Neutral Citation [2015] IEHC 436

THE HIGH COURT

[2014 No. 548 MCA]

IN THE MATTER OF THE ARBITRATION ACT 2010,

AND IN THE MATTER OF AN ARBITRATION

BETWEEN

MARY DELARGY

APPLICANT

AND

JOHN HICKEY AND ANN HICKEY

RESPONDENTS

JUDGMENT of Mr. Justice Paul Gilligan on the 24th day of June, 2015.

1. The applicant, Mary Delargy, entered into a combined contract for sale and building agreement with the respondents, John and Ann Hickey, on the 2nd September, 2008, whereby the respondents agreed to sell a site to the applicant at Garrai Glass, Ballydavid South, Athenry, County Galway, and to build a crèche thereon in consideration of a sum of €550,000.00 inclusive of VAT.

2. The parties executed a separate deed of indemnity on the 7th August, 2009, wherein the respondents, *inter alia*, covenanted to "rectify and make good… all the Major Defects in the building notified to the builder during the Defects Period."

The said "Major Defects" are defined as -

> "…any fault, defect, shrinkage, error or omission in (a) the structure of the building or (b) any part of the building (other than the structure) arising from or a direct consequence of any fault, defect, shrinkage error or omission in the structure of the building and which shall (in the case of the items specified at both (a) and (b) above occur and be notified to the vendors before the expiry of the Defects Period and which shall arise from any failure by the Vendors, the servants or agents, to exercise all proper skill and care in :-
>
> (a) the design of the building;
>
> (b) the selection of materials and goods for the construction of the building;
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> (c) the provision of all other services and duties performed or undertaken or to be performed or undertaken in the construction of the building;
>
> And or making good any physical damage resulting from such fault, defect, shrinkage, error or omission or other default."

3. Paragraph 11 of the combined building agreement and contract for sale entered into by both parties on the 2nd September, 2008, expressly provides for arbitration in the event of any dispute between the parties. It states that:

> "11. Any dispute between the parties hereto shall be referred to arbitration by an arbitrator who shall, in default of agreement between the parties, be appointed on the application of either party by either the President of the Law Society of Ireland or the President of the Construction Industry Federation, such arbitrator to be appointed from a list of arbitrators approved jointly by the President of the Law Society and the president of the Construction

> Industry Federation or in the event of either of such persons being unable or unwilling to act by the next senior officer of the respective institutions."

4. Under Paragraph 3 of the indemnity, a number of limitations to the respondents' liability were set out, and in particular it was provided under Paragraph 3.2 that -

> "the liability of the [respondents] under this deed shall be limited to the costs and expenses of rectifying and making good the Major Defects and notwithstanding anything to the contrary in this deed, the [respondents] shall not be liable to the [applicant] by reason of any representation or warranty, condition or other term or any duty of common law, or under the express terms of this agreement for any consequential or incidental loss or damage, (whether for loss of profit or otherwise) and whether occasioned by the negligence of the parties, or the [respondents'] representatives, or otherwise."

5. Shortly after the applicant took possession of the property in 2009, she noticed the alleged defects. The subsequent arbitration between the parties thus concerned a claim for damages arising from the defective construction of the property. The parties could not agree on the nomination of an arbitrator so Mr. Daly, a solicitor, was appointed by the President of the Law Society. A preliminary meeting was held on the 17th November, 2011, attended by the applicant and the respondents, as well as the arbitrator. It was agreed between the parties at the preliminary meeting in November, 2011, that the arbitration would be conducted by way of written submissions, and this was followed by an exchange of pleadings. It does not appear that there was any actual reference or submission to arbitration.

6. The pleadings closed on the 19th April, 2012, with the issue by the respondents of their points of defence. The arbitrator struck out the defence of the respondents on the 4th March, 2014, by reason of their failure to comply with an order of discovery and a refusal to take any further active involvement in the proceedings.

7. On 15th April, 2014, the arbitrator issued an interim award awarding the applicant such monies "as may be determined by [the Arbitrator] to be due arising from the matters set out and claimed in the claimant's Point of Claim." Finally, pursuant to written submissions made by the applicant on the matter of quantum and costs, and in the absence of any further engagement by the respondents, the arbitrator made his final award in favour of the applicant on the 6th October, 2014, and awarded the applicant the sum of €101,202.07, being made up of the following sums:

> (a) Damages €29,673.33
>
> (b) Loss of Earnings €24,130.00
>
> (c) Interest €1,680.07
>
> (d) Costs €45,718.67

8. The applicant, by way of originating notice of motion, grounded on two affidavits, seeks, *inter alia*, leave of the Court, firstly, to enter judgment in the terms of the award, and secondly, leave to enforce same.

9. By way of response, the respondents, grounded on the affidavit of the first named respondent, Mr. John Hickey, seek, *inter alia*, to set aside the award, either in part or in full, pursuant to Article 34 of the Model Law.

Background.

10. As set out in the applicant's points of claim, a report prepared by Westcon, on behalf of the respondents, confirmed the existence of insulation difficulties. The survey indicates areas of defects in the general construction of the premises in question, including;

> (a) Significant heat escape through the window and external door structure.
>
> (b) Heat escape at the windows and doors and at construction details with the walls.
>
> (c) Cold bridging at junctions of windows and walls.
>
> (d) Infiltration of cold air at junctions of floors and walls.

(e) Lack of insulation at the top of the cavities adjacent to the parapet walls, flat roof and at external walls adjacent to the flat roof in PVC panels and other areas.

(f) Inadequate ventilation.

(g) Dampness.

11. In the respondents' defence to points of claim, there is no dispute that the two agreements that were before the arbitrator provide specifically for arbitration. The balance of the defence to the points of claim is a denial of each and every allegation and claim as made out. In particular it is denied that the premises and construction was not in compliance with the relevant building regulations, and it is further denied that there is or was any lack of ventilation and/or insulation as set out in the applicant's points of claim. Furthermore, it is denied by the respondents that the report prepared on their behalf by Westcon confirms or otherwise identifies the respondents as in any way responsible or liable for the existence of any insulation difficulties. It is further denied by the respondents that there is any excessive heat escape at the junctions of the flat roofs with the parapet walls and external walls of the building or at all. It is further denied that any escape of heat as alleged is the liability or responsibility of the respondents in accordance with the agreement. It is denied that there are defects in the general construction of the crèche. The alleged leak in the flat section of the roof of the applicant's premises is also denied. If, which is denied by the respondents, the plaintiff did suffer, sustain or incur the alleged or any loss, damage, inconvenience or expense, then the respondents deny that same were caused or was in any way contributed to by way of negligence or breach of duty or breach of statutory duty or breach of contract on their part whether as alleged or at all.

12. Clause 8 of the combined agreement - which, *inter alia*, explicitly addresses the issue of defects - was deleted in the Deed of Indemnity of the 7th August, 2009.

13. It does appear to be clear from the affidavit of John Hickey as sworn on the 22nd December, 2015, grounding the respondents' application, that the principle statutory foundation relied on to set aside the award pursuant to the Model Law is to be found in Article 34 (2)(a)(iii) which provides that an arbitral award may be set aside by the Court only if "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration provided that, if the decisions and matters submitted to arbitration can be separated from those not so submitted only that part of the award which contains decisions and matters not submitted to arbitration may be set aside."

