Neutral Citation Number: [2009] IEHC 225

THE HIGH COURT

2007 112 MCA

IN THE MATTER OF THE ARBITRATION ACTS 1954-1998

AND IN THE MATTER OF AN ARBITRATION BETWEEN JOHN MOWLEM CONSTRUCTION LIMITED TRADING AS

IRISHENCO CONSTRUCTION

CLAIMANT

AND

DUBLIN CITY COUNCIL

DEFENDANT

AND IN THE MATTER OF AN APPLICATION PURSUANT TO ORDER 56 OF THE RULES OF THE SUPERIOR COURTS

BETWEEN

CARILLION IRISHENCO FORMERLY KNOWN AS

IRISHENCO CONSTRUCTION

APPLICANT

AND

DUBLIN CITY COUNCIL AND JOHN HIGGINS

RESPONDENT

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 20th day of February, 2009

1. On 29th March, 2001, Carillion Irishenco Limited (formerly known as John Mowlem Construction Limited trading as Irishenco Construction) entered into an agreement with Dublin City Council (the "Respondent", "DCC" or "the City Council) to carry out certain works involving the construction of a bridge, now known as the James Joyce Bridge (formerly referred to as the Blackhall Place Bridge) in Dublin. This Agreement (the "Main Contract") which incorporated the various documents identified at paragraph 2 thereof, was based on the Institute of Engineers of Ireland ("IEI"), 3rd Ed. 1980 Contract, as revised and reprinted in October 1990, as amended by the parties. The engineer appointed for the purposes of the contract was Roughan and O'Donovan, Consulting Engineers ("the Engineer"). The bridge was designed by a Spanish firm, Santiago Calatrava Valllis ("the Designer"). As permitted under the Main Contract, the applicant entered into a sub-contract with Harland & Wolff Heavy Industries Limited (the "Subcontractor", "Harland & Wolff", or "H&W") for the steelwork fabrication involved in the erection of the bridge.

2. The contract work price was €6.3 million inclusive of VAT and the contract period was eleven months. Difficulties arose during the construction of these works; these led to the applicant ("Irishenco") seeking payment of an additional sum of €6,454,846.46 and to the actual works lasting for a period of 26 months. This claim, which was resisted by the City Council and rejected by the Engineer under Clause 66 of the Conditions of Contract, was referred to arbitration, with the second named respondent being appointed arbitrator. By an interim award dated 31st July, 2007, Mr. Higgins dismissed the applicant's claim: these proceedings arise out of that decision and also out of the arbitration process itself.

3. As expanded on in the grounding affidavit, the applicant, in its notice of motion dated 10th September, 2007, seeks to have the award set aside and the arbitrator removed on the following grounds:

- That he, the arbitrator, misconducted himself and the proceedings by failing to consider and adjudicate on, what the applicant describes as its "central submission" made during its closing argument, on the erroneous ground that this submission was an amendment to its case and therefore inadmissible;

- that he misconducted himself and the proceedings by failing to comply with an express assurance given by him to seek legal advice on the admissibility of this "central submission" and to give each party an opportunity of commenting on the advice so received;

- that he misconducted himself and the proceedings by failing to comply with an express assurance given by him to seek legal advice on the admissibility of this "central submission" and to give each party an opportunity of commenting on the advice so received;

- that he misconducted himself in the proceedings by relying on evidence not disclosed to the parties and by failing to inform the applicant of matters weighing against it, thus depriving it of a fair opportunity of responding thereto;

- that the arbitrator accepted "documentary hearsay evidence", which evidence was contradicted by oral evidence during the course of the arbitration process;

- that the said interim award is irrational, unreasonable and perverse;

• that the arbitrator exceeded his jurisdiction in answering certain questions in respect of which he had no jurisdiction to embark upon;

• that the facts give rise to the appearance of "partiality" on the part of an independent expert which the arbitrator heavily relied upon; and finally,

• that the arbitrator erred on the face of the award.

