the arbitrator bound to give reasons?

The plaintiff pleaded in paragraph 6 of the special endorsement of claim that the order for directions reflected the agreements reached at the preliminary meeting. Paragraph 8 of the affidavit of Conor Owens, solicitor for the plaintiff, so deposed.

The defence denies paragraph 6 of the claim. Michael O'Shea, Contracts Manager for Paragon, concedes at paragraph 9 of his affidavit that rule 20.1 of the I.E.I. Arbitration Procedure applied but did not concede that it was ever agreed by the parties or directed by the parties that reasons would form part of the award.

It seems not to be in conflict between the parties that the arbitrator, in his Order for Directions, would provide a reasoned award subject to the Institution of Engineers of Ireland (IEI, now EI) Arbitration Procedure. Having made this Direction the arbitrator was bound to issue a reasoned award in accordance with the relevant rule which gives the arbitrator a discretion.

Paragraph 9 rule 20.1 provides, as has been noted above, that unless both parties request that reasons form part of the award, the arbitrator shall have a discretion as to whether they form part of the award or are provided in a separate document not forming part of the award.

The issue of direction binds the parties as to procedure. No objection was taken to the direction that the rule would apply. There was no evidence of a request that reasons would form part of the award. Accordingly the arbitrator was entitled to provide reasons in a separate document not forming part of the award.

The issue in these proceedings contrasts with *Uniform Construction Ltd v. Cappawhite Contractors Ltd*, (Unreported), Laffoy J., 29th August, 2007, where at p. 11 it was noted that the only evidence before the court was that no request was made to the arbitrator to provide a reasoned award. Laffoy J. concluded that if that evidence represented the true factual position, the arbitrator exceeded his authority in giving a reasoned award under the provisions of the same rule.

The issue in these proceedings, in contract, is whether the reasons should form part of the award or could be in a separate document not forming part of the award.

The court finds that the arbitrator had a discretion and was entitled to state his reasons in a separate document. The only issue is to the adequacy of the reasons given.

9. Reasoned award and reasons not forming part of the award.

The authorities deal with the requirements of a reasoned award, that is an award in which the reasons are set out or incorporated in such a way as to make them part of the award (Mustill & Boyd: *Commercial Arbitration*, 2nd Ed., 373, FN8 and Russell in *Arbitration*, 23rd Ed. at para. 6.028). Donaldson L.J. addresses the requirements of a reasoned award in the Court of Appeal Decision in *Bremer Handelgesellschaft v. Westzucker* [1981] 2 Lloyd's Rep. 130, at 132, where he stated:

> "All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen, and should explain succinctly why, in light of what happened, they reached their decision and what that decision is. This is all that is meant by a "reasoned award."'

While the giving of reasons in a separate document may be less formal and may not, of course, be used in aid of or in opposition to the enforcement of an award there seems to be no reason why that definition should not apply to reasons given separately as well as to a reasoned award.

Reasons not forming part of the award should, in a similar manner, explain how an arbitrator reached his decision. Do the reasons given summarised at para. 4 above explain succinctly why, in the light of what happened, the arbitrator reached his decision?

The arbitrator summarised the evidence of four witnesses (4.2 – 4.4). He made findings in relation to the evidence of some of the answers of the plaintiff's contracts manager as being what he termed inaccurate and evasive. He found it inexplicable that Rhatigan did not write a clear and unambiguous letter to ensure that there was no room for doubt on important issues.

The arbitrator found Paragon's Contract Manager to be candid and regarded him as a very truthful witness. The arbitrator noted that the third witness referred to a meeting with the plaintiff regarding the production for approval of fabrication drawings which was not minuted.

The arbitrator commented that each party was guilty of breach to roughly the same extent as each other in that not all information in connection with the project was contained in the fabrication/design drawings. It would appear that the arbitrator preferred the evidence of Paragon's Contract Manager to that of Rhatigan's Contract Manager though such an express finding is not made.

In respect of the information contained in the fabrication/design drawings, which had been referred to expressly in the matters listed in the Board, the arbitrator determined that each party was guilty of breach as the information could have been ascertained through telephone communications.

Five issues were identified in the award. The arbitrator found that the Bisset contract had been correctly awarded by Rhatigan notwithstanding that the number of tenderers could have been increased.

In relation to the second issue, there is no indication as to whether the extent if any, of Rhatigan's counterclaim for increased costs.

