[2018] IEHC 660

THE HIGH COURT

[2018 NO. 28 MCA]

IN THE MATTER OF THE ARBITRATION ACT, 2010

AND IN THE MATTER OF AN APPLICATION TO SET ASIDE AN ARBITRAL AWARD PURSUANT TO ARTICLE 34 OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

BETWEEN

PATRICK RYAN AND ANN RYAN

APPLICANTS

AND

KEVIN O'LEARY (CLONMEL) LIMITED AND GENERAL MOTORS

RESPONDENTS

JUDGMENT of Mr. Justice David Barniville delivered on the 23rd day of November, 2018

Introduction

1. This is my judgment on an application by the applicants, Patrick Ryan and Ann Ryan (the "Ryans"), for an order setting aside an arbitral award made in arbitration proceedings between Mr. and Mrs. Ryan and the respondents to this application, Kevin O'Leary (Clonmel) Ltd ("O'Learys") and General Motors, dated 21st December, 2017 (the "award"). The Ryans seek to set aside the award on the grounds set out in Articles 34(2)(a)(iii) and (iv) and Article 34(2)(b) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") and the Arbitration Act, 2010 (the "2010 Act").

2. Unfortunately, for reasons set out in this judgment, I have concluded that the Ryans must fail in their application. In the circumstances, I must refuse their application to set aside the award. I will now explain why that is so.

Factual background

3. Mr. Ryan is in his late 70's and Mrs. Ryan is in her late 60's. They live in Mullinahone, Co. Tipperary. In May 2013 they bought an Opel Meriva car from their local Opel dealer in Clonmel, O'Learys. O'Learys are the first named respondent to this application. General Motors are the second named respondent. The car was an ex-demonstration model from 2012 which had approximately 24,000 kilometres on the clock when it was sold to the Ryans. The Ryans paid €17,650 for the car which included a trade-in of their then car and they partly funded the balance of the purchase price with a loan from the credit union. The Ryans had almost three years of trouble-free driving with the car and put up approximately another 70,000 kilometres on the clock over that period. All that came to an end in late January 2016 when the car broke down and had to be towed to O'Learys' garage. It broke down on two further occasions in January and February 2016. On each occasion it had to be towed to O'Learys. Following the first and second breakdown, the Ryans had to replace the battery and fuel pump in the car at their expense.

4. There was a dispute between motor engineers engaged by the Ryans and by O'Learys as to the cause of the problem. The Ryans' motor engineer (Mr. Cottter) was of the view that there was a manufacturing defect in the car, being a problem with the wiring loom. O'Learys' engineer, Mr. Quirke, thought the problem was an overheating fuel pump caused by wear and tear over the years. The car has been off the road since February 2016 and has been stored by a relative of the Ryans (at no cost to them) since April 2016.

5. Attempts to resolve the issue with O'Learys and General Motors were unfortunately not successful. It was accepted by all sides that there was a fault with the car. The cause of that fault was disputed. Mr. Cotter estimated that the cost of carrying out the necessary work to get to the bottom of the problem and to repair it was approximately €5,000. On 13th April, 2016, General Motors, on its behalf and on behalf of O'Learys, offered to cover 80% of the cost of repairing the car. That offer was not accepted by the Ryans, apparently on the advice of Mr. Cotter. The Ryans were not prepared to pay any of the repair costs, believing the problem to be entirely one for O'Learys and General Motors to deal with. Ultimately, the Ryans lost all faith in the car and wished to hand it back to O'Learys and recover the purchase price as well as the additional costs they had paid out for having it towed and repaired the first couple of times it broke down.

6. The Ryans commenced Circuit Court proceedings against O'Learys in December 2016 in Tipperary. O'Learys' solicitors drew to the attention of the solicitors acting for the Ryans that there was an arbitration clause in the contract which the Ryans had entered into with O'Learys to purchase the car. The Ryans then agreed to stay the Circuit Court proceedings and to refer the dispute to arbitration.

7. O'Learys and General Motors are members of the Society of the Irish Motor Industry (SIMI). The Chartered Institute of Arbitrators - Irish branch (CIArb) has put in place an arbitration scheme on behalf of SIMI. The Ryans applied to the CIArb under that scheme for the appointment of an arbitrator to resolve their dispute with O'Learys. The President of CIArb appointed John Hussey, solicitor, as arbitrator in respect of the dispute in July 2017.

8. The arbitrator gave initial directions on 27th July, 2017. In his letter of that date setting out his directions, the arbitrator identified the respondents to the arbitration as O'Learys and General Motors. The arbitrator directed an exchange of pleadings in the arbitration.

9. The Ryans delivered a statement of claim naming O'Learys and General Motors as respondents in the arbitration. They sought relief in the arbitration against both O'Learys and General Motors. O'Learys and General Motors, as respondents in the arbitration, delivered points of defence in which they admitted that the car had developed a fault but pleaded that the fault occurred in the ordinary course of usage, three years after the car had been purchased by the Ryans. It is a matter of controversy between the parties as to whether O'Learys and General Motors raised certain issues in their points of defence on which the arbitrator subsequently relied in his award. I address that issue later in my judgment.

10. The hearing of the arbitration took place on 17th November, 2017 and lasted a full day. The Ryans were represented by solicitors and counsel as were O'Learys and General Motors. Mrs. Ryan and her daughter gave evidence as did Mr. Cotter, the motor engineer, on behalf of the Ryans. O'Learys' service manager gave evidence for the respondents as did Mr. Quirke, the motor engineer retained on their behalf. The witnesses called were all cross-examined by opposing counsel. Counsel had the opportunity of making submissions at the conclusion of the evidence.

11. The arbitrator made his award on 21st December, 2017. The award was furnished to the parties. The Ryans failed in their claims before the arbitrator for the reasons set out in the award. The arbitrator made no order in respect of costs. The arbitrator's own fees were paid by O'Learys/General Motors under the CIArb/SIMI arbitration scheme.

Application to set aside award

12. The Ryans now seek to set aside the award on various grounds which they contend are covered by Articles 34(2)(a)(iii) and (iv) and Article 34(2)(b) of the Model Law and the 2010 Act. O'Learys and General Motors, the respondents to the Ryans' application, resist the application and contend that the Ryans are, in effect, seeking to appeal to the High Court from the decision of the arbitrator as set out in the award. They contend that no such appeal is open to the Ryans under the Model Law or the 2010 Act.