3. An essential component of the contract works involved certain structural steel connections without which the bridge, as designed, could not be constructed. In the fabrication of the "steel box girders", a particular form of connection known as a "cruciform joint" was specified. At meetings in June and September 2001, a Mr. Jim Shaw, the project manager appointed by H&W, remarked to one Andrew Mayoh, the structural steelworks Inspector acting on behalf of the Engineer, that the joint was going to be difficult. Apparently, work on the fabrication of the box girders started in early February 2002. However, by 13th of that month, problems had arisen with these joints, and despite a number of meetings between the parties, the difficulties encountered were not resolved. On 20th March, 2002, H&W stopped all work on the box girders and indicated, in a letter to Irishenco dated 21st March, 2002, that recommencement would only occur on the giving of an "instruction" by the Engineer. In the period that followed, the several meetings and discussions which took place failed to resolve these difficulties. It is claimed by the applicant that, in all, eight instructions were issued by or on behalf of the Engineer. Six of these were verbal and given between June 2001 and 23rd April, 2002. Nothing of significance turns on these instructions. However, on 8th May, 2002, Site Instruction 005 ("S.I. 005") issued. This instruction, which directed the applicant to carry out certain modifications to a particular box girder, stated on its face that it issued pursuant to clauses 51(1) and 51(2) of the "Conditions of Contract". Some two weeks later, on 23rd May 2002, Site Instruction 006 ("S.I. 006") was given by the Engineer. Once more, it directed the carrying out of certain modifications to the box girders, as identified, and stated that it superseded S.I. 005 and was being issued pursuant to Clause 13 of the said Conditions. Both of these instructions are central to the instant proceedings.

5. On 15th September, 2003, and 6th November, 2003, Irishenco sought a decision from the Engineer, under Clause 66 of the Conditions, on its submitted claims for the additional works carried out pursuant to these Site Instructions. By decisions dated 16th December, 2003, and 5th February, 2004, the Engineer rejected both claims. Being dissatisfied with these decisions, the applicant served two notices which had the effect of referring the disputed items to arbitration. On 22nd February, 2005, Mr. John Higgins was appointed Arbitrator by the President of the IEI. The arbitration was to be conducted in accordance with the Institute's Arbitration Procedure 2000. At all stages of the arbitration process, Mr Edward Quigg, an Engineer and Contract Consultant, appeared on behalf of the applicant with Mr. Phillip Lee, solicitor, representing the Council.

6. On 29th June, 2005, the parties attended a preliminary meeting with the Arbitrator following which he issued an Order for Directions dated 19th July, 2005. In this order, which I must return to for the purpose of deciding what has been described as the "preliminary point", directions were given with regard to the exchange of pleading, witness statements, experts' reports, disclosure of documents, etc. As a result, a very detailed Statement of Case was served on 5th August, 2005, particulars thereon were raised and replied to, a defence and counterclaim running to 69 pages was delivered, and a reply to this was served; which reply, itself, required further particulars. Comprehensive witness statements and reports were exchanged and full disclosure made. The experts from both sides met at least four times in the United Kingdom to discuss their differences. Before the commencement of the arbitration hearing, the parties exchanged written documents containing their opening statements. The hearing was conducted over four days of long duration, ending on 19th April, 2007. Oral submissions were deferred until 16th May, 2007, and thereafter, further correspondence was engaged in by the parties and submitted to the Arbitrator. The interim award issued on 31st July, 2007.

Conditions of contract

7. Clauses 13, 51 and 52 of the conditions of contract read as follows:

"13.(1) Save insofar as it is legally or physically impossible, the Contractor shall construct, complete and maintain the Works in strict accordance with the Contract to the satisfaction of the Engineer and shall comply with and adhere strictly to the Engineer's instructions on any matter connected therewith (whether mentioned in the Contract or not). The Contractor shall take instructions only from the Engineer or (subject to the limitations referred to in Clause 2) from the Engineer's representative. Any instruction of the Engineer which is the subject of a subsequent claim under sub-clause (3) of this Clause, shall be either an instruction in writing or an oral instruction subsequently confirmed in writing. If, within twenty working days, the Contractor shall confirm in writing to the Engineer any oral instruction, and such confirmation shall not be amended or contradicted in writing by the Engineer within a further period of five working days from receipt of the Contractor's confirmation, it shall be deemed to be an instruction in writing by the Engineer.