The remaining three issues related to steel fabrication drawings, quantity of steel fabricated and the steel tender

documents in drawing approval all of which appeared to be inherent in the arbitration's summary in the assessment of the witnesses. While the arbitrator, accordingly, dealt with all but one of the issues identified in the award itself he did not give reasons how the claimant's (Paragon's) claim for €305,347 plus VAT and the respondent's (Rhatigan's) counterclaim for €388,418 plus interest, plus VAT was resolved in the sum awarded of €175,000 plus VAT.

One of the issues which arose in the pleadings was not expressly dealt with by the arbitrator. That concerned the issue whether a contract between the parties had been validly terminated by Rhatigan. On the evidence before the court it is clear that both parties proceeded on the basis that the contract had been validly terminated and this issue appeared not to be in dispute when the matter came before the arbitrator, notwithstanding that the pleadings referred to it. The arbitrator's finding in the reasons given separately that the Bisset contract had been awarded correctly by Rhatigan would seem to imply that the contract between the parties had been validly terminated. Accordingly it is not necessary to refer to that issue for further consideration by the arbitrator.

10. Did the arbitrator fail to act impartially?

Counsel for Rhatigan alleges that the arbitrator failed to act in an impartial manner in the conduct of the arbitration.

10.1 Taking into account of privileged information
Firstly, Rhatigan submits that the arbitrator took into account privileged information, namely a valuation generated for the purpose of a conciliation process and accordingly privileged. This information was inadvertently incorporated into Paragon's Reply to Defence and Counterclaim of 13th March, 2006, in the arbitration proceedings. On the basis of this information, the arbitrator stated that he was giving serious consideration to the issuing of a summary award following the exchange of pleadings between the parties.

A meeting took place with the arbitrator following which it was decided by both parties and the arbitrator to continue with the arbitration conditional upon various steps being taken by Paragon. Paragon accepted that such a valuation had been improperly communicated and submitted an amended Reply on 27th April, 2006, and issued a letter to clarify the situation on 28th April, 2006. This appeared to resolve the matter and, accordingly, no issue arises for the attention of the court.

10.2 Alleged bias on the part of the arbitrator in dealing with the plaintiff's witnesses.
Counsel for Rhatigan also submitted that the arbitrator had displayed bias by making disparaging comments of a witness called by the plaintiff on Day 1 of the hearing, a structural engineer who had been engaged on the project. On the afternoon of Day 4 of the hearing, when the witness was not present, the arbitrator commented in relation to her that "*Judging by what we have been saying the last few minutes I would nearly be ready to christen her Margaret Thatcher but however*." The following day, the arbitrator was asked by the solicitor for Rhatigan to clarify that the remark was not meant in a disparaging sense. The arbitrator acknowledged that he should not have made the remark and that it was not intended to be disparaging of the witness.

Counsel for Rhatigan further submits that the arbitrator, on Day 3 of the hearing, asked inappropriate questions of the director of the plaintiff company. In particular, he asked the witness whether he would describe himself as a "tough man" on site with people under him and whether he was ever responsible for causing a company such as a sub-contractor to "go under". Counsel for the arbitrator submits that the arbitrator is entitled to ask questions which he believes to be relevant to the determination of the matter before him and that there was nothing inappropriate in the questions asked.

10.3 Failure to send the reasons document to the plaintiff's solicitors
Counsel for Rhatigan further relies on the fact that the reasons document was sent directly by the arbitrator to Mr. Paul Carty of Rhatigan, and not to Rhatigan's solicitors, on 14th March, 2007. The reasons document was received by Rhatigan's

10.4 Request for documents by the arbitrator
Finally, the arbitrator is alleged by counsel for Rhatigan to have made inappropriate requests for documents by seeking a hard copy of the invitation to tender issued by Rhatigan to Paragon and a hard copy of the contract between Rhatigan and Bissett engineering.

10.5 Do these matters amount in aggregate to bias?
Rhatigan submits that even if each of these matters does not constitute bias, then in aggregate they amount to biased behaviour by the arbitrator.

The issue of the test to be applied where an arbitrator is alleged to have acted in a biased fashion was addressed by Blayney J. in *Bord na Móna v. John Sisk & Son Ltd*. [1990] 1 I.R. 85. He stated that the correct test is that laid down by Murphy J. *in Dublin and County Broadcasting Ltd v. Independent Radio and Television Commission* (Unreported), High Court, 12th May, 1989, where it was held that there must be a "real likelihood" of bias. Murphy J. held:

> "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 a 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 that view which he would form as to the likelihood of bias, not to the fact of 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 out-voted 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, then this would be sufficient to invalidate the proceedings of the tribunal."

