Neutral Citation Number: [2011] IEHC 188

THE HIGH COURT

2010 134 MCA

IN THE MATTER OF THE ARBITRATION ACTS 1954 – 1998

AND

IN THE MATTER OF ORDER 56 RULE 4 OF THE RULES OF THE SUPERIOR COURTS

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

HYMANY (PONTOON) LIMITED

APPLICANT

AND

GALKIL LIMITED T/A IMPACT DEVELOPMENTS

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 25th day of March, 2011.

1. The application

1.1 This is an application in which the applicant seeks an order either under s. 38 of the Arbitration Act 1954 (the Act of 1954) or under the Court's inherent or common law jurisdiction setting aside the award of John E. O'Reilly, arbitrator, made on 31st March, 2010 and furnished to the parties on 10th May, 2010. The arbitration arose out of a building contract (the Contract) which was in the form of an out of date version of the standard Royal Institute of the Architects of Ireland building contract, that is to say, the 1988 edition, reprinted on 1st June, 1991.

1.2 It is convenient at this stage to identify the principal personae dramatis involved in the contractual relationship, the arbitration and this application. On its face the Contract, which was dated 22nd November, 2004, was expressed to be made between Brendan Geary and Ann Geary, referred to as "the Employer", of the one part and Impact Developments Limited, referred to as "the Contractor", of the other part. At a preliminary meeting in the course of the arbitral process it was agreed by the parties that the applicant on this application, Hymany (Pontoon) Ltd., was to be treated as the Employer in the Contract and the defendant on this application, Galkil Limited, was to be treated as the Contractor. Accordingly, henceforth, I will refer to the applicant as the Employer and the defendant as the Contractor. The employer operates a hotel known as the Pontoon Bridge Hotel at Foxford, County Mayo. Ann Geary (Mrs. Geary) is described as the secretary of the Employer.

1.3 The provisions of the Contract assigned an important role to the Employer's architect. While the person who was to fulfil the role is not identified by his name being entered at the appropriate place in the Contract, it was accepted at the arbitration that Michael Conmy (Mr. Conmy) acted as the architect for the project.

1.4 The Court was told that there is another application pending before the Court on foot of an originating notice of motion issued on 23rd December, 2010 to enforce the award. However, the Court is not addressing that application in this judgment.

2. The Contract and its implementation

2.1 In the Contract the Employer retained the Contractor to execute and complete works which were simply described as "the construction & extension to Pontoon Bridge Hotel". The Contract price stipulated was €2,527,786 together with VAT at the rate of 13.5%. In the Appendix the date on which possession was to be given to the Contractor was stipulated as the date of the Contract, 22nd November, 2004. The date of completion for the purposes of Clauses 28 and 29(a) of the Conditions was given as 20th May, 2005. The amount of liquidated and ascertained damages, for the purposes of Clause 29(a) of the Conditions, was stated to be IR£25,000 per week. It is common case that the amount should be €25,000 per week, the parties having failed to amend the outdated version of the standard form contract. The retention percentage for the purposes of Clause 35(d) of the Conditions was stated to be "5% down to 2.5% on completion".

2.2 In broad outline, the Contractor went onto the site and executed certain works in accordance with the Contract. There were issues between the parties from an early stage. It was contended by the Employer that, in breach of contract, the Contractor demolished external walls in the existing structure, when the Contract provided for the demolition only of internal walls and structures to allow for the construction of a new ground floor supporting structure. I will refer to this as the "unauthorised demolition issue". The failure of the Contractor to furnish an indemnity bond also became an issue. Delay on the part of the Contractor was a matter raised by Mr. Conmy from an early stage. On the other hand, the Contractor alleged delay on the part of an independent contractor retained by the Employer. Eventually by letter dated 8th September, 2005 Mr. Conmy, on behalf of the Employer, gave the Contractor notice that it was in default in accordance with Clause 33(a)(ii) of the Contract for failing to proceed with the works with reasonable diligence and stipulated that, if the default should continue for ten working days, the Employer "may proceed to determine your Employment in accordance with" the Contract. By a letter dated 22nd September, 2005, which was signed by Mrs. Geary on behalf of the Employer and which referred to the letter of 8th September, 2005, the Employer stated that it was determining the Contractor's employment under the Contract. As I understand the factual position, the Contractor left the site on 5th October, 2005, as recorded

in the award. Subsequently, the Employer retained an alternative builder, Newpark Developments Ltd. (Newpark) to complete the works. It is common case that the Employer had already paid a VAT inclusive sum of €1,794,315.87 (being €1,580,895 plus VAT at 13.5%) to the Contractor at the time the Contract was determined.

2.3 I wish to emphasise that the foregoing outline is distilled from the award and the affidavit evidence (including the exhibits) adduced on this application and is not based on any finding by the Court. One of the many difficulties I have encountered in dealing with this application is the degree of conflict between the parties and lack of clarity on factual matters.

3. The arbitration

3.1 Apparently around May 2007 the Employer and the Contractor agreed to arbitrate their dispute and, by agreement of the parties, John E. O'Reilly (the Arbitrator) was appointed arbitrator pursuant to the arbitration clause in the Contract. The Contractor was the claimant in the arbitration and the Employer was the respondent. Procedural matters advanced through 2007, the Contractor submitting what was in effect a statement of claim and the Employer responding with what was in effect a defence and counterclaim. There was a gap in the process for about a year from the beginning of 2008 to the beginning of 2009 because the Contractor had been struck off the register of companies and had to be restored. In the event, the hearing of the arbitration did not take place until the beginning of 2010. It was heard over three days on 12th, 13th and 14th January, 2010. The Arbitrator made what is described as an interim award on 31st March, 2010 and it was furnished to the parties on 10th May, 2010. The award is a reasoned award. The result of the arbitration was that the Arbitrator allowed part of the Contractor's VAT inclusive claim of €1,516,502.86 (as revised by him to eliminate errors) by directing the Employer to pay the Contractor the sum of €1,021,684.13 inclusive of VAT. The Arbitrator dismissed the Employer's counterclaim against the Contractor in its entirety. The counterclaim was in the sum of €2,037,570.38 and, as will be explained in greater detail later, comprised a claim for €1,325,000 by way of "liquidated and ascertained damages" under Clause 29(a) of the Conditions in the Contract and a sum of €712,570.38 (whether exclusive or inclusive of VAT is in doubt) in respect of the cost to the Employer of retaining Newpark to complete the works and to rectify work alleged to be defective, which had been executed by the Contractor.

3.2 Although the issue of interest was addressed in the Arbitrator's award, the Court is not concerned with the question of interest. Nor is the Court concerned with the costs of the arbitration.

4. Grounds/evidence relied on by the Employer and the Contractor's response

4.1 The affidavit evidence before the Court consists of the following:

(a) the grounding affidavit of Mrs. Geary sworn on 12th May, 2010;

(b) the replying affidavit of Michael Winters (Mr. Winters), who has been described by the Arbitrator as a quantity surveyor by profession and a director of the Contractor but not a shareholder, which was sworn on 10th June, 2010;

(c) a second affidavit sworn by Mrs. Geary on 18th June, 2010;

(d) a second replying affidavit of Mr. Winters sworn on 1st July, 2010; and

(e) finally a third affidavit sworn by Mrs. Geary on 22nd October, 2010 which, apparently, was filed without leave of the Court, but which, in any event is before the Court.

4.2 The assertion of counsel for the Contractor that the Employer has adopted a "scattergun" approach on this application is not without some degree of justification. It has proved difficult to put structure on the Employer's case. The basis on which the Employer seeks to have the award set aside is that the arbitrator misconducted himself and the arbitration proceedings and that there are errors of fact and law on the face of the award. Allegations of misconduct of a general nature are made and repeated in the grounding affidavit, but I think they can all be subsumed into an allegation that the Arbitrator did not conduct the proceedings in a fair and impartial manner.

Certain specific allegations of misconduct on the part of the Arbitrator are also made in the grounding affidavit, for example, lack of any proper or adequate reference to the unauthorised demolition issue in the award. In their written submissions, counsel for the Employer have classified all the grounds for setting aside the award under three headings, namely:

(a) impartiality in the treatment of evidence, apparently in relation to the quantification of the claim;

(b) failure to deal with all the issues in dispute, apparently in relation to the quantification of the claim although, as I will outline later, this heading also seems to overlap the issues in relation to the counterclaim;

(c) in relation to the counterclaim, the grounds at (a) and (b).