(2) . . .

(3) If, in pursuance of Clause 5 or sub-clause (1) of this Clause, the Engineer shall issue instructions (excluding those to remedy breach of contract by the Contractor) which involved the Contractor in delay or disrupt his arrangements or methods of construction so as to cause him to incur cost beyond that reasonably to have been foreseen by an experienced contractor at the time of tender, then the Engineer shall take such delay into account in determining any extension of time to which the Contractor is entitled under Clause 44 and the Contractor shall, subject to Clause 52(4), be paid in accordance with Clause 60, the amount of such a cost as may be reasonable. If such instructions require any variation to any part of the Works, the same shall be deemed to have been given pursuant to Clause 51." (Emphasis added)

"51(1) The Engineer shall order any variation to any part of the Works that may, in his opinion, be necessary for the completion of the Works and shall have power to order any variation that for any other reason shall, in his opinion, be desirable for the satisfactory completion and functioning of the Works. Such variations may include additions, omissions, substitutions, alterations, changes in quality, form, character kind, position, dimension, level or line and

changes in the specified sequence method or timing of construction (if any).

(2) . . .

(3) . . ."

"52(1) The value of all variations ordered by the Engineer in accordance with Clause 51 shall be ascertained by the Engineer after consultation with the Contractor in accordance with the following principles. Where work is of similar character and executed under similar conditions to work priced and the Bill of Quantities, it shall be valued at such rates and prices contained therein as may be applicable. Where work is not of a similar character or is not executed under similar conditions, the rates and prices in the Bill of Quantities shall be used as the basis for valuation so far as may be reasonable, failing which, a fair valuation shall be made. Failing agreement between the Engineer and the Contractor as to any rate or price to be applied in the valuation of any variation, the Engineer shall determine the rate or price in accordance with the foregoing principles and he shall notify the Contractor accordingly.

(2) . . .

(3) The Engineer may, if, in his opinion, it is necessary or desirable, order in writing that any additional or substituted work shall be executed on a daywork basis. The Contractor shall then be paid for such work under the conditions set out in the Daywork Schedule included in the Bill of Quantities and at the rates and prices affixed thereto by him in his Tender, and failing the provision of a Daywork Schedule he shall be paid at the rates and prices and under the conditions contained in the "Schedules of Dayworks carried out incidental to Contract Work" issued by the Federation of Civil Engineering Contractors current at the date of the execution of the Daywork.

(4) . . ."

8. Clause 66, although referred to at paragraph 2 supra., does not require to be quoted. It is sufficient to note that under this Clause, a contractor can request a decision from the Engineer on any dispute between it and the employer, and if dissatisfied with the result, either party can refer the matter to arbitration. This is the procedure which was followed in the instant case.

9. A few specific points should be noted about Clauses 13 and 51:

(a) A Contractor must complete the works in accordance with the Contract unless it is legally or physically impossible to do so (13(1)).

(b) A Contractor must comply with any "instruction" given to him by the Engineer (13(1)).

(c) An "instruction", other than one given to remedy a breach of contract by the Contractor, may entitle him, in certain circumstances, to compensation for executing it (13(3)).

(d) If any such "instruction" requires a variation to any part of the works (a "variation"), the same is deemed to have been given under Clause 51 (13(3), and finally,

(e) Clause 51 does not contain the exception referred to at subparagraph (c): meaning that a variation, even if issued to remedy a breach of contract, must be paid for.

Order for Directions - 19th July, 2005

10. Prior to deciding on what has loosely been described as the "preliminary point", I should first deal with a closely related issue which arises out of the Arbitrator's order for directions dated 19th July, 2005 (O.F.D.) and, in particular, paragraph 2.10 thereof. This order, according to paragraph 2.0, was "given orally at this Preliminary Meeting [on 29th June 2005) by consent of the parties . . ." and thus appears to represent a consensual position. The paragraph in dispute reads:

"2.10 Any award rendered in this Arbitration shall be a reasoned Award. However, the reasons as set out will not form part of the Award and may not be used or referred to in any way in any application to the Courts to have the Award set aside or referred back." (Emphasis added)

It is the applicants' case that it agreed with the City Council "that the Award would be reasoned" and nothing else. On the other hand, the Council's position would "appear" to suggest that paragraph 2.10 accurately represents the agreement of both parties, although this position is anything but clear from the affidavit evidence sworn in its behalf.