14. The respondents further rely on the provisions of article 31(2) on the basis of the arbitrator giving no reasons for the award, and article 36 is also of relevance to the applicant's reliefs as sought.

15. In this regard the respondents bear the burden of proof in circumstances where there is a presumption that the arbitral tribunal has acted within its mandate.

16. The respondents set out as a basis for the ground to set aside the award the following matters:

• That clause 8 of the Combined Agreement - which, *inter alia*, explicitly addresses the issue of defects - was struck through / deleted from the Combined Agreement of the 2nd September, 2008;

• That the parties executed a separate Deed of Indemnity of 7th August, 2009, wherein the respondents, *inter alia*, covenanted to repair, rectify and make good in accordance with approved standards of building construction all the major defects in the building notified to the builder during the defects period;

• That the parties agreed in clause 3 of the same Deed of Indemnity to exclude the respondents' liability for consequential or incidental loss and, further, to limit the liability of the respondents to the costs and expenses of making good any "major defects";

• As a result of the foregoing, the Arbitration Agreement of the Combined Agreement (clause 11 thereto) could not include a dispute on "major defects", as defined in the Deed of Indemnity; as a result, no jurisdiction existed under the Combined Agreement to refer a dispute, whose subject was "major defects", to arbitration;

• That the Combined Agreement contained only a provision for referring minor defects to expert determination;

• That the award, or portions thereof, specifically the loss of earnings claim in the amount of €24,130, and interest award in the amount of €1,680.07, were specifically excluded from the jurisdiction of arbitration (i.e. per paragraph 10 of the first respondent's affidavit where the first respondent avers "*may be outside the scope of the indemnity*");

• In summary of the foregoing, the arbitrator lacked jurisdiction to deal with and/or award damages in relation to "major defects" and, further, the arbitrator lacked jurisdiction to award sums in respect of costs (e.g. as a head of damage) and any other items of "*consequential or incidental loss*" which were explicitly excluded by clause 3 of the said Deed of Indemnity.

17. It is of some significance that the points of claim and the points of defence as delivered and as before the arbitrator explicitly make reference to and encompass within the jurisdiction of the arbitration both contractual documents, being the combined agreement and the deed of indemnity, and further the documents make explicit reference to the arbitration clauses in both documents and no issue is taken in this regard in the points of defence.

18. It is accepted on the applicant's behalf that the points of claim are somewhat sparsely drafted but the applicant refers to the combined agreement and the deed of indemnity and by doing so the applicant explicitly brings both documents within the terms and scope of the submission to arbitration.

19. At paragraph 10 of the claim the applicant specifically pleads that the cost of the investigation on remedial work as set out in appendix d is in the amount of €41,313.50 in terms of cost of investigation to date and the estimated cost of reformation is further estimated at €35,813.39.

20. The applicant further relies on paragraph 11 in the points of claim that the claimant seeks an order from the arbitrator for payment of these amounts and for such further or other losses that may arise together with the costs of the proceedings and VAT.

21. Accordingly, the points of claim clearly set out a claim in damages for consequential and incidental loss arising from the defects.

22. The respondents, in their points of defence, do not set out even obliquely any concern in relation to the jurisdiction or mandate of the arbitrator.

23. Further, the points of defence effectively set out straight denials of the defects claimed by the applicant specifically in respect to the claim for the cost involved in investigation and remedial work necessary and deny that the costs of same amount to the sums. There is no plea in the points of defence that any claim in respect of the costs of investigation or other losses stand outside the jurisdiction of the arbitration.

24. The reason advanced by the first named respondent for failing to participate in the arbitral process is set out in the following manner:

> "While a full defence was delivered to the applicant's point of claim on behalf of the respondents dated the 19th April, 2012, it is confirmed that by order of the arbitrator made on the 4th March, 2014, this defence was struck out by reason of the respondents' failure to comply with an order for discovery made by the arbitrator on or about the 13th September, 2013. By way of explanation, I say that your deponent and my wife were property developers who, like many others, were particularly badly hit by the recession and a number of residential and commercial properties and sites in our ownership became vested in AIB/NAMA and there was at all times an on-going process of voluntary sale and discussion with AIB and NAMA concerning each of these properties in what was a particularly stressful period for the respondents, and during which the discovery order was inadvertently overlooked as I tried to deal with a myriad of issues."

25. It is necessary to state that had the defendants contested the claim within the scope of the arbitration beyond merely putting in points of defence they would have been entitled to raise all of the issues which they now raise but, in essence, after delivering points of defence within the arbitration they took no further part and indeed it was not until the applicant brought her application for the entry of judgment and the enforcement of the award that the respondents now raise a variety of issues which they say resulted in decisions on matters beyond the scope of the arbitration.

26. The respondents further rely on the terms of article 31(2) of the Model Law, which provides that the "award shall state the reasons upon which it is based unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30." It is submitted on the

respondents' behalf that in this particular instance the arbitrator provided no reasons for the make-up of the award and that this is a mandatory provision by reason of the use of the word "shall".

27. In the circumstances it is necessary to deal firstly with the respondents' cross motion to set aside the award.

The Model Law.

28. Article 34 of the UNCITRAL Model Law provides the procedure for the setting aside of an arbitral award, providing as follows:

> "Article 34 -
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> Application for setting aside as exclusive recourse against arbitral award
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> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
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> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
>
> (b) the court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) the award is in conflict with the public policy of this State."

29. Article 36 of the UNCITRAL Model Law provides the grounds for refusing recognition or enforcement of arbitral awards:

> "(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
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> (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or

was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State."

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."

30. Section 6 of the Arbitration Act 2010 provides:-

"Subject to this Act, the Model Law shall have the force of law in the State and shall apply to arbitrations under arbitration agreements concerning—

(a) international commercial arbitrations, or

(b) arbitrations which are not international commercial arbitrations."

31. The principle legal authority on the application of Article 34 of the Model Law in this jurisdiction is to be found in the judgment of Laffoy J in *Snoddy & Ors v Mavroudias*[2013] IEHC 285 which concerned an application brought under Article 34 of the Model Law by a client in a construction project to set aside an arbitral award wherein the architect on the project was awarded fees for additional services. The applicant partnership in that case premised its application on the basis that the issue was a jurisdictional matter which was opposed by the respondent architect as an attempted "re-examination of the merits of the award." In paragraphs 29-36 inclusive of her judgment, Laffoy J. set out the basic principles in relation to Article 34, and it is appropriate to set them out herein:

"29. There has been very little, if any, judicial comment in this jurisdiction on the Articles invoked by the Client in this case. For that reason, I consider that the proper course is to set out the basic principles. In so doing, I propose primarily resorting to the helpful annotation on the relevant Articles in Mansfield's Arbitration Act 2010 and Model Law: A Commentary.

30. As a preliminary, it is important to note that s. 8 of the Act of 2010 provides that judicial notice shall be taken of the travaux préparatoires of the United Nations Commission on International Trade Law and its working group relating to the preparation of the Model Law and that the travaux may be considered when interpreting the meaning of any provision and shall be given such weight as is appropriate in the circumstances.