13. Under O. 56, rr. 2 and 3 of the RSC, notice of an application to set aside an arbitrator's award must be given to the arbitral tribunal, albeit that the tribunal is not to be a party to the proceedings. It is not clear from the papers whether the Ryans did give notice of their application to the arbitrator, as required under those provisions of the RSC. However, in light of the fact that the respondents to the application fully stood over the procedure adopted by the arbitrator and the award itself, I am satisfied that no prejudice has been caused to the arbitrator by reason of any failure to provide notice of the application to him. I would, therefore, be prepared in this case to dispense with any requirement to give notice of the application to the arbitrator, in the event that such notice was not in fact given to him. I note that a similar approach was taken in somewhat similar circumstances by McGovern J. in O'Leary trading as *O'Leary Lissarda v. Ryan* [2015] IEHC 820 (" *O'Leary Lissarda* ") (para. 3, p. 2). However, this should not be the norm for applications such as this. The provisions of the RSC must be complied with. That is particularly so where (as here) the applicant in a set aside application is critical of the award and of the procedures adopted by the arbitrator.

14. The Ryans application was grounded on an affidavit sworn by Mrs. Ryan on 8th February, 2018. In her affidavit, Mrs. Ryan referred to the background to the dispute with O'Learys and the circumstances in which the arbitrator was appointed. Mrs. Ryan's affidavit then set out the grounds on which it was being asserted the award should be set aside under the relevant provisions of Article 34(2) of the Model Law.

15. In very brief summary, Mrs. Ryan took issue with the joinder by the arbitrator of General Motors as a respondent to the arbitration in circumstances where the only parties to the submission to arbitration were the Ryans and O'Learys. She further asserted that the award contained decisions on matters which were beyond the scope of the submission to arbitration, in that the dispute between the parties was

whether or not the arbitrator should rescind the contract of purchase between the parties or, alternatively, award damages. Mrs. Ryan suggested that the award did not determine that dispute. Rather, she said that the arbitrator decided the arbitration on the basis that the Ryans ought to have accepted the offer by O'Learys and General Motors to cover 80% of the costs of the repairs to the car. Those were the essential grounds relied upon to support the application to set aside the award under Article 34(2)(a)(iii) and (iv).

16. In support of the contention that the award should be aside under Article 34(2)(b) of the Model Law on the grounds that the award is in conflict with the public policy of the State, Mrs. Ryan advanced a number of further arguments. In summary, she contended that the award was irrational and contrary to generally accepted principles of law. She further asserted that the arbitrator failed to take into account the evidence before him and breached the Ryans' right to natural and constitutional justice. In that regard, Mrs. Ryan again asserted that the arbitrator decided the arbitration on the basis of the offer made by O'Learys and General Motors to cover 80% of the costs of repair and did not determine the claims advanced by the Ryans. She argued that the arbitrator was mistaken in determining the arbitration on the basis of the offer and in holding that the Ryans' failure to accept the offer amounted to a failure to mitigate their loss. She further argued that the award contained a fundamental error of law insofar as the arbitrator found that the Ryans had failed to afford O'Learys a reasonable opportunity of repairing the car before the matter was referred to arbitration having regard to the provisions of clause 11 of the SIMI terms and conditions which formed part of the purchase contract. Mrs. Ryan argued that the finding that the Ryans had breached clause 11 was irrational and contrary to the evidence before the arbitrator. She relied on the fact that the car had been brought to O'Learys' garage on three occasions between January and February 2016 to be repaired. Mrs. Ryan contended that the arbitrator misinterpreted and misapplied the provisions of clause 11 of the terms and conditions. She also argued that the award was irrational on the further ground that the Ryans' claim was dismissed on the basis of the offer by O'Learys and General Motors to pay 80% of the cost of the repairs while not requiring O'Learys to carry out those repairs thereby leaving the Ryans in " *no man's land* " in relation to the vehicle. Mrs. Ryan contended that it would be contrary to public policy for the award to stand.

17. Mrs. Ryan put in evidence the relevant documents including the contract under which the car was purchased, the request for appointment of the arbitrator, the arbitrator's directions, the pleadings in the arbitration, the award and certain relevant correspondence including the reports of Mr. Cotter and Mr. Quirke which were contained in letters to their respective clients of 24th May, 2016 and 23rd March, 2016.

18. A replying affidavit was sworn on behalf of O'Learys and General Motors by Alexis Moore, a customer care manager employed by General Motors. Ms. Moore contended that the Ryans were in effect seeking to appeal the decision of the arbitrator and that such was not legally permissible. Ms. Moore briefly addressed the merits of the respondents' case at the arbitration, referred to the hearing which had taken place and then outlined the arbitrator's findings. She contended that the arbitrator's award was comprehensive and had accurately recorded and summarised the evidence given by all of the witnesses. She asserted that the arbitrator had made critical findings of fact, had preferred the respondents' expert evidence and concluded that the Ryans had failed to establish their claim on the balance of probabilities and had failed to mitigate their losses. Accordingly, the arbitrator had dismissed their claim.

19. Ms. Moore contended that the respondents' application to set aside the award amounted to an impermissible collateral attack on the findings and determination of the arbitrator. She further addressed the grounds put forward by Mrs. Ryan in her affidavit for seeking to set aside the award. As regards the contention that the arbitrator had incorrectly named General Motors as a party to the arbitration, Ms. Moore drew attention to the fact that the Ryans had not raised any issue in relation to the joinder of General Motors until the present application and indeed had pleaded a case in their statement of claim in the arbitration against both O'Learys and General Motors. She asserted that there was no merit to that point and, in any event, argued that the Ryans were estopped from raising the point.

20. Ms. Moore further rejected the contention that the award is in conflict with the public policy of the State. In response to the grounds raised to support this element of the Ryans' application, Ms. Moore asserted that in raising these points the Ryans were asking the court to second guess the correctness of the arbitrator's decision on the merits both on the facts and on the law. She stated that the award could in no sense be described as being in conflict with the public policy of the State. She asserted that the highest standards of fair procedures were followed at the arbitration.