11. According to Mr. Quigg's recollection, he produced a "draft order for directions" which was used as an agenda for discussions with Mr. Lee which took place immediately prior to both meeting the Arbitrator on 29th June, 2005. He said that even after Mr. Lee had hand-marked a copy of the draft so as to reflect their discussions, the agreed and only position was that any award would be reasoned. No qualification to this was either discussed or suggested. He goes on to say that after meeting the Arbitrator, Mr. Lee produced a typed version of the "Draft Order" (on 1st July, 2005) in which he unilaterally added the following words:

"The parties acknowledge that the arbitrator shall have the discretion as to whether such reasons form part of the Award or are provided in a separate document not forming part of the Award, as set out in Clause 2.4 of the IEI Guidance Notes in Arbitration 2000."

This was never agreed, but even if it was, Mr. Quigg still argues that the OFD fails to reflect even that view.

12. Mr. Lee disputes this version and says that paragraph 2.10 of the OFD "accurately recorded the agreement of the parties in relation to the Award". In his affidavit, he agrees that Mr. Quigg's "Draft Order" was discussed between them before meeting the Arbitrator on 29th June, 2005. As a result, agreement was reached that "any Award rendered in this arbitration shall be reasoned". On this basis, the parties duly met with the Arbitrator, but during the course of the meeting, Mr. Higgins drew attention to s. 2.4 of the Institute's Guidance Notes which, *inter alia,* says that:

> ". . . the arbitrator shall have a discretion as to whether such reasons form part of the Award or are provided in a separate document not forming part of the Award."

Following some discussion, Mr. Lee recalls the Arbitrator confirming his intention to set out reasons in a separate document and that such reasons would not form part of the award. This clear recollection of his was confirmed in the updated version of the "Draft Order" which he sent to Mr. Quigg on 1st July, 2005. Although Mr. Quigg rejoined on the document and suggested amendments to parts of it, he made no comment or observation on this particular section. Accordingly, for these two reasons, Mr. Lee argues that the applicant cannot now question the actual order, as made.

13. On this issue, it is my belief that the only express agreement truly reached between the parties was that the award should be reasoned. This occurred in the discussions immediately had prior to meeting the Arbitrator on 29th June, 2005; I do not see the City Council as seriously challenging that agreement. Secondly, I accept, as a matter of probability, that the Arbitrator drew the parties' attention to s. 2.4 of the Guidance Notes and that following discussion, he indicated an intention to set out his reasons in a separate document; such reasons not to form part of the award. Thirdly, this position is not accurately reflected in paragraph 2.10 of the OFD in that, firstly, there is no reference to a separate document and, secondly, a *proviso* is added to the effect that such reasons may not be used or referred to in any application to have the award set aside or remitted. This view of what occurred is not entirely inconsistent with the draft OFD sent by Mr. Lee to Mr. Quigg wherein the discretion of the Arbitrator is simply acknowledged. The draft, of course, does not reflect the Arbitrator's decision on that discretion, nor does it make an reference to the *proviso* herein mentioned. Fourthly, Mr. Quigg did not demur or otherwise challenge Mr. Lee's document in this regard, although he did apparently suggest amendments to other parts of it. Fifthly, however, and in my view, decisively, the parties, without objection or even discussion, expressly incorporated paragraph 2.10 of the OFD in the Form of Agreement signed by them on 27th April, 2006: accordingly, they must be taken to have accepted the Arbitrator's decision in this regard, albeit a decision not insisted upon by either of them. Finally, and also of some significance, is the fact that the Arbitrator's decision was, for the most part, an exercise by him of the general discretion afforded by r. 20.1 of the Arbitration Rules and by s. 2.4 of the Guidance Notes.

14. Consequently, I feel that this part of the Order for Directions is binding on the parties, although for the reasons next given, I do not believe that anything of real significance turns on it.