31. The very limited jurisdiction which this Court has under the Act of 2010 and the Model Law to set aside an arbitral award is outlined in Mansfield's note on Article 34 (at p. 213) as follows:

'Where a party is unhappy with an award made by an arbitral tribunal, the only recourse available to it is to apply to set aside the award. The Model Law provides limited grounds for setting aside an award. The *travaux* . . . suggest that there can be no grounds to set aside an award that are not contained in the Model Law and

> the *travaux* . . . suggest that an 'application for setting aside constitutes the exclusive recourse to a court against the award in the sense that it is the only means for actively attacking the award, i.e. initiating proceedings for judicial review'. An award may not be set aside for some reason not specified in the Model Law as a result of the courts' inherent jurisdiction.'

That passage correctly reflects the law as it now stands and, indeed, it reflects the heading to Article 34, which refers to an application for setting aside "as exclusive recourse" against an arbitral award.

32. Sub-paragraph (a) of paragraph (2) of Article 34 sets out four circumstances in which an award may be set aside at the suit of a party to the arbitration, who proves that one or more of such circumstances exists. The circumstance with which the Court is concerned in this case is the third circumstance, that is to say, the circumstance set out in Article 34(2)(a)(iii). Mansfield's commentary on that provision is that it is a ground -

> "That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. Commentators have noted that 'this ground is infrequently invoked and it is even less frequently accepted by national courts to set an award aside' and international case-law decided under the Model Law has held that this ground is to be narrowly construed."

The commentators cited in that passage are Brekoulakis and Shore in Mistelis on *Concise International Arbitration* (1st Ed., Kluwer, 2010). In that text, the commentators also state (at p. 647) that "a strong presumption should exist that a tribunal acts within its mandate".

33. It is generally recognised that the excess of authority ground in Article 34(2)(a)(iii) of the Model Law is modelled on the corresponding provision in the New York Convention, Article V(1)(c). As was pointed out by Lord Steyn in *Lesotho Highlands Development v. Impregilo SpA* [2006] 1 AC 221, s. 68 of the UK Arbitration Act 1996 was modelled on the New York Convention and on the Model Law. In considering the application of that statutory provision, Lord Steyn considered Article V(1)(c) of the New York Convention stating (at p. 236):

> "It deals with cases of excess of power or authority of the arbitrator. It is well established that article V(1)(c) must be construed narrowly and should never lead to a re-examination of the merits of the award."

Lord Steyn cited a decision of the US Federal Courts as authority for that last proposition: *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier* (RAKTA) (1974) 508 F 2d 969 (2nd Circuit). The limits on the excess of jurisdiction ground for setting aside an arbitration are, in my view, clearly brought home by the following passage from the opinion of Judge Smith in the *Parsons* case where he stated:

> "Although the Convention recognises that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement. The appellant's attempt to invoke this defence, however, calls upon the Court to ignore this limitation on its decision making powers and usurp the arbitrator's role."

34. In reality, what the client is asking the Court to do in this case is to second-guess the Arbitrator's construction of the 2007 Agreement. If this Court were to set aside the part of the award dealing with the fees for additional services, the Court would be usurping the Arbitrator's role. Accordingly, I am satisfied that the Client's attempt to have that part of the award set aside on the ground of excess of jurisdiction under Article 34(2)(a)(iii) is wholly misconceived and the application to set aside must be refused.

35. As regards Article 34(4), as is pointed out by Mansfield (at p. 219), the *travaux* suggest that the power to remit an award "would enable the arbitral tribunal to cure certain defects which otherwise would necessarily lead to a setting aside of the award". I consider that counsel for the Architect was correct in her submission that the Court's jurisdiction to remit under Article 34(4) is dependent upon the Court being satisfied that a ground has been

proved for setting aside the award. That has not happened in this case. Therefore, the Court has no power to set aside under Article 34(4).

36. As regards Article 33 of the Model Law, it confers no jurisdiction on this Court to compel a party to an arbitration to seek, or an arbitrator to give, an interpretation of a specific point or part of an award. In any event, by seeking an order compelling the Architect to agree to the Arbitrator giving an interpretation, in reality, as counsel for the Architect submitted, the Client is attempting to re-visit the merits of the Arbitrator's award. Having regard to the analysis of the Client's claim conducted earlier, the aspect of the award with which the Client takes issue could not be regarded as requiring interpretation because there is no ambiguity in it. In my view, it does not require clarification."

Submissions of the applicant:

32. It is submitted on the applicant's behalf by Mr. Fitzgerald that the refusal of the respondents to participate in the arbitration over a period of some years should be the critical lens through which the Court should consider the respondents' entire application. It is submitted that if a party fails to participate in arbitral proceedings, having been given reasonable notice of the proceedings and having been given ample opportunity to present its case, the tribunal does not offend due process or commit a procedural error when it proceeds to determine the proceedings in the absence of the non-participating defaulting party. Further, the applicant contends that the theory of waiver is of dominant application whereupon the respondents, having made no substantive act of participation in the arbitral proceedings after the issue of the points of defence in April, 2012, should not be allowed to come back in after the fact in November, 2014, complaining of an error in due process. Particularly, it is submitted on the applicant's behalf that when the respondents, having been made the subject of a default interim award in April, 2014, were informed of the arbitral tribunal's determination as to the conduct of the proceedings and as to quantum thereafter, they greeted same with silence.

33. It is further submitted on the applicant's behalf that the grounds to set aside and/or resist enforcement under Article 34 and 36 of the Model Law respectively are discretionary in nature. It is submitted that if the Court determines that the respondents have met the burden in establishing a breach of Article 34 of the Model Law, the Court may set aside or remit the final award. However, the use of the word "may" in both Articles 34 and 36, reserves a discretion to the Court to make such decision as is deemed fit and appropriate in all of the circumstances of the case.

34. Mansfield, in his work "*Arbitration Act 2010 and The Model Law - A Commentary*," Clarus Press, 2012, referred to with approval by this Court (Laffoy J) in *Snoddy*, states at page 218 as follows:

> "International case law decided under the Model Law has held that the party may waive its right to apply to set aside in the following circumstances:
>
> 1. Where it has agreed to prohibit any court application other than to enforce an award;
>
> 2. Where it fails to make clear its objection to the jurisdiction of the arbitral tribunal as soon as they are known or where it refused to take part in arbitral proceedings; and
>
> 3. By estoppel, where it made an assertion during proceedings that it later seeks to deny."

35. In relation to an alleged breach of arbitral procedure, counsel for the applicant contends that the arbitrator was not under a duty to give an opportunity to the respondents to make submissions as to quantum and, in the same regard, the arbitrator was under no duty to provide a copy of the applicant's submissions on quantum to the respondents in circumstances where the respondents had taken no active part in the proceedings after the default award had been granted in favour of the applicant. The applicant added that, in the alternative, if the arbitrator was under such a duty to the respondents, the respondents failed to make any objection to the proposed course of the arbitration in relation to the measurement of quantum during the currency of the arbitration such that they forfeited their right to resist the final award on this ground.