I propose to consider the Employer's case to set aside the award by reference to each of those headings.

4.3 As I understand the position there is neither a transcript nor an agreed note of the proceedings before the Arbitrator. The affidavits are replete with factual conflicts. Clearly, it is not the function of the Court to resolve factual conflicts on this application and, in any event, it would be impossible to do so.

5. Impartiality in treatment of evidence

5.1 It would probably be more appropriate if this heading referred to lack of impartiality or partiality on the part of the Arbitrator because, in effect, the Employer alleges bias on the part of the Arbitrator in his treatment of the evidence of the Employer's witnesses. Two witnesses testified on behalf of the Contractor at the arbitration hearing, namely, Mr. Winters and Mr. Tomás Murphy (Mr. Murphy), a quantity surveyor, of whom the Arbitrator stated that he "gave evidence as an expert witness in relation to various aspects of the Conditions annexed" to the Contract. Four witnesses testified on behalf of the Employer: Mrs. Geary, who, apparently, is a director as well as the secretary of the Employer; Conor Kelly (Mr. Kelly), whom the Arbitrator described as an architect and an

arbitrator and a nephew of Mrs. Geary; Vincent Gavin (Mr. Gavin) of Newpark, whom I understand to be a son-in-law of Mrs. Geary; and Breta Geary, a manager of Pontoon Bridge Hotel. The aspects of the Arbitrator's assessment of the evidence relied on by counsel for the Employer in support of the contention that the Arbitrator acted unfairly and prejudicially and my observations thereon are summarised below.

5.2 First, it was submitted that the observations made by the Arbitrator about the credibility of the witnesses who testified on behalf of the Employer were prejudicial to the Employer. The Arbitrator stated that the evidence of Mr. Conmy was not satisfactory, in that he advanced figures "without backup calculation or proof", and that substantial passages of his evidence were read from notes which, on his own admission, he prepared the previous evening. Counsel for the Employer submitted that Mr. Conmy was entitled, as the professional who acted as the engineering and structural supervisor on the project, to prepare notes. The Arbitrator's assessment of the figures advanced by Mr. Conmy goes to the merits and the Court could express no view on it, even if the Court had the relevant data, which it does not. However, given that Mr. Conmy was testifying as a professional witness as to events which occurred mostly four years and more, and partly five years and more, prior to the hearing, in my view, it was entirely reasonable that he had to refresh his memory by preparing and relying on notes. Having said that, taking an overview of the manner in which the Arbitrator addressed the evidential matters in the award, for instance, in relation to valuation of variations, I cannot conclude that the Arbitrator unfairly and prejudicially discounted evidence offered by Mr. Conmy in reliance on his notes.

5.3 Secondly, it was submitted that the Arbitrator attached too much weight to the evidence of the Contractor, which ascribed its delay in completion to the fact that an independent contractor (in the award and hereafter referred to as "IJM") directly retained by the Employer was longer on the site than had been planned, when Mr. Conmy was of a contrary view. That goes to the merits, and it is not appropriate that the Court should express a view on it.

5.4 Thirdly, the arbitrator's reliance on a report produced by Daniel Kilfeather of McCauls, Chartered Quantity Surveyors, dated 23rd February, 2006 (McCauls' Report) was characterised by counsel for the Employer as reliance on inadmissible evidence. McCauls were retained by the Employer and, on the Employer's instructions, they conducted negotiations "on a without prejudice basis" with Mr. Winters, representing the Contractor, to see if the dispute between the parties could be settled in January and February 2006. The position of the Employer was that McCauls' Report was sent to Mr. Winters in error. In the award, the Arbitrator, having commented that in cases such as he was concerned with, where he saw the essential issue as his determination of the sums owing on foot of a contract, it is normal that each party will call "an independent expert Quantity Surveyor" in addition to calling those directly involved in the project as witnesses of fact, and that Mr. Murphy had been called as an expert for the Contractor, went on to state:

> "But the expert who had advised [the Employer], Daniel Kilfeather (of McCauls Surveyors) was not called albeit his report … was admitted in evidence, without proof."

The Arbitrator commented that it was regrettable that he did not have the benefit of hearing the testimony of Mr. Kilfeather. The gist of the Employer's objection to the use of McCauls' Report was that it was a without prejudice document used by the Arbitrator *supra* protest from the Employer. However, that does not appear to be what happened in fact. The Court was informed that, when McCauls' Report was furnished to the Arbitrator on the first day of the hearing, there was objection from counsel for the Employer, but that that objection was withdrawn on the second day of the hearing, as is recorded in paragraph 3.4 of the award. Accordingly, as I understand the position, when the Arbitrator used McCauls' Report in making his determination, he was correct in regarding it as a report that had been admitted in evidence without formal proof.

5.5 Fourthly, counsel for the Employer was critical of the manner in which the Arbitrator used the material in McCauls' Report in assessing the evidence of Mr. Conmy. The following examples were used to illustrate that point:

> (a) Counsel for the Employer was critical of the manner in which the Arbitrator assessed the sum to be credited to the Employer in respect of outstanding works, that is to say, works which the Contractor had not executed. In the award, the Arbitrator recorded both McCauls' evaluation (€634,131.28) and the agreed figure (€610,000 approximately), that is to say, the figure agreed between Mr. Kilfeather and Mr. Winters as set out in McCauls' Report, and commented that Mr. Conmy in his evidence had cited further figures to be added to the agreed figure but had not indicated how those figures were computed or otherwise arrived at. In the award, the Arbitrator discounted Mr. Conmy's evidence and determined the amount at a figure (€609,810.54) which I assume was the agreed amount. It has been contended on behalf of the Employer that the finding of the Arbitrator was fundamentally incorrect in that he should have had regard to Mr. Conmy's evidence. Again, that goes to the merits and is not a matter on which the Court should or, indeed, could, comment on.
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> (b) Counsel for the Employer was critical of the conduct of the Arbitrator for having made findings on the Contractor's claim in reliance on McCauls' Report, while disregarding it to the detriment of the Employer when assessing the Employer's counterclaim.
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> (c) Counsel for the Employer was also critical as to the manner in which the Arbitrator made his finding as to the quantum of the Contractor's claim for variations and, in particular, that he disregarded the agreed figure in McCauls' Report. The passage in the award with which the Employer takes issue is in the following terms:
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> > "I have formed the view of Mr. Conmy's evidence, in relation to his valuation of variations, that he based his valuations on subjective criteria which were not always consistent, notwithstanding that they periodically had merit. It is not clear to me how Mr. Kilfeather valued the variations which enabled him to reach a consensus with Mr. Winters in respect of €420,000 worth of variations. In these circumstances, I have been left with no option but to weigh the respective evidence of Mr. Winters and Mr. Conmy and to make my own subjective assessment as to the appropriate valuation of each variation."

The Arbitrator tabulated his findings on the figures relevant to the individual items of variation in Table 1 and arrived at a total of €580,418.19 as the value of the variations which the Contractor had executed. Counsel for the Employer submitted that the approach adopted by the Arbitrator was neither proper, appropriate, nor fair on a number of grounds: that he exceeded his jurisdiction in awarding a figure greater than the agreed figure (€420,000); that he was inconsistent in awarding €160,000 over the agreed figure; and that Mr. Winters was not an independent expert witness, in that he was a director of the Contractor. Again, in my view, in making that submission, the Employer is inviting the Court to stray into the merits of the matter, which is outside the scope of the Court's function.

5.6 Fifthly, as regards the quantification of the claim for variations, counsel for the Employer also submitted that it was not proper for the Arbitrator to make his "own subjective assessment". If, in making his "own subjective assessment", he valued the variations on

the basis of his own opinion as to the correct valuation without regard to the claim in respect of an individual item and the evidence adduced by the parties in relation thereto, and without putting his figures, if they differed from the witnesses' figures, to Mr. Conmy and Mr. Winters, in my view, the arbitrator acted improperly. However, notwithstanding the use of the expression "my own subjective assessment" in the award, it is not apparent on a review of Table 1 that the Arbitrator did other than consider the claim made in relation to an individual item and weigh the evidence adduced in relation to that item in the balance, as I will demonstrate later.