21. A supplemental affidavit was sworn by Mrs. Ryan on 7th June, 2018. Mr. Cotter also swore an affidavit on behalf of the Ryans on the same date. In her supplemental affidavit, Mrs. Ryan continued to assert that the award contains clear errors of law and that the arbitral process failed to vindicate the Ryans' rights to natural and constitutional justice. She further asserted that the limited nature of the

court's jurisdiction to set aside an award for which the respondents were contending would infringe the Ryans' constitutional right of access to the courts. She argued that the 2010 Act had to be construed to allow for broader grounds of challenge to an arbitrator's award. She further rejected the respondents' contention that the hearing for the arbitrator was comprehensive and impartial. She relied on Mr. Cotter's affidavit in that regard. Mrs. Ryan further sought to make the case that the arbitration process provided by the CIArb on behalf of the SIMI was biased in favour of the motor industry on the grounds that SIMI members were parties to the arbitration and that General Motors paid the arbitrator's fee under the scheme. Mrs. Ryan advanced a further argument that notwithstanding that the respondents to the arbitration had accepted that they were liable for the sum of just over €1,000 and for other charges in respect of towing, no award was made in respect of those sums.

22. Mr. Cotter's affidavit contains a series of allegations in relation to the conduct of the arbitration and the manner in which the arbitrator dealt with the evidence, including the evidence given by Mr. Cotter himself. Mr. Cotter contended that the arbitrator did not assess his evidence in a fair and unbiased manner. Mr. Cotter advanced a series of what are, in effect, submissions in relation to the various aspects of the award with which he took issue.

23. Ms. Moore swore a further affidavit on behalf of O'Learys and General Motors on 21st June, 2018 taking issue with the claims made in Mrs. Ryan's supplemental affidavit and in Mr. Cotter's affidavit. She contended that it was clear from those affidavits that the Ryans were in effect seeking to appeal the decision of the arbitrator to the High Court which is not legally permissible. She further rejected the contention that the respondents had accepted liability in respect of certain items of special damage put forward by the Ryans at the arbitration. She stated that certain heads of claim were accepted by the respondents in terms of quantum but that such acceptance was without prejudice to the respondents' liability to pay those amounts which remained in issue between the parties and was ultimately determined in favour of the respondents. Ms. Moore was critical of Mr. Cotter's affidavit and his attempt to ask the court to second guess the arbitrator's findings in relation to the expert evidence. She further asserted that it was not open to Mr. Cotter to seek to adduce additional evidence before the court to bolster the evidence given by him which was not accepted by the arbitrator. As regards the contention made by Mr. Cotter that the arbitrator was unfair and showed prejudice and bias against him, Ms. Moore noted that no such complaint had been made during the course of the hearing.

24. Counsel for the Ryans and counsel for O'Learys and General Motors made oral submissions on the hearing of the application. I set out my conclusions in relation to those submissions below. Before doing so, I will briefly consider the scope of the jurisdiction which the High Court has to set aside an arbitrator's award.

Jurisdiction to set aside award

25. The 2010 Act gave force of law in the State to the Model Law and provided that the Model Law would apply to domestic and international commercial arbitrations (s. 6 of the 2010 Act). By virtue of s. 9 of the 2010 Act and Article 6 of the Model Law the High Court has jurisdiction to set aside an arbitral award. That jurisdiction is exercised by the President of the High Court or by another judge of that court nominated by the President. Article 34 of the Model Law (which is set out at Schedule 1 of the 2010 Act) makes it clear in its heading that an application to set aside the award amounts to "exclusive recourse" against such an award. This is expressly stated at Article 34(1) which provides as follows:-

> *"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."*

26. Article 34(2) reinforces this by stating that an arbitral award may be set aside by the court specified in Article 6 (i.e. the President or nominated judge of the High Court) " *only if*" certain grounds are certified. Those grounds are then set out in Articles 34(2)(a)(i) to (iv) and in Article 34(2)(b). An applicant who seeks to set aside an award must bring its application within one of the grounds set out in Article 34(2) of the Model Law. The High Court (Laffoy J.) confirmed that to be the position in *Snoddy v. Mavroudis* [2013] IEHC 285 (" *Snoddy* "). At para. 31 of her judgment in that case, Laffoy J. referred to the " *very limited jurisdiction which [the] court has under the Act of 2010 and the Model Law to set aside an arbitral award".* She then quoted with approval a passage from Mansfield " *Arbitration Act 2010 and Model Law: A Commentary* " 1st edn., (Clarus Press, 2012) ("Mansfield"). In a passage approved of by Laffoy J. in *Snoddy* , Mansfield stated:-

> " *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."* (at p. 213).

Laffoy J. then stated that: -

> " *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."* (para. 31, p. 14).

27. Laffoy J.'s observations in *Snoddy* were followed by Gilligan J. in *Delargy v. Hickey* [2015] IEHC 436 (" *Delargy* ")(para. 31, pp. 12-15) and by McGovern J. in *O'Leary Lissarda* (para. 5, pp. 2-3) and in *Hoban v. Coughlan* [2017] IEHC 301 (" *Hoban* "). In *Delargy* , Gilligan J. stated that the grounds for setting aside an award " *are to be construed narrowly and the onus in this regard is on the moving party…* " (para. 78, p.40). In *Hoban* , McGovern J. stated the basis on which an award can be set aside under Article 34 of the Model Law is " *very limited and it is a jurisdiction which the court should only exercise sparingly* " (para. 25, p.7).

28. The Ryans bring their application to set aside the award under a number of the provisions of Article 34(2). They first rely on Article 34(2)(a)(iii). Under this subparagraph, the award may be set aside if:-

> *"(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…"*

29. The Ryans further rely on the grounds set out in Article 34(2)(a)(iv). Under this provision, an award may be set aside if:-

> *"(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties… or…was not in accordance with this Law;"*

The third ground on which the Ryans rely is that contained in Article 34(2)(b). The Ryans rely on subpara. (ii) of Article 34(2)(b) in that they contend that the award should be set aside on the grounds that it is "i *n conflict with the public policy of this State* ".

Approach to applications to set aside awards: General Principles

30. Before addressing each of the grounds advanced by the Ryans and the submissions made in respect of those grounds, it is necessary to make a number of observations in relation to the approach which the Irish courts have taken when dealing with applications to set aside awards under Article 34 of the Model Law.

31. Two important principles which can be derived from the Irish cases are as follows. First, the cases stress the importance of the finality of arbitration awards. Second, they make clear that an application to set aside an award is not an appeal from the decision of the arbitrator and does not afford the court the opportunity of second-guessing the arbitrator's decision on the merits, whether on the facts or on the law.