36. In relation to the question of the arbitrator being under an obligation to give reasons for the award, counsel for the applicant referred to the case of *Oil Basins Ltd v. BHP Billiton Ltd*. Victoria Court of Appeal, Australia, 16 November 2007 [2007] VSCA 255. In this case, the Australian court adopted the view that the standard of reasoning should be the same as for court judgments. However, in general, Model Law

courts have adopted a lower threshold. The Victorian Court of Appeal held at paragraph 26 *et seq*. as follows:

> " "26 The respondents challenged the interim award before the judge below on two grounds: first, that the reasons given by the majority arbitrators were so manifestly inadequate as to constitute error of law on the face of the interim award; and, secondly, that the majority arbitrators had so much failed to consider and adjudicate upon substantial and serious submissions and evidence relied upon by the respondents as to amount to technical misconduct.
>
> 27 In dealing with the first of those contentions, the judge noted that the arbitration had been conducted under the Commercial Arbitration Act 1984 and, therefore, that the arbitrators were required by s. 29 (1) (c) of that Act to include in their award a statement of the reasons for making the award. After referring to a number of cases in which the duty of judges and arbitrators to give reasons has been considered, his Honour [trial judge] held that:
>
> > "The standard to be applied in considering the sufficiency of an arbitrator's reasons depends upon the circumstances of the case including the facts of the arbitration, the procedures adopted in the arbitration, the conduct of the parties to the arbitration and the qualifications and experience of the arbitrator or arbitrators. For example, in a straightforward trade arbitration before a trade expert, a less exacting standard than would be expected of a judge's reasons should be applied in considering the adequacy of the reasons for the making of an award. On the other hand, in a large-scale commercial arbitration, where the parties engage in the exchange of detailed pleadings and witness statements prior to a formal hearing before a legally qualified arbitrator, a higher standard of reasons is to be expected. This is especially so where the arbitrator is a retired judicial officer."

And that:

> > "My review of the authorities and the facts of this case leads me to conclude that the arbitrators were under a duty to give reasons of a standard which was equivalent to the reasons to be expected from a judge deciding a commercial case. The arbitration is a large commercial arbitration involving many millions of dollars. It was attended with many of the formalities of a legal proceeding, including the exchange of points of claim and defence and of substantial witness statements. The hearing occupied 15 sitting days. In addition to oral argument, substantial written submissions were made by the parties. The arbitrators were obviously chosen for their legal experience and were retired judges of superior courts. Both sides were represented by large commercial firms of solicitors and very experienced Queens Counsel.""

37. However, it is contended that, unlike the factual matrix in *Oil Basins*, the arbitration between the applicant and the respondents in the instant case was not a complex commercial dispute but rather one that centred on a relatively simple claim for breach of contract arising from the defective construction of the applicant's crèche. Further, the applicant contends, even if one was to apply the most exacting standard of *Oil Basins*, by way of interim award, as repeated in the final award, the arbitrator gave reasons for his finding in favour of the applicant which would not be dissimilar to the reasons which might ordinarily be given in a default judgment handed down by a court in similar circumstances.

38. The determinative reason why the applicant in the present case succeeded on the merits of her claim was set out at paragraph 4 and 5 of the interim award of 15th April, 2014, where the arbitrator stated as follows:

> " 4. By order dated 4th day of March, 2014, I ordered that the defence of the respondents in these proceedings be struck out and that the claimant be entitled to recover her costs associated with and arising from the application for the striking out of the said defence against the respondents."
>
> 5. Having read all the pleadings and documentation furnished relevant to the claim and having considered the matter I hereby order as follows:
>
> > A. The claimant do recover from the respondents such monies as may be determined by

me to be due arising from the matters set out and claimed in the claimant's statement of claim herein.

B. To enable me to assess the quantum thereof, the claimant's solicitors do within four weeks from the date thereof furnish me with written submissions as to the amount of the monies so claimed.

C. The claimant do recover from the respondents the claimant's costs of these proceedings to date, such costs to be taxed."

It was therefore submitted by counsel for the applicant that the arbitrator sufficiently articulated the reasons for his decision.

39. The applicant contends that it is common case that the respondents were notified of the order of the 3rd March, 2014, striking out their defence without a response from the respondents. Similarly, the respondents were properly notified of the interim award of the 16th April, 2014, which again failed to elicit a response. If the respondents were dissatisfied with the interim award striking out their defence and the decision to proceed with the arbitration essentially in their absence, this was the time to raise the appropriate objections. It is submitted that if a party fails to participate in the proceedings, having been given reasonable notice of the proceedings and having been given ample opportunity to present its case, the tribunal may proceed in the absence of the defaulting party.

40. It is submitted that the jurisprudence on the application of Article 34(2)(a)(iv) of the Model Law in several Model Law countries are aligned on the accepted Model Law premise that a failure by a party to object to an error in due process and/or procedure where the party is aware of the alleged error during the arbitration and before the making of the Final Award will preclude that party from being entitled to rely upon the issue as a basis for a subsequent application to set aside / remit under Article 34. The lack of objection to procedures is frequently considered to constitute a waiver of the right to raise such objection at the post-award stage. Consequently, in *Uniprex S.A. v. Grupo Radio Blanca*, Madrid Court of Appeal, Spain, 22 March 2006, case No. 178/2006 - 4/2004, a party was held to be prevented from invoking non-compliance with an alleged multi-stage dispute resolution process where such non-compliance had not already been raised in the arbitral proceedings. In the seminal decision of *Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al. v STET International, S.p.A. et al (22 September 1999)*, the Ontario Superior Court of Justice held that a party waives its right to apply to set aside an award under the Model Law where it refused to take part in arbitral proceedings.

41. In this case, the respondents (together referred to as "STET") made up of an Italian company and its Netherlands subsidiary, commenced on arbitration against the Mexican applicants (collectively referred to as "COTISA") where STET had entered into a share subscription agreement with COTISA to purchase an indirect interest in the Cuban national telephone company.

42. In June 1999, pursuant to the arbitration clause in the subscription agreement, STET sought rescission of the subscription agreement. A three-person I.C.C. arbitral tribunal was constituted and arbitration proceedings were held in Ottawa. The arbitral tribunal concluded that it had jurisdiction in respect of all the parties and issues presented to it and went on to find that the applicants were all jointly and severally liable to compensate STET for losses of approximately US$305 million incurred as a result of breaches of the subscription agreement. Before the Ontario court, the applicants sought to have the award set aside while the respondents asked for its enforcement.

43. The applicants challenged the arbitral award on several grounds provided for in articles 34(2)(a)(ii) and (b)(ii) of the Model Law: namely that the tribunal was without jurisdiction over three of the parties, that they had been denied equality of treatment and opportunity to present their case contrary to Article 18 of the Model Law; and that the award was in conflict with public policy in Ontario.

44. The Court held that under Article 34 of the Model Law, the applicant had the onus of proving that the award should be set aside. If an applicant fails to do so, then Articles 35 and 36 require the Court to recognize and enforce the award. The Court also noted that the grounds for refusing to enforce an award are to be construed narrowly and that the public policy ground for resisting enforcement should apply only where enforcement would violate basic notions of morality and justice of which corruption, bribery or fraud are examples.

45. The Court also held that the "due process" protection of art. 34(2)(a)(ii) included both procedural and substantive fairness, which made it overlap with the public policy defence in 34(2)(b)(ii). After considering the facts of the case, the Court found that the applicants failed to establish grounds to set aside the award. In particular, the Court noted that a party that refuses to participate in arbitration is deemed to

have forfeited the opportunity to be heard. The purpose of the procedural fairness guarantees in Article 34 and elsewhere in the Model Law, in the Court's view, is to protect a party from egregious and injudicious conduct by a tribunal. It is not intended to protect a party for its own failures or strategic choices.