5.7 Sixthly, it was submitted on behalf of the Employer that the manner in which the Arbitrator admitted he had treated the evidence of the Employer's witnesses displayed bias on his part. The passage from the Arbitrator's award which gave rise to that submission is to be found in para. 2.4, where the Arbitrator stated:

> "Whilst the evidence of Mr. Conor Kelly, a distinguished architect and arbitrator and that of Mr. Vincent Gavin was, in both cases, very objective and helpful, their respective relationships with Mrs. Ann Geary rendered their evidence potentially lacking in absolute independence".

Counsel for the Employer submitted that both witnesses were called by the Employer as witnesses of fact, who were required to give truthful evidence as to the facts and that they did so. It was submitted that the Arbitrator adopted a fundamentally flawed position in viewing the evidence of the witnesses as "potentially lacking in absolute independence" and further that he was in breach of natural justice and fair procedures because the witnesses were not warned that this was the Arbitrator's view and were not given an opportunity to comment on it. Once again, counsel for the Employer pointed out that Mr. Winters was not independent, in that he was a director of the Contractor.

5.8 On the basis of the foregoing, it was submitted on behalf of the Employer that the Arbitrator was wrong, misconducted the arbitration and demonstrated bias in treating the evidence before him in a prejudicial manner, not affording all the witnesses the same procedural safeguards, and undertaking what was described as "an unjustified attack of the independence or credibility of the Employer's witnesses on the basis of a known familial relationship".

6. Failure to deal with all the issues in dispute

6.1 There were two matters of substance and one evidential matter raised by the Employer under this heading.

6.2 The first matter of substance was an assertion that it was an express term of the Contract that the works on the hotel would be completed by the start of the summer tourist season. It was asserted that the unauthorised demolition issue referred to at para. 2.2 above necessitated additional works – that it caused the whole project and the original footprint to be changed. Accordingly, it was submitted, the Contractor was in breach of contract. The Arbitrator was criticised for making no reference whatsoever to the unauthorised demolition issue in the award. As I understand the Employer's complaint, it is that the Arbitrator made no express finding as to whether or not the unauthorised demolition issue gave rise to a breach of contract on the part of the Contractor.

6.3 It is true that the unauthorised demolition issue is not expressly addressed as such in the award. However, on this application, Mr. Winters has averred in his first affidavit, at para. 20, that the Arbitrator heard evidence that the walls (obviously referring to the exterior walls) were unstable and the planned works could not proceed. Presumably, the inference which the Court is expected to draw from what follows is that the specification for the works was defective in failing to take account of "the location and new loading" on the original exterior walls. He further averred that the Arbitrator had determined the quantum of "the variations which arose from the acceptance by all parties" that the exterior walls were knocked at the beginning of the works. Presumably, the Court is expected to infer, that in quantifying the variations, the Arbitrator was implicitly finding that the Contractor was not in breach of contract in demolishing the exterior walls. In response, in her second affidavit, Mrs. Geary asserted that the breach of contract which the Employer alleges the unauthorised demolition gave rise to was pleaded and approved before the Arbitrator, but the Arbitrator "refused to entertain it". In her final affidavit, at para. 9, Mrs. Geary persisted in her contention that the unauthorised demolition was in breach of contract and she averred that the "unauthorised razing" of parts of the hotel building necessitated new plans outside the scope of the Contract.

6.4 The other matter of substance raised by the Employer was that the Arbitrator failed to address the very large number of building defects and substandard work for which the Employer asserted the Contractor was responsible. It is true that, when dealing with the Contractor's claim *per se* in the award, the Arbitrator did not make any finding that works executed by the Contractor were or were not executed in a defective or substandard manner. However, he dismissed the element of the Employer's counterclaim which related to the cost of alleged defective work.

6.5 The evidential issue arises from the fact that site meetings between the representatives of the Employer and the representatives of the Contractor were taped. It was the position of the Employer's witnesses, including Mrs. Geary and Mr. Kelly, that the site meetings were taped in the knowledge and with the agreement of all of the parties, although Mr. Winters disputed this. The Arbitrator was invited to consider the contents of the tapes but he refused to do so, stating in the award (para. 2.4):

> "Whereas much was made earlier concerning the discovery of tape recordings of site meetings, made by members of the Geary family, no part of these tapes was used in evidence. It was suggested that I should listen to the entire tapes, a proposal which I rejected on the grounds of the time it would take and on the grounds that it was not my business to go searching for evidence."

It was submitted on behalf of the Employer that the Arbitrator was wrong, unreasonable and acted unfairly in not considering what was described as evidence probative to a matter in dispute. The transcripts of the tapes had been prepared and were offered to the Arbitrator and the position of the Employer is that he would have been "compensated" for any time he spent considering the tapes.

6.6 On that evidential point, counsel for the Employer relied on a passage from a judgment of the High Court (Carroll J.) in *O'Sullivan v. Joseph Woodward & Sons Ltd*. [1987] I.R. 255. In the passage (at p. 258) Carroll J. stated:

> "I am of opinion that the matter comes within the ground of misconduct of the proceedings by refusing to hear evidence material to the issues to be decided."

On the basis of what the Arbitrator has stated in the award it is not clear that what occurred in this case can be equated with a situation where the Arbitrator refused to hear evidence material to the issues to be decided. As recorded above, he has specifically recorded that "no part of these tapes was used in evidence". It would seem that what he was being invited to do was to listen to tapes or read transcripts of tapes which were not put in evidence. If the content of the tapes was being relied on by the Employer to

corroborate its version of events, the content of the tapes should have been put to Mr. Winters in cross-examination. Having regard to what is stated in the award, I assume that did not happen. On the basis of that assumption, I must conclude that the Arbitrator did not misconduct the arbitration by refusing to listen to the tapes or read the transcripts.

6.7 In relation to the assumption on which I have reached that conclusion, the affidavit evidence, while, unfortunately, lacking in clarity, does seem to bear out that the tapes were not put in evidence. In his first affidavit, at para. 26, Mr. Winters averred that the Contractor's counsel objected to the introduction of the tapes without formal proof. Presumably that objection was upheld by the Arbitrator. Further, Mr. Winters averred that witnesses called on behalf of the Employer gave evidence of conversations which may have been on the tapes, but the tapes had not been listened to by him or the legal representatives of the Contractor. Mrs. Geary in her second affidavit, at para. 10, did not deal with whether any part of the contents of the tapes was put to Mr. Winters in cross-examination before the Arbitrator. She did aver that the Contractor and its legal advisers had ample opportunity to examine the tapes before the hearing. Her principal averment, or, more accurately, her point of advocacy, that, if the Arbitrator had regard to the tapes and the transcripts thereof he would have clearly seen that the evidence of Mr. Winters was wrong or "at least … should have gone to his credibility and the reliability of his evidence", suggests that they were not put in evidence.

6.8 Counsel for the Employer did not differentiate between the impact of the alleged failure by the Arbitrator to make a finding in relation to the unauthorised demolition issue or the defective and substandard work issue on the Contractor's claim and on the Employer's counterclaim so that it may be that these grounds of complaint overlap the grounds of complaint in relation to the counterclaim addressed below. It is convenient at this juncture to give an overview as to how the Arbitrator assessed and quantified the Contractor's claim.

6.9 As the Arbitrator explained, the Contractor's claim was based on its "Final Account". Having made an adjustment for a slight error, the Arbitrator recorded that the Contractor's claim, exclusive of VAT, was in the sum of €1,336,425.87. He then set out his approach to the assessment of the Contractor's claim and he summarised the position in Table 3 annexed to the award. The starting point was the contract price in the Contract: €2,527,786. From that sum, the Arbitrator deducted two sums: the sum just short of €610,000, referred to at (a) in para. 5.5 above, which was credited to the Employer in respect of outstanding works; and €18,000. In dealing with the sum of €18,000 which was to be credited for "amounts in tender not carried out", the Arbitrator observed that the figure did not appear in McCauls' Report. He also recorded that, apart from the Employer's general denial in the defence of each and every item of the Final Account, no evidence was adduced by the Employer "to show that this credit item should have been for a greater sum". The Arbitrator then added the amount awarded to the Contractor in respect of variations (€580,418.19). I have outlined at (c) in para. 5.5 above the basis on which the Arbitrator stated he arrived at that figure. The Arbitrator made a small adjustment for what was described as "interest on late payments", which is not in issue on this application. The sub-total which the Arbitrator arrived at, having adjusted the contract price by giving the Employer the credits referred to above and allowing the Contractor the sum in respect of variations was €2,481,146.86, exclusive of VAT. From that sub-total he deducted the VAT exclusive amount which had been paid to the Contractor, which was €1,580,895.04. The balance, exclusive of VAT, due to the Contractor was, accordingly, €900,251.82. The amount of the award, €1,021,684.13 payable to the Contractor represented that balance together with VAT at the rate of 13.5%, which was approximately €315,000 short of the Contractor's claim.