32. The first principle, namely, the finality of awards, was stated very clearly in the context of the pre-2010 legislative regime by McCarthy J. in the Supreme Court in *Keenan v. Shield Insurance Company Ltd* [1988] IR 89 (" *Keenan* "). In that case, McCarthy J. described arbitration as a "*significant feature of modern commercial life"* and continued:-

> *"It ill becomes the court 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."*

33. These comments were cited with approval by Clarke J. in the High Court in *Limerick City Council v. Uniform Construction Ltd* [2007] 1 IR 30 (" *Uniform Construction* ")(at para. 33, pp. 41-42). Clarke J. observed that it was the unanimous view of the Supreme Court (in *Keenan*) that policy considerations favoured conferring finality on the awards of arbitrators (para, 34, p. 43). Similar comments have been made by the courts following the enactment of the 2010 Act and the adoption of the Model Law. For example, in *Delargy* , Gilligan J. cited the dicta of McCarthy J. in Keenan with approval (at para. 70, p. 36) and commented as follows:-

"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…" (para. 78, p. 40).

34. There is no doubt, therefore, that the policy behind the 2010 Act and the Model Law is to uphold the finality of an award and, therefore, courts are required to construe narrowly the grounds on which an award may be set aside under Article 34 and to exercise the jurisdiction to set aside in a sparing manner. I do not accept, therefore, the case advanced by the Ryans, on affidavit, that there is a constitutional imperative to construe the provisions of Article 34(2) in a broad sense.

24. As regards the second principle which emerges from the case law, namely, that an application to set aside is not an appeal from the decision of the arbitrator and does not confer upon the court the opportunity of second-guessing the arbitrator's decision on the merits, it is sufficient to refer to a small number of the Irish cases and the observations made in those cases. In *Snoddy* , Laffoy J. made it very clear that it was not open to the court to second-guess the construction of the relevant contractual issue in that case by the arbitrator by way of a set aside application. Laffoy J. stated that if the court were to do so, it would be usurping the arbitrator's role (para. 34, p. 16). In*Delargy* , Gilligan J. stated:-

"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." (para. 74, p. 37).

Later in his judgment, Gilligan J. stated that:-

" *This Court does not consider that it is appropriate to revisit the merits of the arbitrator's award."* (para. 78, p. 39).

25. In *O'Leary Lissarda* , McGovern J. noted the acknowledgment of the applicant that an application to set aside an award *"…is not a proceeding in the nature of an appeal against the arbitral award on the merits."* (para. 5, p. 2). He rejected one of the grounds on which it was sought to set aside the award in that case on the basis that it "… *effectively amounts to an attempt to appeal the arbitrator's decision which is not permissible* ." (para. 11, p. 4).

26. With those important general principles in mind, I now address the grounds on which the Ryans seek to satisfy the award under Article 34 of the Model Law and set out my conclusions in relation to those grounds.

Article 34(2)(a)(iii) and (iv)
27. I deal with these two grounds together as there is some overlap in the case made by the Ryans in reliance upon these provisions.

28. The relevant parts of Article 34(2) are as follows:

"(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:…..
(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, …; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, … or, failing such agreement, was not in accordance with this Law; .."

29. As I outlined when considering the affidavits sworn in connection with this application, the Ryans put forward a number of grounds on which they contend the award should be set aside under these provisions of Article 34(2). Those grounds were set out in the two affidavits sworn by Mrs. Ryan, in Mr. Cotter's affidavit and in the oral submissions at the hearing. In brief summary, they are:

30. First, the Ryans contend that General Motors was not properly a party to the arbitration and was improperly joined to the arbitration proceedings by the arbitrator himself. The Ryans contend that this complaint falls within Articles 34(2)(a)(iii) and (iv).

31. Second, they contend that the arbitrator decided the arbitration on the basis of an issue which was not before him, namely, that the Ryans ought to have accepted the offer made by O'Learys/General Motors to cover 80% of the costs of repairing the car.

32. Third, they contend that the arbitrator did not decide issues which were properly before him such as the nature of the defects in the car, whether those defects were caused by wear and tear or whether they arose as a consequence of some inherent manufacturing defect, whether the defects were dangerous and whether the car was of merchantable quality for the purposes of the Sale of Goods Acts.

33. Fourth, and related to the last two points, the Ryans contend that the arbitrator decided the entire arbitration on a point which he had not directly raised with the parties and given them an opportunity of addressing. In support of this ground, the Ryans claim that the arbitrator decided the entire arbitration on the basis of a failure by the Ryans to give the O'Learys/General Motors a reasonable opportunity of repairing the car which he found to be in breach of clause 11 of the SIMI terms and conditions.

34. Fifth, the Ryans contend that, as a consequence of all of those grounds, the award was incomplete. Reliance was placed by the Ryans on a number of cases referred to in one of the leading texts on arbitration law in Ireland, Dowling-Hussey and Dunne " *Arbitration Law* " 2nd ed. (Round Hall, 2014) (" *Dowling-Hussey and Dunne* ") and on the brief description of some cases referred to in " *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* " (the " *2012 Digest* "). It should be noted, however, that a number of the cases relied upon by the Ryans were not in fact cases under the particular sub-paragraphs of Article 34(2)(a) on which the Ryans brought their application but arose under another sub paragraph (Article 34(2)(a)(ii)). Nonetheless, I have considered the cases relied upon in a context of the particular provisions of Article 34(2)(a) relied upon by the Ryans in their application.

35. In response to the points raised by the Ryans, O'Learys/General Motors make a number of points. The essential and overriding point made by them, however, is that the entire purpose, objective and effect of the Ryans application is to appeal against the award and to ask the High Court to second guess the findings of the arbitrator on fact and on law and to invite the High Court to differ from those findings. They contend that such an appeal is not open to the Ryans.

36. On the particular points raised by the Ryans, O'Learys/General Motors make the following points. First, they argue that it is not open to the Ryans to object to the joinder of General Motors to the arbitration. They contend that if the Ryans had a problem with the joinder of General Motors, they ought to have raised the point at the time of the joinder and not after the award. O'Leary/General Motors contend that not only did the Ryans not object to the joinder of General Motors but they proceeded to plead their case against both parties in the statement of claim, in subsequent pleadings and in the submissions at the hearing of the arbitration. O'Learys/General Motors argue that it is not open to the Ryans to object to the joinder of General Motors to the arbitration and that this does not afford any basis for impugning the award under Article 34(2)(a)(iii) or (iv).