46. In conclusion, counsel for the applicant contends that the course of the proceedings, which resulted in the striking out of the respondents' defence and which concluded in the absence of the respondents, came about solely by the respondents' failure to participate in the process. The respondents were notified at the critical junctures as to the course of action the arbitrator proposed to pursue but failed to participate. It is submitted that the respondents have forfeited the opportunity to set aside the Final Award under Article 34 on the premise of procedural or substantive unfairness, if any, on the part of the arbitral tribunal.

Submissions of the respondents:
47. Counsel for the respondents, Mr. Charity, submits that under the provisions of paragraph 3 of the indemnity provided by the respondents on 7th August, 2009, and in particular paragraph 3.2 thereof, the award made by the arbitrator deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. On the basis of the foregoing, the applicant relies on Articles 34(2)(a)(iii) and (iv) of the UNCITRAL Model Law on International Commercial Arbitration, as adopted by the Arbitration Act 2010. The respondent relies on a number of international cases on arbitration in this regard.

48. In the Canadian case of *Louis Dreyfus SAS v Holding Tuscukum B.V. [2008] Q.J. No. 12906*, the parties entered into an agreement whereby each became shareholders of a German company, subject to a clause that allowed either party to request the claimant to buy out the defendant's shares in the company if an impasse arose between them. Following a dispute, the matter was referred to arbitration and, ultimately, an award was made dismissing both the claim and counterclaim made by the parties therein on the grounds that the agreement between them had become frustrated and the relationship terminated. It was also directed that the claimant buy out the defendant's shares. An application to partially set aside the award was made by the claimant in circumstances where it was alleged that the tribunal had fashioned an award not sought by either party. The German Company subsequently became bankrupt and the arbitral tribunal, in a second award, concluded that the company's bankruptcy had effectively terminated the parties' relationship and made the arbitral tribunal's previous award regarding the buyout of shares inoperative. The defendant sought the annulment of this award on the grounds that by issuing another order despite being *functus officio*, the tribunal had acted beyond its jurisdiction and failed to observe the applicable rules of procedure. The Court annulled the first award, concluding that the arbitral tribunal had gone beyond the scope of its mandate in creating a valuation and buyout remedy based on its own perception of what was fair and equitable in the circumstances. In so doing, the tribunal failed to comply with procedural rules applicable to the arbitration.

49. The Court noted the applicant's submissions to be as follows:

> "In assuming jurisdiction over the entire relationship … and in purporting to fashion a remedy … the alleged purpose of which (according to the Tribunal) was to resolve the entire relationship by "divorcing" the parties, the Tribunal dealt with a dispute not contemplated by and not falling within the agreement to arbitrate … and decided matters and issues beyond the scope of the said agreement;
>
> The Terms of Reference … signed by the parties in connection with the arbitration proceedings and the conduct of the parties during the arbitration process did not directly or indirectly confer upon the Tribunal jurisdiction over the entire relationship or jurisdiction to "divorce" the parties by fashioning a remedy for that purpose and, in purporting to do so, the Tribunal rendered a decision without jurisdiction and which, in any event, is manifestly and patently unreasonable…"

In considering the standard of proof to be adopted to an application for annulment of an arbitral award under Article 34, the Court held: -

> "Although some earlier Quebec authorities prior to Desputeaux reflected conflicted views regarding the limits of judicial intervention in proceedings involving applications for homologation or annulment of arbitral awards governed by the Code of Civil Procedure, it is now settled law that the only recourse against a disputed or contested arbitration award is by way of an application for its annulment. The grounds for seeking annulment, inspired by Article V of the New York Convention, are limited to those set out in Articles 946.4 and 946.5 C.C.P. These grounds must be narrowly construed and cannot be assimilated with those on an application for judicial review of an administrative tribunal pursuant to articles 33 and 846 C.C.P. Moreover, it is not disputed that decisions of international arbitral tribunals, are

presumed valid. They must be accorded a high degree of deference. The onus of proving that they should be annulled rests on the party seeking annulment."

Nonetheless, the Court proceeded to find:

> "…that the valuation and buyout remedy was improperly fashioned according to the Tribunal's own perception as to what was fair and equitable, rather than by respecting the scope of the mandate consented and agreed to by the parties. More particularly, by so doing, the Tribunal: (i) violated the audi alteram partem rule; (ii) dealt with a dispute which was not contemplated by the parties and decided matters beyond the scope of the terms of reference; (iii) failed to observe applicable arbitration procedure; (iv) rendered an award that is contrary to public order; and (v) engaged in a transformation of roles from that of arbitrators to that of amiable compositeurs, without the required express consent of the parties."

50. The respondents rely on a number of relevant provisions of the Model Law which it is contended apply to their benefit namely;

> • Article 18 providing for the equal treatment of parties and specifying that "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."
>
> • Article 23(3) of the Model Law relates to the provision of documentation and provides that "all statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties."
>
> • Article 25 of the Model Law deals with default of a party and provides at Article 25(c) that where "any party fails to…produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it."
>
> • Article 34(2)(a)(ii) of the Model Law providing that "the party making the application was not given proper notice of the arbitration or was otherwise unable to present his case." In '*Arbitration and ADR in Contract Disputes'* by Hutchinson G (Thomas Round Hall, 2010) at 104, the author discussed this provision and notes at Paragraph 13-08 that "The reference to 'otherwise unable to present his case' in art.34(2)(a)(ii) imports the notion of fair procedures and natural justice previously associated with the requirement that an arbitrator should not "misconduct" himself or the proceedings under the 1954-1980 Acts. The approach of the Courts in that regard hithertofore will be instructive in foreseeing how they might apply the new provisions."

Hutchinson further refers at page 105 that such circumstances may arise where there is a "failure to give each side an appropriate opportunity to be heard on any issue: see e.g. *Geraghty v Rohan Industrial Estates Ltd and the Registrar of Titles* [1988] 1 IR 419."

In *Geraghty* this Court (Carroll J) stated that:-

> "It appears to me to be essential to the requirements of justice that all parties be given a reasonable opportunity to adduce evidence considered necessary and to make submissions relevant to the issues to be decided… (T)he arbitrator, having stated that he would make an interim award at the first hearing, failed to make it clear to the solicitor or counsel for the plaintiff that he intended to deal with all issues at the second hearing. In my opinion the failure on the part of the arbitrator to conduct the arbitration in such a manner so that both parties might reasonably be aware that he had abandoned the idea of an interim award and intended to deal with all issues amounted to misconduct in the proceedings within the meaning of s. 38, subs. 1 (a). *The State (Hegarty) v. Winters* [1956] I.R. 320 is authority for the proposition that want of fairness alone, even though there is no partiality on the part of the arbitrator, is grounds for setting aside an award."

Reference was also made to *Montrose Canned Foods Limited v. Eric Wells (Merchants) Limited* [1965] 1 Lloyds Rep. 597 at 602 where Magaw J. stated:

> "… it is incumbent upon the arbitrators to take steps to ensure, as far as is reasonably possible, before they make an award, that each of the parties to the dispute before them

know the case which is being put against them, and has had the opportunity to put forward that party's own case."