The test was succinctly expressed by Blayney J. in the following terms:

> "the question that is to be answered is this: 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?"

On the facts presented, I do not agree with counsel for Rhatigan that there was a real likelihood of bias on the part of the arbitrator in the present case. While the arbitrator's reference to the plaintiff's witness as Mrs. Thatcher may have given cause for concern, this matter was raised by Rhatigan in the course of the arbitration and it was duly clarified by the arbitrator that he should not have made the remark and did not intend it to be disparaging. The issue of wrongful disclosure of privileged information was also adequately addressed by the parties and the arbitrator in the course of the arbitration. In my view, this dispels any concerns that the arbitrator was acting in a biased manner. With regard to the other instances raised by counsel for Rhatigan, I do not agree that these are sufficient to give rise to a real likelihood of bias in the circumstances of the case. Having carefully considered the matter, it appears to the court that the behaviour of the arbitrator did not amount to bias.

11. The appropriate remedy

Rhatigan relies on these provisions of the Arbitration Act 1954 in seeking to have the arbitrator removed and his award set aside.

11.1 Section 36(1) provides:

> "In all cases of reference to arbitration, the Court may from time to time remit the matters referred or any of them to the reconsideration of the arbitrator or umpire."

In addition to its jurisdiction under the Arbitration Acts, the High Court has a common law jurisdiction to set aside or remit an award which shows an error of law on the face of the award. A relevant authority in this regard is *Uniform Construction v. Cappawhite Contractors Ltd*. [2007] IEHC 295, where Laffoy J. stated:

> "It is well established that the common law jurisdiction to set aside or remit the award of arbitrator which shows on its face an error of law has survived in this jurisdiction. Moreover, error on the face of the award is recognised in this jurisdiction as one of the grounds on which the court has a discretion to remit a matter to an arbitrator under s. 36(1) of the Act of 1954. However, it is also well established that the error of law must be "so fundamental that the courts cannot stand aside and allow it to remain unchallenged" or "obvious error" (per McCarthy J. speaking for a court of five in the Supreme Court in *Keenan v. Shields Insurance Company Limited* [1988] 1 I.R. 89) or a "decision … clearly wrong on its face" (per Finlay C.J. in *McStay v. Assicurazione Generali SPA & Anor*. [1991] I.L.R.M. 237)."

11.2 Section 37 provides:

> "Where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him."
>
> The court is satisfied that he has not misconducted himself or the proceedings.

11.3 Section 38(1) provides:-

> "Where-
>
> (a) an arbitrator or umpire had misconducted himself or the proceedings, or
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> (b) an arbitration or award has been improperly procured, the Court may set the award aside."

The meaning of misconduct under s.38 was addressed by the Supreme Court in *McCarthy v. Keane and Others* [2004] IESC 104, where Fennelly J. stated:

> "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 by the arbitrator to perform his task. Real cases of misconduct may arise in the conduct of arbitration, where an 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.
>
> 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."

It is clear that the court's jurisdiction at common law and under the Arbitrations Acts is one which is to be exercised sparingly. In *McCarthy v. Keane and Others* [2004] IESC 104, the Supreme Court held that the correct judicial approach to arbitral awards was that set out by McCarthy J. in *Keenan v. Shield Insurance Company Limited* [1988] IR 89, at 96:

> "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."

In the present case, I am not persuaded that the behaviour of the arbitrator reaches the threshold of substantial injustice or unfairness amounting to misconduct which would justify the setting aside of the award.

11.4 The jurisdiction to remit the award under s.36 has to be considered. The remarks of Donaldson M.R. in *King v. Thomas McKenna Ltd*. [1991] 2 QB 480 are instructive:

> "In my judgment the remission jurisdiction extends beyond the four traditional grounds to any cases where,