37. Second, O'Learys/General Motors contend that the arbitrator did decide all of the issues in the arbitration. They rely on the award itself and on the findings made by the arbitrator as set out in the award. They point out, for example, that the arbitrator made it clear in the award that, insofar as the question of the defects in the vehicle were concerned, he was preferring the expert evidence of Mr. Quirke on behalf of O'Leary/General Motors over the evidence of Mr. Cotter. They draw attention to the detailed account of the evidence of all of the witnesses, including the evidence of the expert witnesses, to the submissions of counsel for the parties and to the findings made by the arbitrator which were set out at points (1) to (18) on pp. 13 to 14 of the award.

38. Third, O'Leary/General Motors submit that the arbitrator dealt very fully with all of the issues in the case and did so fairly on the basis of issues which were well known to the parties. There was no question of the arbitrator deciding the arbitration on the basis of a point of which the parties were unaware. As regards clause 11 of the SIMI terms and conditions, O'Leary/General Motors assert that the point was expressly raised in their points of defence and addressed in submissions made by counsel on their behalf at the conclusion of the hearing (although Counsel accepted that the award did not expressly refer to the fact that a submission was made by him in relation to clause 11).

39. The Irish courts have had the opportunity of considering the proper approach to be taken in considering a challenge to an award based on Article 34(2)(a)(iii) where it is suggested that an arbitrator has exceeded his or her authority or acted outside his or her mandate. The leading Irish case on this point is *Snoddy* . In *Snoddy* , Laffoy J. quoted with approval the commentary contained in Mansfield in relation to Article 34(2)(a)(iii). She stated as follows:

> *"Mansfield's commentary on that provision is that it is a ground -*
>
> > *'[t]hat 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'." (per Laffoy J. at para. 32, pp. 14 - 14).

40. Laffoy J. in *Snoddy* went on to observe that Article 34(2)(a)(iii) of the Model Law was based on a corresponding provision contained in the New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10th June, 1958), which was Article V(1)(c). Laffoy J. continued:

"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 .. (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 defense, however, calls upon the Court to ignore this limitation on its decision making powers and usurp the arbitrator's role.'" (per Laffoy J. at para. 33, pp. 15 - 16)."

41. These dicta of Laffoy J. in *Snoddy* were cited with approval and followed by Galligan J. in*Delargy* (at para. 31, pp. 13 - 14 and para. 65, pp. 33 - 34). The cases make clear that there is a presumption that the arbitral tribunal has acted within its mandate and the onus of establishing otherwise rests with the party seeking to set aside the award on this ground.

42. In my view, the Ryans have failed to establish any basis on which the court could set aside the award under Article 34(2)(a)(iii) or (iv) of the Model Law. The Ryans have failed by a very significant distance to displace the presumption that the arbitrator did act in accordance with his mandate. I have reached that conclusion for several reasons, as I will explain below.

43. In the first place, there is no substance whatsoever to the Ryans' contention that the award should be set aside under either of the sub paras of Article 34(2)(a) relied upon by reason of the joinder of General Motors to the arbitration proceedings. The arbitrator appears to have understood that General Motors was properly a party to the proceedings. As a consequence, he wrote in the terms which he did on 27th July, 2017 expressly naming General Motors as a respondent to the arbitration as well as O'Learys. The arbitrator was not represented in the set aside application and has not had the opportunity of explaining the basis on which he joined General Motors as a party to the arbitration. However, it may well have been due to the fact that General Motors appears to have written the cheque in payment of the arbitrator's fee (as appears from an email dated 22nd June, 2017 from Jennifer Crowther, CIArb's administrator, to the Ryans' solicitor which noted that CIArb had received a cheque for the arbitrator's fee from General Motors. Whatever the reason, the arbitrator wrote to solicitors for the parties by letter dated 27th July, 2017 naming the respondents to the arbitration as O'Learys and General Motors). There was no objection whatsoever to that course of action by the Ryans. On the contrary, the Ryans proceeded to make their case against O'Learys and General Motors in the statement of claim which they delivered in the arbitration in late August 2017. General Motors was named as a respondent to the arbitration in that statement of claim which contains claims against O'Learys and General Motors.

44. For example, at para. 3 of the statement of claim it was expressly pleaded as follows:

> *"The second respondents [i.e. General Motors] have been joined at the behest of the first respondent [i.e. O'Learys]. The claimants have no contractual relationship with them, they are however responsible in Ireland for the supply of the vehicle, and as such are equally responsible for the loss and damage caused by the said defect as supplier of the car with the defect and/or pursuant to the Defective Products Act, 1991 (sic)".*

45. At para. 4 of the statement of claim, it was asserted as follows:

> *"In the circumstances the first named respondent [i.e. O'Learys] is in breach of contract, and the second named respondent [i.e. General Motors] has supplied a product which is dangerously defective, and the claimants are entitled to repudiate and to recover the purchase price of the vehicle. They have also suffered loss and damage as a result."*

46. The prayer for relief in the statement of claim sought the return of the purchase price of the vehicle together with other sums, declaratory relief in relation to the repudiation of the contract and, without prejudice to that, damages. Damages were sought against O'Learys and General Motors.

47. The respondents to the arbitration, O'Learys and General Motors, delivered their points of defence on 6th September, 2017. The points of defence responded to all of the allegations contained in the statement of claim made against both respondents. There was then a reply on behalf of the Ryans. For some unexplained reason however, the reply referred to the " *respondents*" in the title but only named O'Learys. There is no significance in my view to that omission in light of the earlier pleadings.

48. Having pleaded the case against O'Learys and General Motors, the Ryans continued to make a case against both respondents at the hearing. This is quite clear from the award made by the arbitrator. The award records complaints being made by the Ryans against both O'Learys and General Motors. The same is true for the submissions made on behalf of the Ryans at the conclusion of the evidence of the arbitration, as they are recorded in the award.