In *Lennon and Harvey Ltd v. Murphy and Whelan* [2004] IEHC 402 at paragraph 10, the Court (Murphy J.) referred to the judgment of Donaldson J. in *The Myron* [1969] 1 Lloyd's Rep. 411 at 416-7 in finding:

> "The practice of allowing each party to submit their evidence and arguments to the arbitrators separately only works on the assumption that neither party will be taken by surprise by either evidence or the assumptions advanced by the other party. Normally both parties are fully aware of the issues, the arguments and the evidence available for consideration and no problem arises. If, however, the arbitrators have the slightest grounds for wondering whether one of the parties had fully appreciated what is being put against him or whether he might reasonably wish to supplement his evidence or arguments in the light of what has been submitted to the other party, it is their duty to take the appropriate steps to resolve those doubts. This would normally be done by one of the arbitrators writing to the party concerned summarising the case made against him and inquiring whether in the light of the summary he wished to add anything by way of evidence or argument."

At page 58 of the previously referenced '*Arbitration and ADR in Contract Disputes*', Hutchinson in dealing with the duty of the arbitrator in terms of conduct, states:-

> "Were the arbitrator to allow one party to communicate with him or her without giving the other party the opportunity to participate and respond the arbitrator would be in breach of that requirement…The 2010 Act in art.24(3) of the UNCITRAL Model Law requires that all statements, documents or other information supplied to the arbitrator by one party will be communicated to the other party; and that any expert report or evidentiary document on which the arbitrator may rely will be communicated to the parties."

It was further contended on the respondents' behalf that, even if John Hickey had not attempted to engage with the arbitration process by sending a letter seeking the applicant's submissions as to quantum, in *Lennon and Harvey Limited v Murphy & Whelan* [2004] IEHC 402, this Court (Murphy J.) referred with approval to the case of *McCarrick v. Gaiety (Sligo) Limited* [2001] 2 IR 266, where this Court (Herbert J.) adopted the position that the Court does not necessarily refuse to assist a party out of difficulty because he had got into it by his own fault although it may impose strict terms as a condition of giving such assistance.

51. In the case of *McCarrick v. The Gaiety (Sligo) Limited* [2001] 2 IR 266, Herbert J. considered the position of an applicant who had failed to furnish submissions within the time permitted by the arbitrator due to an "oversight". It is worth noting that like the present case herein, the arbitration in McCarrick was dealt with on the papers and in the absence of an oral hearing.

52. In *McCarrick* the arbitrator proceeded to make an award based solely on the respondents' submissions, and which, as is evident from paragraph 13 of the judgment, was challenged by counsel for the applicant as "…a "procedural mishap" which resulted in the contentions and evidence on behalf of the applicant/lessee not being considered by the arbitrator, and that there being no oral evidence in the matter it would be unjust to the applicant/lessee that the award, which counsel does not dispute was properly made by the arbitrator, without error, mistake or misconduct, should be permitted to stand."

53. This Court in *McCarrick* was referred by counsel for the applicant to the English case of *King and Anor v. Thomas McKenna Ltd. and Anor* [1991] 1 AER 653, and Herbert J., at paragraphs 13 and 14 thereof, outlined the findings of the master of the rolls therein as follows:-

> "In my judgment the remission jurisdiction extends beyond the four traditional grounds to any cases where, notwithstanding that the 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 as 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 any particular cases, subject to the vital qualification that it is designed to remedy deviations from the route which the reference should have taken toward 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 was 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 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. That is why there are rights of appeal in litigation and no doubt would be in arbitration were it not for the fact that in English law it is left to the parties, if they so wish, to build a system of appeal into their arbitration agreements and few wish to do so, preferring "finality" to "legality", to adopt Diplock J.'s terminology".

54. This Court (Herbert J.) in *McCarrick* rejected the respondent's argument that unless the four grounds found in Section 36(1) of the Arbitration Act 1954 applied, there was no jurisdiction to remit the matter for the consideration of the arbitrator. At Paragraphs 31-32, before remitting the matter back for the consideration of the arbitrator, the Court found that:-

> "in my judgment, on the basis of such evidence as has been put before the court and to which I have already made reference, what occurred in this case was a procedural mishap… and through no fault of the arbitrator or of the respondent/lessor the applicant/lessee has not received a fair hearing… In my judgment the possible injustice which the applicant/lessee may suffer, now and in the future should this award not be remitted to the reconsideration of the arbitrator exceeds any risk of detriment to the respondent/lessor."

55. Thus, it was submitted to this Court that there is authority in Irish law for the equitable intervention of the Courts in remitting arbitral proceedings.

56. As regards the contention that the award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given, it is submitted that this provision, through use of the word "shall", is mandatory in nature and the arbitrator in the present case failed to comply with same, there being no agreement between the parties that written reasons for an award not be furnished. It is noteworthy that Article 31(2) does not provide any saver for the duty to provide reasons in the event of a default award, and in fact only refers to circumstances where an agreement is made or an award agreed in compliance with Article 30 of the Model Law.

57. Article 34(4) of the Model Law provides that "The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside of proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

58. It is contended on the respondents' behalf that, any objective reading of Article 34(4) reveals that the same is a suspension of the application to set aside and which is two tiered in its applicability. The provision permits the arbitral tribunal to "…resume the arbitral proceedings…" on the one hand, or on the other "… to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside." In the case of *McCarrick*, discussed above, Herbert J considered the position of an applicant who had failed to furnish submissions within the time permitted by the arbitration due to an "oversight". Counsel submits that it is worth noting that like the present case herein, the arbitration in *McCarrick* was dealt with on the papers and in the absence of an oral hearing.

59. It was thus contended on the respondents' behalf that, in making the final award, dated 6th October, 2014, the arbitral tribunal dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contained decisions on matters beyond the scope of the submission to arbitration. In particular, Clause 3.2 of the Indemnity Agreement provided express and specific exclusion of liability for consequential loss or damage, and further confined recovery for loss to "Major Defects." Despite this, a number of awards, including an award for loss of earnings, was made by the arbitrator without reference to Clause 3.2, and further in circumstances where the award was effectively made in default such that the respondents' right to be heard on the issue was not canvassed.

60. It was contended on the respondents' behalf that an award for costs has also been made by the arbitrator, being measured in the sum of €45,718.67, without notice to the respondents, and with no opportunity for the respondents to address the arbitrator on same or refer the issue of costs to taxation. The respondents further contended that the sum is excessive in all the circumstances, given that judgment was obtained herein by default in the absence of an oral hearing and solely on the papers.

Additionally, the arbitrator has failed to provide the respondents with a breakdown of the calculation of the final award.

61. The Court received a further affidavit on behalf of the first named respondent, Mr. John Hickey, on the 6th March, 2015, in which it was averred that a communication of the 3rd day of July, 2014 had, in fact, been made by Mr. Hickey to the arbitrator. It was averred that Mr. Hickey requested a copy of the applicant's submissions to the arbitrator, dated 3rd June 2014, and that he received no response to the request. Two supplemental affidavits were filed on behalf of the applicant, Mary Delargy, and the arbitrator in which both strongly refute these allegations. The applicant in her affidavit avers that neither she nor her legal advisors ever saw the first named respondent's alleged letter of the 3rd July, 2014 until the 9th March, 2015. For the avoidance of doubt she avers that the letter was not received by her or her legal advisors during the currency of the arbitration or at any time prior to the 9th March, 2015, and further that the respondents made no mention of the existence of this alleged letter in their affidavit evidence or legal submissions prior to the hearing of this matter on the 27th February, 2015. The applicant further avers that the respondent made absolutely no mention of the existence of this letter during the full hearing of the matter before this Court on the morning of the 27th February, 2015, in circumstances where both parties made significant submissions on the law of waiver and the impact of a party's failure to object during the currency of the arbitral proceedings. Further the applicant avers that the alleged letter of the 3rd July, 2014 is addressed solely to the arbitrator and she says and believes that in circumstances where a party to an arbitration issues correspondence to an arbitrator during the currency of the arbitration but fails to copy the alleged letter to the other party it would be expected that the arbitrator would issue a copy to the excluded party.