6.10 That shortfall is explained largely by the following factor. When dealing with the claim, the Arbitrator disallowed a claim by the Contractor for €350,000 in respect of what he referred to as "Extension of Time". The Arbitrator recorded in the award that the claim had been made in the Contractor's pleadings under Clause 30 of the conditions of the Contract and, in particular, paragraphs (f) and (i). Clause 30 provides that, if in the opinion of the architect the works are delayed for any of the reasons set out in paragraphs (a) to (j) thereof, the architect shall make a fair and reasonable extension of time for completion of the works. The reasons apparently relied on by the Contractor were delay resulting from the architect giving instructions in relation to variations (para. (f)) and delay on the part of other contractors engaged by the Employer executing works not forming part of the Contract (para. (i)). Having stated that no extension of time was granted by the architect under Clause 30, the Arbitrator commented that the purpose of an extension of time under Clause 30 is wholly to protect a contractor from being unfairly made liable for "Liquidated and Ascertained Damages" under Clause 29(a) and no other financial relief is afforded to a contractor by virtue of Clause 30. The Arbitrator also considered the possibility that the Contractor might have intended to make the claim under Clause 29(b), which provides as follows:

> "If any act or default of the Employer delays progress of the Works then the Contractor shall within five working days of the act or default give notice in writing to the Architect to this effect and any time lost from this cause shall be ascertained and certified by the Architect and the Employer shall pay or allow to the Contractor such damages as the Contractor shall have incurred by the delay."

The Arbitrator made the point that, even if the Contractor had intended to claim under Clause 29(b), no evidence had been adduced to show that the Contractor had served the appropriate notices nor was there any evidence as to damages incurred by the Contractor arising from delay caused by any alleged act or default of the Employer.

7. The counterclaim

7.1 As the Arbitrator outlined in the award, there were two elements in the Employer's counterclaim for €2,037,570.38, namely:

> (a) a claim for €1,325,000 by way of "Liquidated and Ascertained damages" under Clause 29(a) of the Contract which, mathematically, represented fifty three weeks at €25,000 per week; and
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> (b) a claim for €712,570.38, exclusive of VAT, in respect of the cost to the Employer of having to engage another contractor (Newpark) to complete the works and to rectify the defective workmanship of the Contractor.

7.2 In order to put the Employer's complaints as to the manner in which the Arbitrator dealt with the first element of its counterclaim into context, it is necessary to set out precisely what the Arbitrator stated in paragraphs 4.4 to 4.8 inclusive of the award. He recited the provision in Clause 29(a) of the conditions in the Contract, which (incorporating the detail set out in the Appendix) states:

> "If the Contractor fails to practically complete the Works by [20th May, 2005] ….. or within any extended time under Clause 28 or Clause 30 … and the Architect certifies in writing, on simultaneous notice to the Employer and the Contractor, that in his opinion the same ought reasonably so to have been completed the Contractor shall pay or allow the Employer [€25,000] per week …. for the period during which the said Works shall so remain or have remained incomplete and the Employer may deduct such damages from any money due or to become due to the Contractor under this Contract."

Five reasons were advanced by the Arbitrator for not allowing the Employer damages in accordance with Clause 29(a).

7.3 First, the Arbitrator found that the execution of variations, which he outlined, was "unquestionably a contributory cause to delaying the works" and belonged to the category of potential delays described in paragraph (f) of Clause 30. The Arbitrator prefaced that finding by stating that the evidence of Mr. Winters, Mr. Murphy and Mr. Conmy "was consistent that substantial variations were directed to be carried out by Mr. Conmy as the Architect". However, he noted that Mr. Conmy maintained that the works in question were "further works" and not "variations". The Arbitrator then listed the principal variations. In relation to that finding of the Arbitrator, it was submitted on behalf of the Employer that he was wrong in his assessment of the evidence. As I understand it, the Employer's position is that he should not have found that the works he particularised were variations and, in consequence, he was wrong in his finding that variations within the ambit of paragraph (f) of Clause 30 (variations directed by the architect in pursuant of Clause 2) contributed to the delay in the completion of the works. On the issue as to whether the "further works" were or were not "variations", it is impossible for the Court and, in any event, being an issue which appears to be primarily an issue of fact, it is no part of the Court's function, to express a view. This is not an appeal on the merits. What can be stated is that the Employer's contention that the Arbitrator used a flawed approach to misconstrue the evidence and to come to illogical and unfair conclusions has not been established so as to justify a conclusion that the Arbitrator misconducted the arbitration.

7.4 Secondly, the Arbitrator was of the view that he should have regard to the fact that the independent contractor directly retained by the Employer, that is to say, IJM, was on site for longer than it should have been, although there was a conflict as to whether the additional period was two to three weeks (*per* Mr. Conmy) in a letter to Mrs. Geary; or four weeks (*per* Mr. Murphy's evidence) or five weeks (*per* Mr. Winter's evidence). The conclusion of the Arbitrator was that whatever the actual duration of the delay, it was delay which fell into the category of potential delay described in paragraph (i) of Clause 30 (delay on the part of other contractors engaged by the Employer in executing work not forming part of the Contract). The Arbitrator recorded Mr. Winter's evidence that the Contractor had applied for an extension of time and no extension had been granted, but, in my view, it is implicit that he considered that an extension should have been granted under both paragraph (f), in relation to variations, and paragraph (i) in relation to the delay on the part of the independent contractor, of Clause 30. It was submitted on behalf of the Employer that, although the Contractor had not been granted the extension of time applied for, and was not granted an extension in relation to the works carried out by IJM, that delay was inconsequential in the overall scheme of things. Again that is a factual issue on which it would be inappropriate for the Court to make a finding.

7.5 Thirdly, the Arbitrator pointed out that the element of the Employer's claim which was based on Clause 29(a) covered a period of fifty three weeks. He pointed out that it was pleaded in the counterclaim that the Employer got back possession of the hotel on 1st March, 2006. On that basis he concluded that the real overrun was forty weeks, from which there should have been deducted "a fair and reasonable extension of time" whatever that might have been.

7.6 Fourthly, the Arbitrator was of the view that the issue was complicated by "an inevitable hiatus" between the departure of the Contractor from the site on 5th October, 2005 and the commencement of the works by Newpark in "late October".

7.7 On the basis of the third and fourth reasons outlined above, the Arbitrator expressed a view that, if the Employer was entitled to damages under Clause 29(a), it must be for a period considerably less than the fifty three weeks claimed. He went on to state that he did not have sufficient evidence to accurately assess what the relevant period should be but, in any event, the making of such assessment would be of an academic interest only for the reason then outlined.

7.8 Fifthly, the Arbitrator stated that the Employer's entitlement to damages under Clause 29(a) only arose in circumstances where the Architect had certified in writing, on simultaneous notice to the Employer and the Contractor, that in his opinion the works ought reasonably to have been completed by 20th May, 2005 or within any extended time allowed under Clause 28 or Clause 30. The Employer had not contended that such certificates had been issued nor was any evidence adduced to indicate that they had been. Accordingly, the Arbitrator held that the Employer was not entitled, under the terms of the Contract, to damages for non-completion as provided in Clause 29(a). On that basis he dismissed that element of the counterclaim.