49. If the Ryans had an issue with the involvement of General Motors in the arbitration, they ought to have made that point within a reasonable time after their solicitors received the arbitrator's letter of 27th July, 2017. It is a clear inference from the evidence that the Ryans did not have any difficulty or issue with the joinder of General Motors. If they had had such a difficulty, I have no doubt that their solicitor would have raised it immediately with the arbitrator and with CIArb whose President had appointed the arbitrator. Not only did the Ryans not object to the joinder of General Motors, they pleaded their case against General Motors and O'Learys and continued to make a case against both respondents in the pleadings and at the hearing of the arbitration on 17th November, 2017. It was only when the Ryans were dissatisfied with the award and applied to set it aside that the issue of the joinder of General Motors was first raised. It was far too late for the Ryans to do so at that stage. It would be patently unfair to permit the Ryans, having sought to make a case against General Motors and having failed in that case, to be entitled then to set aside the award by reason of the joinder of General Motors. I am satisfied that the joinder of General Motors to the arbitration proceedings does not provide any basis on which the award should be set aside under Article 34(2)(a)(iii) or (iv) of the Model Law.

50. Nor am I satisfied that there is any basis for the Ryans' contention that the arbitrator failed to decide issues which were before him and decided issues which were not before him. The award is a comprehensive one. It sets out in some detail what happened during the course of the hearing. It records the opening submission of counsel for the Ryans, the evidence given by all of the witnesses (both examination in chief and cross-examination) and the closing submissions by counsel for the Ryans and by counsel for O'Learys and General Motors. The award then sets out the findings of the arbitrator in a series of paragraphs, numbered (1) to (18). While the manner in which those findings are expressed is not in a form which one might expect to see in a reserved judgment delivered by a judge of the Superior Courts, it is clear from the authorities discussed below that such was not a prerequisite for a valid award. The award is detailed and comprehensive. I do not accept that the arbitrator did not deal with the nature of the defects in the car.

51. The arbitrator dealt with that issue, albeit somewhat succinctly, in paras. (2) to (4) of his findings (on p. 13 of the award), having previously set out the evidence of the parties and their experts on that issue. The arbitrator expressly noted that the burden rested with the Ryans to establish their case on the balance of probabilities. The arbitrator then referred to the evidence of Mr. Cotter, the Ryans' expert and set out the arbitrator's conclusions in relation to that evidence. The arbitrator stated that he " *was not convinced that Mr. Cotter had identified the exact problem with this vehicle* " and that the arbitrator " *did not feel that Mr. Cotter had got to the bottom of identifying the problem that caused the vehicle to break*

down on three occasions" (para. (3) of the findings on p. 13 of the award). He then referred to certain burn marks on the photographs adduced in evidence which he noted showed that there had been overheating and expressly stated that in that regard he preferred the evidence of Mr. Quirke, the respondents' expert (para. (4) of the findings on p. 13 of the award).

52. While it is true that the arbitrator did not make an express finding on the question as to whether the vehicle was of merchantable quality or whether the defect was a dangerous one, I do not believe that he was required by law to do so. This I believe is clear from an analysis of the case law on the requirements for a complete arbitration award.

53. This issue was addressed by Clarke J. in the High Court in *Uniform Construction* in the following terms:

> *"87 … For reasons which I advert to later … I have come to the view that the arbitrator does not, necessarily, have to answer each issue raised at the hearing (whether by pleading, written submissions, oral argument, or on an 'issue paper' prepared by the parties) unless that issue is necessary to resolve the case which he is hearing.*
>
> *…*
>
> *90. It is true to say that the arbitrator does not appear to have specifically answered this question in express terms. The approach to construing an award of an arbitrator by the courts is illustrated by Stillorgan Orchard Limited v. McLoughlin and Harvey [1978] I.L.R.M. 128, where Hamilton J. came to the conclusion that an award of an arbitrator will be sustained although the arbitrator may have omitted in his award to notice some claim put forward by a party if according to a fair interpretation of the award it is to be presumed that the arbitrator is taking the claim into consideration in making the award. The overall principle is that it is not appropriate to parse and analyse an arbitrator's award but rather to consider from an overall point of view whether it may be said that the arbitrator has dealt properly with each of the matters referred to him. ...*
>
> *91. Applying the test identified at para. 87 above and taking, as I feel I should, the overall approach to the construction of an arbitral award illustrated by Stillorgan Orchard Limited …, I do not believe that the arbitrator has failed to decide a matter referred to him. Unless required by the arbitration agreement, an award will not be set aside because the arbitrator has not found separately on each matter referred to him: Whitworth v. Hulse (1866) L.R. 1 Exch. 251."*
>
> (per Clarke J. at paras. 87-91, pp. 58-59).

54. McGovern J. touched on this issue in the High Court in *Hoban* where one of the issues raised was whether the arbitrator had given a reasoned award for the purposes of Article 31(2) of the Model Law. In rejecting the criticisms of the award in that case, McGovern J. stated:

> *"The arbitrator is not under an obligation to provide the sort of reasoned judgment that would be expected from a judge of the Superior Courts but he still must give a reasoned award to the extent required to enable a party to see why he reached his decision* ." Per McGovern J. at para. 38, p. 12).

55. The law on this point is helpfully summarised in Dowling-Hussey and Dunne in the following terms:

> *"8-85 …In deciding whether the arbitrator has decided all the issues that must be decided in order to properly dispose of the dispute between the parties, the court will not exhaustively parse and analyse the award in an attempt to find fault with the arbitrator's reasoning. The court will consider from an overall point of view whether it may be said that the arbitrator has dealt properly with each of the matters referred to him or her and the court will not set aside the award merely because the arbitrator has not made a separate finding upon each individual issue referred to him or her (unless the arbitrator is required to do so under the arbitration agreement). The arbitrator is not under a duty to deal with every single point or issue raised in the proceedings. The arbitrator's duty is limited to dealing with every claim or defence that is essential to the determination of the dispute between the parties."*

56. I am satisfied that the arbitrator did deal with the issues which were required to be dealt with in the arbitration and that it is not appropriate to parse and analyse the award in the manner sought by the

Ryans. To do so would effectively be asking the court to review the award on its merits which the authorities make clear is not permissible.

57. Nor am I satisfied that there is any basis for the Ryans' contention that the arbitrator decided the arbitration on the basis of a point of which they were unaware and to which their attention had not been directed. As noted earlier, the Ryans' arguments in this respect would more appropriately be directed to another sub-paragraph of Article 34(2)(a) of the Model Law, namely, sub-paragraph (ii) and not the sub-paragraphs on which the Ryans have relied in their application. Nevertheless, I have considered those arguments.

58. Essentially, the Ryans argue that the arbitrator decided the arbitration on the basis of the Ryans' failure to afford O'Learys a reasonable opportunity to repair the car and that this was a breach of clause 11 of the SIMI terms and conditions. The Ryans contend that the arbitrator did not expressly draw to their attention the fact that he was considering taking the course he did and that, as a consequence, the award should be set aside.