62. The arbitrator in his affidavit avers that he has read and considered the supplemental affidavit of John Hickey of the 6th March, 2015 which exhibits a letter addressed to him from Mr. Hickey as dated the 3rd July, 2014 which he has carefully reviewed. He avers that he has thoroughly reviewed his file on the arbitration as between the parties hereto and premised upon this review and upon his own recollection he says that he was not contacted by the respondents at any time in the relevant period commencing on the 15th April, 2014 and concluding on the date of his final award of the 6th October, 2014. The arbitrator avers that he did not receive the letter from the first named respondent, John Hickey, as dated 3rd July, 2014, requesting a copy of the applicant's submissions and seeking advice upon how the respondents might make submissions on same. The arbitrator avers that the first communication in any form from the respondents in relation to this arbitration received by him after the date of his order striking out the respondents defence on the 4th March, 2014 was a letter from Donal Quinn solicitors of Athenry, Co. Galway dated the 11th December, 2014. The arbitrator exhibits this letter which makes no reference to an alleged letter of the 3rd July, 2014.

63. I am satisfied on the balance of probabilities that the arbitrator never received the alleged letter of the 3rd July, 2014 from the first named respondent. However, in any event, article 3 of the Model Law delineates what constitutes proof of receipt, or deemed receipt, as follows:

"Article 3 - Receipt of written communications:

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) The communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings."

64. There is no actual proof of delivery of the alleged letter to the arbitrator, his place of business, habitual residence, or mailing address. There is no evidence of any registered letter or any other means which provides a record of the attempt to deliver it. In these circumstances there is no basis pursuant to article 3 of the Model Law to deem the alleged letter of the 3rd July, 2014, delivered to the arbitrator. In these circumstances, the alleged communication from the first named respondent John Hickey to the arbitrator cannot be taken into account in these proceedings.

Conclusion.

65. As discussed herein, the essence of the respondents' claim to set aside the arbitral award in this case arises from Article 34(2)(a)(iii) of the Model Law. Under this section, the respondents must satisfy the Court that:

> "(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;"

Commentators have noted that "this ground is infrequently invoked, and it is even less frequently accepted by national courts to set an award aside." (Brekoulakis and Shore in Mistelis, *Concise International Arbitration, UNCITRAL Model Law Jurisdictions* (3rd ed, Sweet & Maxwell; London, 2010) p. 383) The respondents in the instant case thus bear the burden of proof, where there is a presumption that the arbitral tribunal has acted within its mandate.

66. The Court notes that the grounds to set aside and/or resist enforcement under Article 34 and 36 of the Model Law respectively are discretionary in nature. It is the case that if this Court was to determine that the respondents have met the burden of establishing a breach of Article 34 of the Model Law the Court may set aside or remit the final award. However, the use of the word "may" in both Articles 34 and 36, reserves the decision to the discretion of the Court as it deems fit and appropriate in all of the circumstances of the case. This interpretation is shared by the aforementioned Mansfield's work, *Arbitration Act 2010 and The Model Law - A Commentary*," referred to with approval by Laffoy J in *Snoddy*, in which he states at page 217 as follows:

> "The grounds to set aside an award, whether party grounds or ex officio grounds, are discretionary, not mandatory in nature. As commentators have noted, 'a court may annul an award if one or more of the Article 34(2) grounds are satisfied, but the court is not mandatorily required to annul the award, even where one of the grounds apply.'"

67. Mansfield also states, at page 218, as follows:

> "International case law decided under the Model Law has held that the party may waive its right to apply to set aside in the following circumstances:
>
> > "…… 2. Where it fails to make clear its objection to the jurisdiction of the arbitral tribunal as soon as they are known or where it refused to take part in arbitral proceedings;"

68. As set out, in the seminal Model Law decision of *Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al. v STET International, S.p.A. et al (22 September 1999)*, the Court held that a party waives its right to apply to set aside an award under the Model Law where it refused to take part in arbitral proceedings. If an applicant fails to prove that an award should be set aside, then Articles 35 and 36 require the Court to recognise and enforce the award. Under Article 34(4) of the Model Law, when asked to set aside an award, the Court may, where appropriate and so requested by a party, suspend proceedings and remit the award to the arbitral tribunal in order to give the arbitrator an opportunity to resume the proceedings or to take action to eliminate the grounds for setting aside the award.
The *travaux preparatoires* (of which Irish courts are permitted to take judicial notice when interpreting provisions of the Model Law, pursuant to section 8(1) of the Arbitration Act, 2010) suggest that the power to remit an award "would enable the arbitral tribunal to cure certain defects which otherwise would necessarily lead to the setting aside of the award." (UNCITRAL Commission Report, A/40/17, Art 34, para 306). The judicial power to remit an award for the reconsideration of an arbitral tribunal is familiar in an Irish context, as the Arbitration Acts 1954-1998 (s. 36 Arbitration Act 1954) permitted the High Court to remit an award in certain circumstances. Although the circumstances were not specified under the Arbitration Acts 1954-1998, case-law has held that a court may remit an award where there was a patent error of calculation; where an award was ambiguous or uncertain; where the arbitral tribunal itself sought to rectify an error; and, in certain circumstances, where new evidence had become available. In a recent case, *CIE v Spencer Dock Development Company Ltd* [2011] IEHC 185, decided under the Model Law, this Court (Laffoy J.) stated, at para. 5.2 of the judgment, that in circumstances where the parties believed there to be a lack of clarity in an award, "the logical and sensible course for the parties to adopt would be to avail of the [arbitral tribunal's] invitation to make further submissions to [it]." However, this is not the situation in the instant case.

69. The discretionary nature of Articles 34 and 36 of the Model Law allows the Court to take all material facts of the case into account when deciding to set aside an award in full or to remit part of an award back to the arbitrator in order to cure alleged defects. It is the view of this Court that if it were to be the case that any party to an arbitral process could simply opt out of the proceedings, by reason of strategy or opportunism, and then come back in after the fact complaining of an error of due process, it would be against the spirit upon which the Model Law was constructed, that is to avoid unnecessary legal costs through a process that should guarantee expediency, finality, and closure.

70. The general approach of the Irish courts in applications such as in the instant case has thus far been one of caution. In *Keenan v. Shield Insurance* [1988] I.R. 89, McCarthy J., with whom the other four judges of the Supreme Court hearing the appeal concurred, (at page 96) stated that:-

> "Arbitration is a significant feature of modern commercial life; there is an international institute of arbitration and the field of international arbitration is an ever expanding one. 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."

71. International case law has also held that the requirement for due process is not intended to protect a party from its own failures or strategic choices so that a party that refuses to participate in arbitral proceedings is deemed to have forfeited the opportunity to be heard (CLOUT Case 391 *Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al. v STET International, S.p.A. et al (22 September 1999)*). The Court is very mindful of the fact that the respondents in this application effectively walked away from the arbitral process midway through it and deprived themselves of the opportunity to make their case before the agreed arbitrator, and in particular any point they wished to raise regarding the issue of jurisdiction or the claims of the applicant, or the amounts as claimed, at the appropriate juncture during the currency of the arbitration.