7.9 Counsel for the Employer contended that the Arbitrator was in error in holding that the Employer was not entitled to damages for non-compliance with Clause 29(a) and further that he was in error in stating that he did not have sufficient evidence to accurately assess the relevant period over which the Employer's entitlement to damages arose. In relation to both arguments, once again, counsel for the Employer was straying into factual matters and inviting the Court to find that the Arbitrator was wrong in his finding on the facts. For instance, in relation to non-compliance with Clause 29(a), it was contended that Mr. Conmy had written to the Contractor on five different occasions to the effect that the project was unreasonably delayed and the five letters were exhibited on this application. The five letters were dated respectively 24th January, 2005, 21st March, 2005, 23rd June, 2005, 8th July, 2005 and 18th July, 2005. There is no doubt that in each of those letters Mr. Conmy complained about lack of progress and of delay on the part of the Contractor. However, the contention of counsel for the Employer that the Contractor was put on clear notice that Clause 29(a) would be invoked is incorrect. In two of the letters, the letter of 21st March, 2005 and the letter of 23rd June, 2005, Mr. Conmy referred to the "penalty clause". In the letter of 23rd June, 2005, having stated that "the hand-over of the bedrooms is for 2nd July, 2005", Mr. Conmy stated that he was putting the Contractor on notice that the penalty clause specified in the Contract would have to be applied, and that the amount of the penalty per week would have to be sufficient to meet the Employer's losses. However, in none of those letters did Mr. Conmy certify in writing, on simultaneous notice to the Employer and the Contractor, that in his opinion the works ought reasonably to have been completed by 20th May, 2005. In any event, it would appear that the position of the Employer is that the completion date was revised to late July 2005, although this was disputed by Mr. Winters in his second affidavit and Mrs. Geary's response in her final affidavit was that there was "no formal extension". Nonetheless, that is the position of the Employer which has emerged in the context of the reliance by counsel for the Employer on a letter dated 5th August, 2005 directly from the Employer to the Contractor enclosing a cheque in discharge of Certificate No. 8 issued by the architect. In discharging that certificate the Employer deducted the sum of €25,000 from the sum certified and ascribed the deduction to "1 week (penalty) clause". It was contended on behalf of the Employer that the Contractor accepted the deduction as a valid deduction, but the Arbitrator had ignored that fact. That letter highlights an inconsistency in the position of the Employer. Clause 29(a) could only be invoked after the completion date or any extension of it in accordance with the Contract. On the evidence before the Court, it cannot be concluded that Mr. Conmy issued simultaneous certificates under Clause 29(a) after late July 2005, which the evidence indicates as being the revised completion date, but before 5th August, 2005 or indeed at any time.

7.10 The position adopted by the Employer before the Court in relation to the period of delay in respect of which it claims to be entitled to damages was inconsistent with the approach which was, apparently, adopted before the Arbitrator. The case made on behalf of the Employer to the Court was that forty weeks had elapsed from the original completion date, 20th May, 2005, to the date on which the Employer recovered possession from Newpark. The Employer's case that the Arbitrator should have awarded damages under Clause 29(a) seems to be predicated on the fact that it was entitled to forty times €25,000, rather than the sum which was claimed before the Arbitrator, that is to say, fifty three times €25,000. In relation to the finding of the Arbitrator that delay in

completion of the works was partly attributable to the delay by the independent contractor, the answer of the Employer was that this would only have absorbed at most three weeks of the forty weeks and the Employer was at least entitled to thirty seven times €25,000. The Employer also took issue with the Arbitrator's reliance on the complication of the "inevitable hiatus" between the departure of the Contractor and commencement of work by Newpark, on the basis that the Employer acted promptly in appointing the new contractor and did all it could to mitigate its loss.

7.11 Contrary to the contention of counsel for the Employer that the Arbitrator did not address the issue of liability, as distinct from the issue of quantification of damages, the Arbitrator did make a finding as to the non-application of the remedy available to the Employer under Clause 29(a), which was a finding on liability, although he did not use that terminology. All of the criticisms of the manner in which the Arbitrator dealt with the element of the counterclaim which related to the claim for damages for delay, when analysed, amount to accusations that the Arbitrator made incorrect findings of fact. Even if it was appropriate for the Court to review the facts, which it is not, no evidence has been put before the Court that the pre-condition to the entitlement of the Employer to damages under Clause 29(a) was complied with. Apart from that, it would appear that, on the case made on behalf of the Employer to the Court, it has been conceded that, on this element of the counterclaim, the Employer's claim before the Arbitrator exceeded its entitlement by sixteen times or thirteen times €25,000.

7.12 Turning to the second element of the counterclaim, I have encountered extreme difficulty in understanding and reconciling the figures set out in the award in paragraphs 4.1, 4.9 and 4.10. For example, it is stated in paragraph 4.1 that the figure of €712,570.38 claimed in respect of the cost of completion of the works and rectifying defective workmanship is exclusive of VAT, whereas in paragraph 4.9 it is stated that it is inclusive of VAT. Further, a figure of €72,567.36 (*i.e*. €63,936 plus VAT) is mentioned in para. 4.10 in respect of which the Arbitrator records that there is a lack of evidence as to how precisely it was arrived at. For my part, I cannot relate that figure to the issues on the claim and counterclaim as represented in the award. However, I note that a figure of €63,936 appears in the summary in McCauls' Report as being a figure claimed by McCauls as a credit (additional to the credit of €610,000) for work for which the Employer claimed the Contractor was responsible. What I understand to have been the position of the Employer, as perceived by the Arbitrator, from para. 4.10 is that its claim under the heading of the extra cost to the Employer for completion of the works and remedying defective work was the difference between the sum paid to Newpark (€1,289,696.30 plus VAT) for the works it carried out less the figure of €610,000 agreed between Mr. Winters and McCauls as the "approximate value of omitted works". On that basis, the quantum of this element of the Employer's claim represents what the Employer paid Newpark other than the cost of the works included in the Contract which were not executed by the Contractor and for which the Contractor was not paid, so that, logically, the Employer had to bear the cost of those works having been executed by Newpark. If that analysis is correct, it is peculiar that the Employer should adopt the agreed figure of approximately €610,000 for the purpose of quantifying part of its counterclaim, but object to its use in the quantification of the Contractor's claim. However, it is important that I should emphasise that because of the difficulty in reconciling the figures in the award adverted to above, there is a large element of conjecture in that analysis.

7.13 The Arbitrator expressed dissatisfaction in relation to the quantification of the second element of the counterclaim on a number of bases. First, the tender of Newpark had been a negotiated tender and competitive tenders had not been sought because, according to Mr. Kelly's evidence, of the market conditions at the time. Secondly, there were certain works included in the Contract with Newpark, which were not covered by the Contract in respect of which no allowance was made. Thirdly, the Arbitrator considered it unsatisfactory that the Newpark contract was negotiated with Mrs. Geary's son-in-law, Mr. Gavin. The inference to be drawn from the first and third bases, presumably, is that the contract price on a contract entered into following a competitive process would have been lower, notwithstanding Mr. Kelly's opinion of market conditions at the time or what Mrs. Geary referred to as the "economic reality of that time" in her grounding affidavit. On those grounds the Arbitrator stated that in his view, as with the claim for damages for non-completion, the quantum of the claim for extra costs of completion and remedial works by Newpark was neither accurately nor reasonably established. That conclusion was based on an assessment of the facts, including the inferences to be drawn from the facts, by the Arbitrator.

7.14 Apart from the foregoing matters, the Arbitrator based his dismissal of this element of the counterclaim on two grounds on which he considered Clause 33 had not been complied with and he held that, by reason of non-compliance with Clause 33 of the Contract, the Employer was not entitled to pursue the costs of engaging Newpark to complete and remedy the works.

7.15 One ground related to giving notice in accordance with Clause 33(a). Clause 33(a) provides that, if the Contractor shall make default in any of the respects stipulated, including failing "to proceed with the Works with reasonable diligence", then, if the default shall continue for ten working days after notice specifying the default has been given to the Contractor by the Architect, the Employer may, without prejudice to any other rights or remedies, thereupon and at the latest within ten working days by notice determine the employment of the Contractor. The factual position as put before the Court, as recorded in para. 2.2 above, is that on 8th September, 2005 Mr. Conmy sent a notice by registered post to the Contractor alleging that it was in serious breach of contract, in that the works were seriously delayed and, in addition, the works were not watertight and that the progress to that date indicated that there was no likelihood that they would be watertight in the near future. In addition it was asserted that there was no adequate means of fire exiting from, or fire alarm in, the "handed over areas". It was stated that that was not an exhaustive list of defects. The notice concluded:

> "On behalf of the Employer I now wish to give notice that you are in default in accordance with clause 33(a)(ii), for failing to proceed with the works with reasonable diligence and if such default should continue for ten working days, the Employer may proceed to determine your employment in accordance with this Contract."