59. In my view, there is no basis for this ground of challenge. It is true that, having referred to the evidence of the experts in relation to the defects and having preferred the evidence of Mr. Quirke over that of Mr. Cotter and having then referred to the offer made by O'Learys and General Motors to cover the 80% of the cost of repairs, the arbitrator did then go on to refer to clause 11 of the SIMI terms and conditions. Having referred to clause 11, and having referred to the fact that it could be argued that the respondents had been given a reasonable opportunity to repair the car on three previous occasions, the arbitrator found that a final opportunity should have been given to them to repair the vehicle in light of their offer to cover 80% of the cost of those repairs. He found that the failure to afford that further opportunity to the respondents amounted to a failure by the Ryans to comply with the terms of clause 11. This led to the arbitrator's conclusion that the Ryans failure to respond to, and ultimately to accept, the respondents offer was fatal to their claim as well as being a failure to mitigate their loss. While the arbitrator may have been right or wrong both on the facts and on the conclusions of law he drew from those facts, it is not my role or function to second guess the arbitrator's conclusions or to review the correctness as a matter of fact or law. What I must consider is whether there is any basis for the argument that the Ryans were not on notice of the fact that clause 11 was " *in play* ", as it were, in the arbitration. I am satisfied that they were on notice of this.

60. Clause 11 was expressly pleaded in the points of defence delivered by O'Learys and General Motors. The particulars pleaded at para. 7 of the points of defence referred to the respondents' offer to cover 80% of the repair costs and to the failure by the Ryans to accept that offer. The particulars then stated:

> *"In the circumstances pleaded, the claimants are in breach of the provisions of condition 11 of the contract between the parties (requirement to afford the second respondent a reasonable opportunity to repair the vehicle) and/or in the alternative the claimants failed to mitigate their alleged loss, which loss is denied."*

The Ryans took issue with the points of defence in the reply delivered on their behalf. It is quite clear, therefore, that the Ryans were on notice of the fact that clause 11 was in issue at the arbitration.

61. I am also satisfied that this issue did feature in the submissions at the hearing before the arbitrator notwithstanding a submission to the contrary made to me on behalf of the Ryans. I sought express clarification from counsel for the respondents (who appeared at the arbitration hearing) as to whether clause 11 had been raised in submissions before the arbitrator. I was informed that, although the award does not record the fact, clause 11 was raised in argument and in closing submissions before the arbitrator. I accept that it was. It is also very likely that it was having regard to the terms of the points of defence which expressly referred to the clause.

62. It is against that background, therefore, that the case law relied upon by the Ryans in support of those grounds of challenge must be considered. The Ryans relied on a number of cases in which courts have set aside awards where the arbitral tribunal made its award on the basis of an issue of fact or law of which the parties were not on notice. In that regard, the Ryans relied on *Zermalt Holdings SA v. Nu-life Upholstery Repairs Ltd* [1985] EGLR 14 (English High Court, Bingham J.),*Louis Dreyfus SAS v. Holding Tusculum BV* [2008] QCCS 5903 (Superior Court of Quebec, Canada) and *O.A.O. Northern Shipping Company v. Remol cadores De Marin SL* [2007] EWHC 1821 (English High Court, Gloster J). The dicta in each of these cases relied upon by the Ryans were all to the effect, understandably, that an award may be set aside where it is based on issues of which the parties were not on notice or which they reasonably assumed were no longer live in the case. That is not what happened in the present case. Those cases, therefore, have no application to the facts of this case.

63. The Ryans also relied on decision of the New Zealand High Court in *Trustees of Rotoaira Forest Trust v. Attorney General* [1999] 2 NZLR 452. In that case, the court held that a party who alleged that its right to be heard had been violated where the arbitral tribunal made an award on a basis which was not evident from the pleadings, evidence and submissions had to establish, first, that a reasonable litigant in the party's position would not have foreseen reasoning on the part of the tribunal of the type contained in the award and, second, that with adequate notice it might have been possible to convince the tribunal to reach a different result. An Irish court may well reach the same conclusion and apply the same test. However, it simply does not arise in the present case as the arbitrator did not depart from the pleadings, evidence and submissions but reached a conclusion in his award on a basis which was dealt with in the pleadings, evidence and submissions. I do not believe, therefore, that the authorities relied upon by the Ryans afford any support to this ground of challenge.

64. In conclusion, the Ryans have failed to persuade me that the award should be set aside on the grounds set out in Article 34(2)(a)(iii) or (iv) of the Model Law.

Article 34(2)(b) of the Model Law

65. The third provision of Article 34(2) of the Model Law on which the Ryans rely is Article 34(2)(b). The Ryans contend that the award is in conflict with the public policy of the State. The basis for the Ryans challenge on this ground was set out in very broad terms in the affidavits sworn by Mrs. Ryan and by Mr. Cotter. A whole series of assertions were made by Mrs. Ryan in her affidavits to support the case that the award is in conflict with the public policy of the State. I have referred to those grounds when outlining the affidavit evidence before the court. I think it is fair to say, however, that rather than being specifically directed to any overriding public policy of the State, the grounds advanced by Mrs. Ryan in her first affidavit were really made to support a claim that the arbitrator had fundamentally erred in law and in the conclusions which he reached in his award primarily in relation to clause 11 of the SIMI terms and conditions and in relation to the failure by the Ryans to accept the offer made by O'Learys and General Motors to meet 80% of the costs of repairing the vehicle. As is clear from the case law on this provision in Article 34(2) of the Model Law, those arguments, even if correct, would go nowhere near establishing a ground for setting aside an award on public policy grounds. The Ryans' public policy ground of challenge did not stop with the ground set out by Mrs. Ryan in her first affidavit. She went considerably further in her second affidavit when she contended that the Ryans had not received a comprehensive and impartial hearing before the arbitrator and that the CIArb/SIMI arbitration system was biased. The case further mushroomed in Mr. Cotter's affidavit when Mr. Cotter accused the arbitrator of acting unfairly and in a biased manner and of misrepresenting his evidence. He accused the arbitrator of being prejudiced against him and his evidence. He disagreed strongly with arbitrator's conclusions on the evidence.