72. The arbitrator, in the particular circumstances of this case, had before him the points of claim and the points of defence and had the two relevant documents which form the basis of the parties agreeing to the matter being referred to arbitration and while it does not appear that there is in place an actual reference or submission to arbitration it is quite clear that both parties attended a preliminary meeting on the 17th November, 2011, with the arbitrator, and it was agreed they would proceed with points of claim and points of defence and that the arbitration would be conducted by way of written submissions. Both parties accordingly agreed the procedure and neither had any objection. It was at all times open to the respondents to raise any appropriate objection but they did not do so and, in the circumstances, the absence of a reference or submission to arbitration in my view is not material and not a ground to set aside or refer the award back to the arbitrator.

73. The arbitrator, having made an order for discovery against the respondents, was perfectly entitled, when his order had not been compiled with, to strike out the respondents' points of defence, and in the interim award the arbitrator made it quite clear as to his proposed path of action and that he was proceeding to assess the quantum of damages to which the applicant was entitled. Again at this point in time, the respondents failed to take any further action or to cooperate in any way with the arbitral process and, in my view, it was not necessary for the arbitrator to continue to involve the respondents when quite clearly they had walked away, were noncompliant, and in fact were on notice of precisely the course of action which the arbitrator proposed to follow without any objection from them, and accordingly, the fact that the arbitrator did not provide the respondents with continuing documentation and, in particular, the applicant's submissions on quantum, in my view does not provide a ground on which the final award should be set aside or referred back to the arbitrator.

74. It is no function of this Court to attempt in any way to second guess the decision as arrived at by the arbitrator and this Court does not propose to do so. It may be the position that there may have been grounds for submissions on the respondents' behalf contrary to the views as expressed on the applicant's behalf but the respondents, in the circumstances that pertain, by walking away from the arbitral proceedings, have forfeited their right to raise any objections after the final award has been delivered.

75. Insofar as the respondents raise an issue as regards an alleged failure on the part of the arbitrator to give reasons, this Court does accept that the arbitrator could have expanded on the reasons for his award, but the factual reality of the situation that pertains in this particular instance is that the respondents' points of defence were struck out, and judgment was entered in favour of the applicant in circumstances which would not be dissimilar to the reasons which might ordinarily be given in a default judgment handed down by this Court. This was not a case where contesting evidence and submissions were made to the arbitrator and he had to decide between two or more parties to the arbitral process. If the respondents

were dissatisfied with the reasons given in the interim award of the 16th April, 2014, that was the time to raise the appropriate objections or to make further submissions. In my view the pertaining circumstances do not give rise to a situation where this Court, in the exercise of its discretion, should either set aside the award or refer the subject matter of the final award or part thereof back to the arbitrator.

76. I do not consider that this Court has a duty to assist a party out of a difficulty because he has got into it by his own fault. Each situation has to turn on its own particular set of facts and the exercise of the Court's discretion. The respondents failed to comply with the order for discovery, were on notice that their points of defence had been struck out, were advised of the procedural course which the arbitrator intended to pursue, were aware of the general nature of the claim raised by the applicant, had the benefit of legal advice, and effectively took a deliberate decision not to participate in the arbitral process. Herbert J. in *McCarrick* took the view on the basis of the evidence as put before his Court that what occurred was a procedural mishap which was through no fault of the arbitrator or of the respondent and this led to the applicant not receiving a fair hearing and in the particular circumstances of the *McCarrick* case Herbert J. took the view that the possible injustice which the applicant may suffer should the award not be remitted to the reconsideration of the arbitrator exceeds any risk of detriment to the respondent. The circumstances in this application are different in that the respondents at all times had the right to participate in the arbitral process and did so up until a certain point of time and were on notice as to precisely what the situation was and for their own reasons declined to further participate in the process. This is not a case of an unfortunate procedural mishap.

77. The respondents raise an issue in respect of the alleged failure of the applicant to make a claim for loss of profits in her points of claim. In this regard, this Court is satisfied that the respondents are attempting to intermingle two separate aspects in respect of the claim for loss of profits by the allegation that in fact there was no claim for loss of profits in the points of claim and that if there was such a claim, the arbitrator, because of the content of the deed of indemnity as subsequently entered into, should have precluded a claim for loss of profits. This Court is satisfied that the arbitrator was entitled to consider a claim for loss of profits as generally referred to in the points of claim and, furthermore, having all the relevant documentation before him and having indicated that he had read and considered the documentation as previously referred to herein, this Court is not going to attempt at this stage to second guess the findings of the arbitrator.

78. This Court does not consider that it is appropriate to revisit the merits of the arbitrator's award. In particular, there is no ambiguity in the award and this Court considers that no clarification of the award is necessary. The respondents failed to make any objection to the course of action as proposed by the arbitrator during the course of the arbitral process, and they were not prevented in any way by the arbitrator from participating in the arbitral process and it was of their own choice that they declined to participate. No valid reason has been offered by the respondents to this Court as to why, in the particular circumstances that arise, they should be entitled at this stage to come back in to the arbitral process. There is no basis for the respondents to set up a claim that the arbitrator violated the *audi alteram partem* rule or that he dealt with the dispute beyond that which was set out in the points of claim and points of defence, or that he failed to observe applicable arbitration procedures or that he rendered an award that is contrary to public order. There is no allegation in the particular circumstances of this application that enforcement of the award would violate basic notions of morality and no allegation of corruption, bribery, or fraud, or any allegation which alleged serious wrongdoing on the part of the arbitrator. It is clear that the relevant grounds for referring the process back to an arbitrator, or in setting aside the arbitrator's award, are to be construed narrowly and the onus in this regard is on the moving party, being the respondents herein. Clearly there is a public policy ground in issue in relation to the desirability of making an arbitration award final in every sense of the term, and in all the circumstances that pertain herein I do not consider that, as a result of their own actions, the respondents have suffered any possible injustice in the award as handed down by the arbitrator. The requirement for due process is not intended to protect a party from its own failures or strategic choices, and in the circumstances that pertain in this instance it does appear appropriate that the respondents are deemed to have forfeited the opportunity to be reinstated in the arbitral process either by having the award or part thereof remitted to the arbitrator or set aside in its entirety.

79. I take the primary view in the exercise of my discretion, for the reasons as set out herein, that as a result of the respondents' refusal to take part in the arbitral proceedings, they have lost the right to raise a challenge to the findings of the arbitrator and to seek to have his award set aside or remitted pursuant to Article 34 and, in particular, subsection (2)(a)(III).

80. In any event, in the exercise of my discretion and in the upholding of the integrity of the arbitral process, I do not consider that even if the reasons for the award as given are considered to be inadequate that it would be appropriate in the circumstances that pertain either to set aside the award or refer the

award back to the arbitrator for further consideration. Furthermore, I do not propose to attempt to second guess the findings as arrived at by the arbitrator.

81. In these circumstances, and for the reasons as set out herein, the respondents do not discharge the onus of proving that the award of the arbitrator should be set aside or that the award, or any part thereof, should be referred back to the arbitrator, and accordingly, the reliefs as sought on the respondents' behalf are refused and I will hear the submissions of counsel as regards the applicant's claim for judgment and for an order enforcing the award.