On the evidence before the Court, on 22nd September, 2005 the Employer wrote directly to the Contractor referring to the letter of 8th September, 2005, pointing out that ten working days had expired and the default was continuing. It was stated that the Employer was terminating the employment of the Contractor under the Contract. The letter went on to invoke the entitlement of the Employer under Clause 33(c)(ii) of the Contract to require the Contractor to assign the benefit of any contract for the supply of materials and suchlike to the Employer.

7.16 In paragraph 4.13 of the award the Arbitrator stated that Clause 33(a) required that two notices be issued by or on behalf of the Employer, one specifying the default and the second determining the employment of the Contractor. It was stated that, apart from Mr. Conmy's notice of 8th September, 2005 specifying the default, no evidence had been adduced before the Arbitrator that the second notice had ever been issued. The position of the Employer on this application was that the letter of 22nd September, 2005 was in fact put in evidence before the Arbitrator at the hearing. Counsel for the Employer surmised that the Arbitrator had concluded that the second notice was required to be issued by the architect, rather than directly by the Employer. It was submitted that that was an incorrect interpretation of Clause 33 and that the error led to the Arbitrator's flawed conclusion that the Contract was not properly terminated by the Employer.

7.17 If the letter of 22nd September, 2005 was before the Arbitrator, in my view, he erred in law in his conclusion that the employment of the Contractor was not determined in accordance with the provisions of Clause 33(a) for non-compliance with the notice requirement. However, as with many aspects of this matter, the problem with which the Court is confronted is the lack of clarity as to whether the evidence before the Court is consistent with the evidence which was before the Arbitrator. In paragraph 23 of her grounding affidavit, Mrs. Geary referred to the notice of 8th September, 2005 pursuant to Clause 33. She went on to aver that the Arbitrator had found that the Employer's right to employ and pay a second contractor was contingent upon the service of two such notices and that, as the Arbitrator had evidence of only one such notice, he found that the Employer was not within its rights to employ the second contractor. Mr. Winters did not comment on those averments in his first affidavit. In her second affidavit, at paragraph 15, Mrs. Geary referred to the notice of 8th September, 2005 and went on to aver that a "follow up letter", the date of which was not specified, was sent by her "as per" her grounding affidavit, which informed the Contractor that the Contract was determined. I see nothing in the grounding affidavit about the "follow up letter". However, Mrs. Geary reiterated that the fact was that two letters were sent and she also averred that the quantity surveyor called by the Contractor (presumably, referring to Mr. Murphy) agreed that the correct procedure for determining the Contract was used. Mr. Winters in his second affidavit merely referred to the fact that the Arbitrator made it clear in the award that no evidence had been adduced "about compliance with the requirement of two notices under Clause 33(a)" and he went on to aver that the Employer "failed to adduce evidence at the arbitration hearing about the second notice". However, he did not dispute that the "follow up letter" had been sent. The problem which confronts the Court in relation to the Arbitrator's treatment of the question whether the Contract was properly terminated by notice in accordance with Clause 33(a) is that there is a conflict of evidence as to what evidence was before the Arbitrator and it is a conflict which the Court cannot resolve.

7.18 The Arbitrator dismissed the element of the counterclaim which related to the extra costs of completion on another ground of non-compliance with Clause 33. He referred to the proviso in Clause 33 that notice pursuant to the Clause "shall be void if the Employer is at the time of the notice in serious breach of this Contract". He went on to state that at the date of the notice of 8th September, 2005 the Employer had withheld payments on three certificates issued by Mr. Conmy, Certificates Nos. 4, 8 (from which €25,000 was deducted, as recorded in para. 7.9 above) and 9, to the cumulative amount of €266,970.65 as at 26th August, 2005, with the withholding of payments going back to 13th April, 2005, when the sum of €15,666.54 was withheld from the certified amount of €162,668.21. He held that the failure of the Employer to honour certificates within the time stipulated in Clause 35(a) constituted a serious breach of its contract with the Contractor, in consequence of which breach he held that the notice of 8th September, 2005 was void. On the evidence before the Court, each of the "certificates" in issue emanated from Mr. Conmy and each was headed "Progress Claim No. …". Each was addressed to the Employer.

7.19 The issue as to whether the Employer wrongly withheld payment out of the sum certified on Certificate No. 4 is a factual issue. Certificate No. 4, which was dated 7th April, 2005, has been exhibited on this application. I find it difficult to reconcile it with para. 4.14 of the award, in that the payment due on the certificate before the Court is €166,859.25. However, it is common case that the Employer paid less than the certified amount. The explanation given by Mrs. Geary in her second affidavit (at para. 17) was that the Contractor was unable to provide a bond (as I understand it, an insurance bond or a guarantee) for the project and that it was agreed by the parties that the retention monies would be increased from 5% to 10% on that account. Of the amount certified in Certificate No. 4, 10% had been held back as retention monies in accordance with that agreement and the correct sum issued from the Employer to the Contractor on 30th April, 2005. The response of Mr. Winters in his second affidavit was that the issue of the bond arose after the Contract was signed. The Contractor did not get a bond and agreed to an increase in the retention sum from 5% to 10%. The certificates which were issued by the architect mentioned those retention amounts following that agreement. However, Mr. Winters went on to suggest that what Mrs. Geary had averred in paragraph 17 was irrelevant to the consideration of the issues before the Court. It was not irrelevant, if it establishes that the Employer paid the correct amount due to the Contractor in accordance with the agreement which, apparently, Mr. Winters acknowledges was reached, which varied the terms of the Contract. However, Certificate No. 4, as exhibited, provides for retention based on 10%, leaving €166,859.25 due to the Contractor. Perhaps the lesser sum paid by the Employer was designed to address an insufficient deduction for retention on the three earlier certificates. That is pure speculation, but it does highlight the difficulty the Court has been confronted with on this application.

7.20 There is also a factual dispute as to whether the Employer was in default in relation to Certificate No. 9 on 8th September, 2005. Certificate No. 9 was dated 26th August, 2005. It was averred by Mrs. Geary in her second affidavit that payment was not actually due on Certificate No. 9 until 13th September, 2005 and that this fact is recognised by the Arbitrator in the award. In this connection I assume that Mrs. Geary is referring to Table II in the award, which sets out the calculation of interest, with which the Court is not concerned. In relation to Certificate No. 9, the period to which interest applies is stated in Table II as having commenced on 13th September, 2005. In fact, Clause 35(a) of the Contract provides that each interim certificate shall be honoured by the Employer "within seven working days of presentation of same to him by the Contractor". It is not clear when, if ever, the Certificate No. 9 was presented by the Contractor, as distinct from by the architect, Mr. Conmy. However, apart from contending that Certificate No. 9 did not require to be honoured before 8th September, 2005, Mrs. Geary has averred that payment in advance of €150,000 had been made in respect of Certificate No. 9 in circumstances where the Contractor was experiencing cash flow difficulties. In return for the early payment, she wanted the Contractor to seal the roof and stop the ingress of water, which was damaging the completed works in the levels below and damaging previously certified works which had been paid for. The Contractor agreed to do that but failed to do so. Counsel for the Employer contended that the Contractor had never complained that there were underpayments on the certificates and, in particular, there was no complaint in relation to the deduction of €25,000 from Certificate No. 8 referred to in para. 7.9 earlier.

7.21 The response of Mr. Winters in his second affidavit to the factual matters raised by Mrs. Geary in relation to Certificate No. 8 and Certificate No. 9 does not really address the facts. He embarked on advocacy in stating that "it was not within the remit of Ms. Geary or her company to determine unilaterally that it will pay on foot of a certificate in circumstances which she may specify and which may suit [the Employer] or hotel operation", whatever that means. In relation to Certificate No. 8, he expressed agreement with the Arbitrator, in that he "correctly found" that monies had been wrongfully deducted. He went on to aver that the witnesses, including Mr. Kelly and Mr. Conmy, did not dispute at the arbitration that the Employer was not entitled to impose conditions for payment on foot of the architect's certificate and went on to aver:

> "The unilateral imposition of conditions for subsequent and late payment by [the Employer] was in breach of contract as Ms. Geary only knows too well from her advisers who gave evidence at the arbitration hearing."

That averment certainly does not assist the Court.