> notwithstanding that arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspect of the dispute which has been the subject of the reference has not been considered and adjudicated upon as fully or in a manner which the parties were entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the arbitrator.
>
> In so expressing myself I am not seeking to define or limit the jurisdiction or the way in which it should be exercised in particular cases, subject to the vital qualification that it is designed to remedy deviations from the route which the reference should have taken to its destination (the award) and not to remedy a situation in which, despite having followed an unimpeachable route, the arbitrators have made errors of fact or law and as a result have reached a destination which is not that which the court would have reached. This essential qualification is usually underlined by saying that the jurisdiction to remit is to be invoked, if at all, in relation to procedural mishaps or misunderstandings. This is, however, too narrow a view since the traditional grounds do not necessarily involve procedural errors. The qualification is however of fundamental importance. Parties to arbitration, like to parties to litigation, are entitled to expect that the arbitration will be conducted without mishap or misunderstanding and that, subject to the wide discretion enjoyed by the arbitrator, the procedure adopted will be fair and appropriate. What they are not entitled to expect of an arbitrator any more than of a judge is that he will necessarily and in all circumstances arrive at the "right" answer as a matter of fact or law."

This judgment was cited with approval by the Supreme Court in *McCarthy v. Keane and Others* [2004] IESC 104, where Fennelly J. remarked:

> "It is true that section 36 does not in terms set any limits to the exercise of the discretion. This does not mean that the discretion is unlimited. The policy of the law is to uphold the certainty of arbitral awards, once they have been made. Furthermore, the courts will not interfere without very good reason in the arbitration process…I would certainly be prepared to agree that the power to remit is not necessarily limited to the four well-established circumstances. These have, on the other hand, been developed by the courts after careful consideration over many years. Normally, the arbitrator should be allowed, subject to the overriding obligation of fairness, to be master of procedure. It would be inimical to the autonomy and certainty of the arbitral process if the notion of "procedural mishap" were to become an additional ground of potential complaint. Donaldson M.R. emphasised, in particular, that it would have to be "inequitable to allow the award to take effect." He also described it as a "vital qualification" and one of "fundamental importance" that the power was "designed to remedy deviations from the route which the reference should have taken toward its destination."

In my view, the present case is a clear example of one where there was a deviation by the arbitrator from the route which the reference should have taken toward its destination. The arbitrator's own Order for Directions made it clear that a "reasoned award" was to be issued. Under the IEI rules, the arbitrator retained a discretion as to whether these reasons should form part of the award or be provided in a separate document not forming part of the award. In issuing his final award without providing reasons, the arbitrator deviated from the route which his own Order for Directions laid down. Furthermore, I believe that it would be inequitable to allow this award to take effect due to the failure of the arbitrator to give reasons for the award.

The requirements of a reasoned award were examined in *J.H. Rayner v. Shaher Trading Co*. [1982] 1 Lloyd's Rep 632, at 637, where Bingham J., noting that the sellers were entitled to advice on whether the award was open to challenge, stated:

> "In giving that advice, I think it important that solicitors and Counsel should be clear what is the factual and in general terms the legal basis of the award, and in saying that I do not in any way mean that there should be a detailed consideration of authorities or anything of that sort, but I do think it undesirable that at the end of the day, a party should be left in any doubt as to the basis on which an award has been given against him."

Having regard to Mustill and Boyd's *Commercial Arbitration*, 2nd ed., at pp. 377-388, I am of the view that a reasoned award should incorporate the following:

> (i) a summary of the contentions advanced by the parties and the matters in dispute between them;
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> (ii) the award should set out all the facts as found by the arbitrator;
>
> (iii) the arbitrator should set out the substantive rules governing the dispute;
>
> (iv) it is not necessary for the arbitrator to use formal legal language, but the award should be expressed in sufficiently cogent and clear terms. The award should also comply with any procedural requirements governing the arbitration;
>
> (v) the award should be complete and final, stating the arbitrator's reasoned conclusions on all the matters referred to him. Where there are claims and counter-claims, it is best practice to make an explicit award on each. If the arbitrator's conclusion is supported by more than one reason, he should set out each of his reasons not just one. The award should state the reasons for the award in sufficient detail. This will allow the court to consider any question of law arising therefrom.
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> (vi) The award must be binding and enforceable in law, that is, it must be capable of giving effect to the arbitral decision in the jurisdiction or jurisdictions in which it may have to be enforced.

12. Conclusion

I am satisfied that the arbitrator had discretion under the relevant rules to provide reasons separate to the award. The document listing the reasons behind the award deals with the arbitrator's view of the evidence, answers all but one of the

issues identified in the award. To accord with best practice, particularly in a hearing of several days which concentrated on detailed heads of claim and counterclaim, the arbitrator should make an explicit award on claims and counterclaim. The award should state reasons in sufficient detail. The court will remit the matter for reconsideration of the arbitrator.