66. I should make clear that I do not regard Mr. Cotter's affidavit as being helpful in any way in determining the issues raised in this application. On the contrary, his affidavit was inappropriate and contained grossly unfair allegations against the arbitrator, in circumstances where, as noted earlier, the arbitrator does not appear to have been given notice of this application. In addition to being unfair and inappropriate, Mr. Cotter's affidavit made plain to me that the Ryans entirely misunderstood the basis on which an application can be made to set aside an award under Article 34 of the Model Law. It was quite clear from Mr. Cotter's affidavit that the court was being invited to engage on the merits of the case and to parse and analyse evidence which was before the arbitrator. As the authorities make quite clear, this is not the role of the court in an application to set aside an award under Article 34 of the Model Law. Nor do the affidavits sworn by Mrs. Ryan and by Mr. Cotter go anywhere near what must be established by an applicant to have an award set aside on public policy grounds as they are properly to be understood under Article 34(2)(b).

67. The leading Irish case on the scope of the public policy ground for setting aside an award is*Brostrom Tankers AB v. Factorias Vulcano SA* [2004] 2 I.R. 191 (" *Brostrom Tankers* "). In that case, a party seeking to resist the enforcement of an award of a foreign arbitrator contended that it would be contrary to public policy to enforce the award in Ireland. The High Court (Kelly J.) was satisfied that the award should be enforced and that the attempt to resist its enforcement as being contrary to Irish public policy had to fail. The public policy ground at issue in that case arose under s. 9 of the Arbitration Act, 1980 and not under Article 34(2)(b) of the Model Law or the 2010 Act. Nonetheless, I am satisfied that precisely the same considerations arise under the latter provisions. In declining to refuse to enforce the award on public policy grounds in *Brostrom Tankers* , Kelly J. stated:

> *"I am quite satisfied that a refusal of an enforcement order on grounds of public policy would not be justified in this case. To do so would extend to a very considerable extent the notion of public policy as it has come to be recognised in the context of the enforcement of an arbitral award. The case law and the textbook writers make it clear that the public policy defence to an enforcement application is one which is of a narrow scope. It extends only to a breach of the most basic notions of morality and justice. In this regard, I derive considerable*

assistance from the decision in Parsons & Whittemore Overseas Co. Inc. v. Société Général de l'Industrie du Papier *… a decision of Circuit Judge Joseph Smith. […] In the course of his judgment, Judge Smith says this, and I quote:- […]*

> *'…We conclude, therefore, that the Convention's public policy defence should be construed narrowly.*
>
> *Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.'*

He quotes authorities in support of that proposition." (per Kelly J. at 197) (emphasis added).

68. Notwithstanding that the public policy issue in that case arose in the context of the enforcement of a foreign award, the dicta of Kelly J. are, in my view, equally applicable in considering the scope of the public policy ground for setting aside an award under Article 34(2)(b) of the Model Law. What must be established, therefore, is that the award conflicts with the public policy of the State insofar as the award is, or was procured, in violation of the " *most basic notions of morality and justice* " of the State. This is an extremely narrow ground and one which will be satisfied in only the most extreme circumstances. Those circumstances do not, in my view, exist in the present case.

69. In fairness to the Ryans, counsel on their behalf made clear in his submissions before me that while the Ryans were maintaining their arguments based on the public policy ground, the primary focus of their challenge was on the grounds advanced under Article 34(2)(a). The Ryans urged me to consider the arguments advanced in the affidavits under the public policy heading as part of my consideration of their challenge to the award based on the grounds in Article 34(2)(a). I have done so both in my consideration of those grounds above and in this part of my judgment.

70. I am satisfied that there is no basis whatsoever for the Ryans' challenge to the award under Article 34(2)(b). The evidence put forward on their behalf goes nowhere near establishing that the award is or was procured in violation of the " *most basic notions of morality and justice* " or was otherwise in breach of Irish public policy. None of the arguments advanced in the affidavits sworn by Mrs. Ryan and by Mr. Cotter provide any basis on which the award could be set aside under Article 34(2)(a) or (b).

71. In fairness to the arbitrator, who was not a party to this application, I should make clear that I completely reject the allegations made in the affidavits sworn by Mrs. Ryan and by Mr. Cotter that the arbitrator was not fair and impartial and was biased against the Ryans and their expert, Mr. Cotter. Those allegations amount to an unfair and inappropriate attack on the integrity of the arbitrator and the system of arbitration in which the Ryans participated. There is no basis for them.

Conclusions

72. In conclusion, for the reasons set out in my judgment, the Ryans have not persuaded me that there is any basis on which the arbitrator's award could be set aside under Article 34(2) of the Model Law. I have considered each of the provisions of Article 34(2) on which the Ryans relied and the arguments advanced by them in respect of those grounds. I have concluded that there is no merit to any of the grounds or arguments raised by them. On the contrary, the Ryans' application to set aside the award was in reality an attempt to appeal to the High Court from the decision of the arbitrator with a view to seeking to persuade the court to overturn the findings of fact and law made by the arbitrator. That approach was doomed to fail from the very outset. In truth, in my view, the Ryan's application never got off the "starting blocks". In the circumstances, I must refuse the Ryans' application to set aside the award.

73. Before concluding my judgment, however, I would like to add the following remarks. In the course of the arbitration O'Learys and General Motors, through their counsel, properly accepted that the Ryans were honest and decent people who had experienced admitted problems with the car which they purchased from O'Learys. Those sentiments were expressly endorsed by the arbitrator in his award. He too described the Ryans as being honest and truthful people who were merely seeking recompense for the problems with their car. For what it is worth, I am quite satisfied that the Ryans are honest and decent people who have suffered as a result of those problems. The problem for the Ryans is that the arbitrator rejected the evidence of their expert as to the defects and their cause and also found that they ought to have accepted the offer by O'Learys/General Motors to meet 80% of the costs of repairing the car at the time. It is clear from the correspondence which I have seen, and from the evidence at the arbitration as recorded in the award, that the Ryans did not accept that offer on the basis of the advice of their motor engineering expert. According to the arbitrator's award, the Ryans ought to have accepted the offer. They are now left in the very unfortunate situation that the car has been sitting in storage for

more than two and half years. While I have no express power to do so, and while O'Leary/General Motors have no obligation to act on foot of my comments, it would reflect very well on those parties if further consideration were given to reviving the offer and to repairing the car or otherwise attempting to rebuild the relationship with the Ryans. Equally, it would reflect well on the Ryans to respond positively to any such initiative. In light of the conclusions I have reached on this application, however, I cannot direct that any of this be done.