7.22 The second issue as to the validity or otherwise of the notice pursuant to Clause 33(a) is whether, at the material time, the Employer was in serious breach of the Contract. It would appear that the Employer's contractual liability to honour the certificates issued by the architect was not as simple and clear cut as simply looking at the bottom line on the relevant certificate and looking at how much the Employer actually paid and determining that, if the Employer did not make the full payment, it was a breach. What is not clear is the extent to which this was laid before the Arbitrator. On the other hand, one is faced with the undisputed fact that Mr.

Conmy issued Certificate No. 9 on 26th August, 2005 to the Employer certifying that there was a VAT inclusive payment of €402,746.90 due by the Employer to the Contractor and somewhat short of a fortnight later Mr. Conmy issued a notice under Clause 33(a)(ii), at a time when apparently all but €150,000 of the amount certified remained undischarged.

7.23 As regards the second element of the counterclaim, the Arbitrator did address the issue of liability in considering whether the pre-conditions to the termination of the Contract stipulated in Clause 33(a) had been complied with, although he did not use that terminology. As outlined at para. 7.13 above, he also addressed the issue of quantification of damages. Both issues were primarily matters of fact.

8. The law

8.1 In seeking to have the award of the Arbitrator set aside, the Contractor has invoked s. 38 of the Act of 1954 and the Court's common law jurisdiction. Section 38(1) of the Act of 1954 provides:

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

8.2 Both parties relied on a recent decision of the Supreme Court in *Galway CC v. Kingston Ltd*. [2010] 2 ILRM 348. O'Donnell J., in his judgment, adopted, subject to certain comments, as correct the following statement of the legal principles on which arbitral awards can be challenged contained in the judgment of McMahon J. at first instance. The relevant passage, insofar as it relates to setting aside an award, as opposed to remittal, is quoted at p. 355 and is in the following terms:

> "First, section 38 of the Act of 1954 provides for the setting aside of an award where 'an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured…'. The term 'misconduct' has a special meaning in this context. As explained by Jenkins L.J. in *London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd*. [1958] 1 W.L.R. 661 at p. 665, misconduct is 'used in the technical sense in which it is familiar in the law relating to arbitrations as denoting irregularity, and not any moral turpitude or anything of that sort'. Similarly, Atkin J., in *Williams v. Wallis and Cox* [1914] 2 K.B. 478 stated, at p. 485, that the expression 'does not necessarily involve personal turpitude on the part of the arbitrator' and that it 'does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice'. This passage was recently cited by Fennelly J. in *McCarthy v. Keane* [2004] 3 I.R. 617, who went on to say, at p. 627, that 'the standard or test of misconduct … would be something substantial, something that smacks of injustice or unfairness'. Examples of misconduct from the case law include refusing to hear evidence on a material issue, adopting procedures placing a party or parties at a clear disadvantage, acting with clear favouritism towards one party, deciding a case on a point not put to the parties or failure to resolve an issue in the proceedings. However, in order to provide the basis for a successful challenge to the arbitral award, the misconduct must reach the high threshold set out above.
>
> Secondly, …
>
> Thirdly, the court has a common law jurisdiction to set aside or remit an award for an error of law on the face of the record. In *Church & General Insurance Co. v. Connolly & McLoughlin* (Unreported, High Court, 7th May, 1981), Costello J. stated that 'there is no doubt that at common law the Court can either remit or set aside an award if there is an error of law on its face'. This jurisdiction, according to McCarthy J. in *Keenan* at p. 96, is limited to 'an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged'. In *McStay v. Assicurazioni Generali SPA & Anor* [1991] 2 I.L.R.M. 237, Finlay C.J. stated at p. 243 that, where an Arbitrator decides a question of law in respect of which the general issue in dispute, but not the precise question of law, is submitted to him, the court 'may in its discretion and in particular cases where the decision so expressed is clearly wrong on its face, intervene by way of remitting the matter or otherwise in the interests of justice'. Thus, as noted by Clarke J. in *Limerick City Council v. Uniform Construction Ltd.* [2007] 1 I.R. 30 at p.43, the jurisdiction is 'limited and arises only where the error is 'so fundamental' that it cannot be allowed to stand … or 'clearly wrong''."

8.3 In his comments on those principles, O'Donnell J. addressed how the Court should approach determining whether an error is so serious and fundamental as to justify remittal or setting aside of an award and he stated (at p. 360):

> "… I would suggest that it is important that the courts in considering challenges to arbitral awards should firstly remind themselves of the high tolerance that the system of arbitral review has for arbitral error and furthermore should seek to articulate as fully as possible the consideration of law and policy, and the analysis of the individual proceedings, which lead the Court to conclude that in any given case a substantial error has or has not been established which is so fundamental that the proceedings cannot be allowed to stand ."

8.4 It is well established that the jurisdiction to set aside an award of an arbitrator on the basis of misconduct does not apply where the ground relied on is that the arbitrator made a mistake of fact or a mistake of law. As Fennelly J. stated in *McCarthy v. Keane* (at p. 627):

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

9. Application of the law to the facts

9.1 With the observations of O'Donnell J. quoted at para. 8.3 above in mind, I think it would be useful to highlight the monetary items in the claim and counterclaim in relation to which the Employer contends the Arbitrator was in error and do so in the broad context of the claim and counterclaim. I propose to do so in tabular form hereunder, identifying, in relation to the items in dispute, the finding of the Arbitrator, the position of the Employer in relation to the finding, and where the reasoning of the Arbitrator in relation to those items in dispute is outlined in this judgment.

CLAIM AND COUNTERCLAIM	AMOUNT FOUND DUE BY ARBITRATOR	POSITION OF EMPLOYER	REASONING OF ARBITRATOR
Claim Contract Price (ex VAT)	€ 2,528,000	Agreed	
Less credit due to Employer for works not executed by Contractor	(A) 610,000 _ 1,918,000	Too low	Para. 5.5 and 6.9 supra
Plus amount due to Contractor for – (a) Variations (b) Damages for delay (Clause 29(b)) Sub-total	(B) 580,000 Nil 2,498,000	Not "variations"/ Too high	Para. 5.5, 5.6 and 6.9 supra
Less amount paid by Employer to Contractor (ex VAT) Total (ex VAT)	1,581,000 917,000	Agreed	
Total subject to minor adjustments by Arbitrator (€900,251.82) plus VAT (AMOUNT OF AWARD)	1,021,684		
Counterclaim/Setoff Damages under Clause 29(a) Damages under Clause 33 (c)	(C) Nil (D) Nil	€1,325,000 €713,000	Para. 7.3 to 7.8 supra Para. 7.13 and 7.18 supra

In the interests of simplicity, except in setting out the amount of the award, I have rounded the figures to the nearest thousand. From the table, it is clear that the items in dispute are the items noted as (A), (B), (C) and (D).

9.2 In relation to item (A), notwithstanding the various issues raised by the Employer in relation to the manner in which the Arbitrator had arrived at the figure of €610,000 in respect of the credit due to the Employer for work not executed by the Contractor, which I have outlined, in essence, the Arbitrator was arriving at a conclusion on a question of fact. If that conclusion was erroneous, in my view, it was not arrived at in an irregular manner and the error was not so serious and fundamental as to justify setting aside the award. The Arbitrator's unjustified criticism of Mr. Conmy for his reliance on notes he had prepared the previous evening, in my view, does not taint the award to a substantial degree, nor, taking an overview of the award, does it smack of injustice or unfairness.

9.3 In relation to item (B), the amount of €580,000 which he found due to the Contractor in respect of variations, again, in my view, the Arbitrator was essentially addressing a question of fact. Even though he referred to his "own subjective assessment" in the award, a review of Table 1 in the award, as I have already indicated, does not suggest that he ignored the evidence adduced and substituted his own opinion for it. This can be illustrated by reference to the seven largest items in Table 1, which in value aggregate €463,969.17, as the following indicates:

> (a) In relation to item 50 (Basement), in respect of which he allowed €75,046.35, he stated that the claim was submitted in April 2005 but had not been agreed by August 2005 when Progress Claim No. 8 was submitted.
>
> (b) Item 51 (Additional Floor Area) was an agreed claim at €114,328.36.
>
> (c) In relation to item 67 (Revised ceiling make-up), he noted that the work was not carried out in full and he allowed 75% of the claim, amounting to €34,004.59.
>
> (d) In relation to item 72 (Provide acoustic ceiling on ground floor), he noted that the item was originally in Progress Claim No. 9 as €75,000 but was not dealt with. He allowed the amount claimed in the Final Account in full (€63,387.50).
>
> (e) In relation to item 75 (Encase structural steel beams and columns), he allowed the claim of €51,202.37 on "the balance of evidence".
>
> (f) In relation to item 80 (Revised ground floor), he noted that on "the balance of evidence" he was not prepared to allow more than was claimed for that item in Progress Claim No. 9 in the sum of €86,000.
>
> (g) In relation to item 100 (Enabling work at Entrance), he allowed the amount claimed in the Final Account in full (€40,000), as he recorded on "the basis of Mr. Conmy's evidence in relation to this item".

The foregoing suggests that the Arbitrator assessed the evidence in relation to valuing the variations properly. In relation to the two matters which it was alleged the Arbitrator failed to address, the unauthorised demolition issue and the alleged building defects and substandard work of the Contractor, I think it is implicit in the manner in which the Arbitrator assessed the valuation of the variations that he addressed those matters, insofar as he considered necessary to do so. In relation to the amount awarded to the Contractor for variations, even if he erred in the assessment, I cannot see a basis for concluding that the Arbitrator conducted the award in a manner that gave rise to substantial injustice or unfairness or was based on error so serious and fundamental as would justify setting aside the award.

9.4 In relation to item (C), the core issue on the liability of the Contractor and the entitlement of the Employer to damages for non-completion under Clause 29(a) is whether the precondition to such entitlement, the issue of a certificate by the architect of the type stipulated in that clause simultaneously to the Employer and the Contractor was complied with. The Arbitrator found, on the evidence before him, that it was not and, as I have set out at para. 7.9 above, on the basis of the analysis of the evidence before the Court, there is no evidence before the Court that it was complied with. As the foundation of the item (C) claim was the Employer's contractual entitlement under Clause 29(a) and no other basis appears to have been advanced for the first element of the counterclaim, I see no basis for finding that the Arbitrator erred in dismissing that element of the counterclaim.

9.5 Turning to item (D), because of the absence of a transcript or an agreed note of the proceedings before the Arbitrator and the factual conflict in the affidavits before the Court, it is extremely difficult to review the manner in which the Arbitrator dealt with the counterclaim. Aside from that, the evidence, such as it is, suggests that the actual implementation by the parties of the Contract deviated substantially from what provisions of the Contract anticipated. For instance, I have already alluded to Clause 35 of the conditions which deals with interim certificates and payments thereunder. Reading paragraph (a) in conjunction with the Appendix, it was envisaged that the period of interim certificates would be four weeks, that within five working days of production of a detailed progress statement the architect would issue to the Contractor a certificate of the amount due to it, and the Employer would honour the certificate within seven working days of its presentation by the Contractor. Apparently what occurred was that Mr. Conmy issued the interim certificates directly to the Employer. That creates a difficulty in the application of Clause 33 of the conditions, which is particularly relevant to the maintainability of the claim in relation to item (D).

9.6 Paragraph (a) of Clause 33, which was invoked in the letter of 8th September, 2005 by Mr. Conmy, provided that, if the Contractor should make default in certain respects, for instance, fail to proceed with the works with reasonable diligence, if the default should continue for ten working days after notice specifying the default had been given to the Contractor by the Architect, the Employer was entitled by notice to the Contractor to determine the employment of the Contractor under the Contract. That entitlement was subject to the proviso that the notice should be void if the Employer at the time of the notice was in serious breach of the Contract. As I have outlined earlier, two findings were made by the Arbitrator which supported his conclusion that Clause 33(a) was not properly invoked. The first was that the second of the two notices which required to be served in accordance with Clause 33(a) was not issued. The second was that at the time of the first notice of 8th September, 2005 the Employer was in serious breach of the Contract by reason of not having discharged the amounts due on the interim certificates in full. As a consequence of those findings, the Arbitrator held that the employment of the Contractor had not been determined in accordance with the provisions of Clause 33 and that the second element of the counterclaim (item (D)), the costs incurred in completing the works and rectifying workmanship, which he treated as a claim under Clause 33(c) was not maintainable. Sub-paragraph (i) of Clause 33(c) provided that the Employer might employ and pay an alternative contractor to complete the works, if the employment of the Contractor was determined in accordance with Clause 33(a). Sub-paragraph (iv) postponed liability to make any further payment to the Contractor until after completion of the works. However, sub-paragraph (iv) contained a proviso that, upon completion and the verification within reasonable time of the accounts therefor, the architect should certify the amount of expense properly incurred by the Employer and, if such amount added to the money paid to the Contractor before determination exceeded the total amount which would have been payable on due completion, the difference should be a debt payable to the Employer by the Contractor. Whether the certification requirement provided for in sub-paragraph (c) was complied with is not addressed in the Arbitrator's award, nor is there any evidence before the Court of the point, but is not an issue to which the Court can have regard.

9.7 Apart from that, the issues which the Court has to address on the question as to whether the Arbitrator acted irregularly and in error in dismissing the counterclaim for €712,570 is mired in imponderables, for instance:

> (a) whether there was evidence before the Arbitrator that the letter of 22nd September, 2005 was issued directly by the Employer to the Contractor, as it should have been as a precondition to the determination of the Contract ; and
>
> (b) whether there was evidence before him which established that the retention percentage provided for in the Appendix to the Contract was varied by agreement and the implications of that on the amount which had been paid by the Employer to the Contractor on foot of the interim certificates which had issued before 8th September, 2005.

The core issue which underlies the liability of the Contractor on the second element of the counterclaim is whether the employment of the Contractor was properly determined by the Employer in accordance with Clause 33(a). The Arbitrator held that it was not. It is simply not possible to reach a conclusion on whether that finding was correct or erroneous on the basis of the evidence before the Court. Apart from the imponderables, it is not clear whether the inferences to be drawn from the fact that the Contractor had, apparently, served notice of arbitration pursuant to the Contract on 16th November, 2005 (para. 3.8 of the award) and left the site after the notices were served in September 2005, which the award suggests occurred on 5th October, 2005 (para. 4.7), were addressed before the Arbitrator.

9.8 As to the consequences of the Arbitrator's conclusion that the Contract had not been determined being incorrect which, if it was incorrect, would have been a substantial error, the position is that, as recorded in para. 7.13 above, in the award, the Arbitrator set out his assessment of this element of the claim as formulated and found that, as a matter of fact, it was neither accurately nor reasonably established. The weight to be attached to the evidence was a matter for the Arbitrator. It is not open to the Court to find that he was wrong in harbouring and expressing a degree of scepticism as to its quantification, given that this element of the counterclaim was formulated on the basis of a contract which was negotiated with the son-in-law of Mrs. Geary who, in reality, was the Employer. Taking an overview of the task of the Arbitrator and how he performed it, he assessed the evidence in relation to the Contract and the works from a number of perspectives: the works covered by the Contract; the works covered by the Contract which the Contractor did not execute; additional works which the Contractor executed; valuation of variations; and the progress of the works in the context of the allegations of delay made by both the Contractor and the Employer. He had independent evidence from Mr. Murphy and he had McCauls' Report, which I am satisfied was admitted in evidence before him without proof. The Arbitrator came to a conclusion on the facts that the item (D) claim was not factually established and he did so, in a manner, which, in my view, was neither unfair nor unjust. Therefore, in my view, it is irrelevant that the Arbitrator was incorrect in concluding that the employment of the Contractor was not properly determined in September 2005, if he was incorrect.

9.9 While I am conscious of the fact that, even if it had only been partially successful, an award on foot of the counterclaim would be set off against the amount found due on the Contractor's claim, I am not satisfied that the Employer has established misconduct on the part of the Arbitrator in conducting the arbitral process in relation to the counterclaim or, alternatively, that there is an error on the face of the award, which if rectified, would entitle the Employer to succeed on all or part of the counterclaim.

9.10 By way of general observation, I found the process the Court had to engage in on this application most unsatisfactory. The issues raised by the Employer were primarily issues of fact. The Court was hampered by the absence of a transcript or even an agreed note of the three day hearing before the Arbitrator. This was compounded by the factual conflict on the affidavits filed on this

application. Taking an overview of the matter, however, even if the Arbitrator reached the wrong result, I cannot conclude that he was guilty of misconduct.

10. Order

10.1 There will be an order dismissing the Employer's application.