Preliminary point

15. The applicant argues that when evaluating the Arbitrator's findings, this court should also look at the reasons which led to such findings. It bases this claim on what it says is the true agreement of the parties (paragraph 10 *supra.*) and also on the fact that the findings and reasons in the award are, in effect, indistinguishable. Moreover, it submits that even if paragraph 2.10 of OFD is accurate, the same constitutes an "ouster" of the court's jurisdiction and therefore, as a matter of public policy, is void. In support of this submission, it refers to the decision of Laffoy J. in *Uniform Construction Limited v. Cappawhite Contractors Limited* [2007] IEHC 295. In response, the City Council, relying upon the precise wording of paragraph 2.10, submits that the reasons for the award, which, in its view, are clearly separate to the findings, cannot be looked at, considered or otherwise used by this court. In addition, it is claimed that the parties are contractually prohibited from referring to them in the present or any legal proceedings which arise or might arise out of the arbitral process.

16. The Council, in its written submissions on this point, refers to a passage from Bernstein & Wood *'Handbook of Arbitration Practice'* (1993) at p. 388. However, it is quite clear that the section quoted is discussing circumstances where a reasoned award is not requested and, therefore, the authors' view, however insightful, can have no bearing on the present case.

17. With regard to the *Cappawhite* decision, the Council seeks to distinguish that case from the present one by pointing out that the relevant clause to parallel paragraph 2.10 of the OFD is differently worded. In the former case, it read:

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

It is said that this direction, which, incidentally, contains the precise wording of r. 20.1 of the IEI's Arbitration Procedure 2000, is tentative and discretionary when contrasted with the definitive and authoritative wording of paragraph 2.10 of the OFD. Moreover, reference is made to the decision of Moore-Bick J. in *Thames Shipping Limited v. A.T. Navigation Limited* [2004] 1 Lloyd's Rep. 626 at p. 634, where the Judge stated that if, with the agreement of the parties, the Arbitrator publishes his reasons in a separate document containing a prohibition against their use in any court proceedings, then the parties are so bound by that restriction. Notwithstanding these submissions, however, the Council does accept that the court is not entirely precluded from considering the reasons, even in these circumstances. However, it should only do so if there is no other method by which a claimant can make its case.

18. In *Czarnikow & Company Limited v. Roth, Schmidt & Company* [1922] ALL E.R. 45, the parties had entered into a contract for the sale and purchase of a quantity of sugar (f.o.b. Antwerp), which contract, by express incorporation, included the Rules of the Refined Sugar Association. Rule 19 prohibited the parties from requiring the Arbitrator to state its

award in the form of a special case and from applying to the court to require it to do so. The buyers, however, being dissatisfied, asked the Arbitration Tribunal to do one of a number of things, all designed to have the award framed in the form of a special case. The Tribunal, believing that it was bound by the rule in question, declined. In the subsequent proceedings, the Court of Appeal, consisting of Bankes, Scrutton and Atkins L.J.J., gave judgment in favour of the applicant. All three Judges agreed that the rule had the effect of preventing the court from applying the provisions of the Arbitration Act 1889, and accordingly, was invalid as violating public policy. Whilst it can be argued that the applicable rule in Czarnikow is different from its counterpart in the present action, nevertheless, both, when applied, lead to precisely the same result: that is, an ousting of the court's jurisdiction. This case, therefore, is a clear authority for the court's disapproval of any mechanism which leads to such a result.

19. This issue, but not specifically comparable to the instant one, again arose in *Mutual Shipping Corporation v. Bayshore Shipping Company Limited* [1985] 1 W.L.R. 625. In that case, the Arbitrator determined that a certain sum was owing by the charterers to the owners of the M.V. "The Montan", and reflecting that decision, made consequential orders as to interest and costs. He was not required to give reasons, but in accordance with the established practice of the London Maritime Arbitrators, he did so. The reasons in question were published in a separate document expressly marked "not (to have been) issued contemporaneously with or forming part of or to be used in any way in conjunction with . . . the Award". That document revealed that the Arbitrator had made a mistake in that he had awarded damages to the owners instead of the charterers. As part of their application to have the award remitted, the charterers sought to rely upon the document containing the reasons therefore. In the Court of Appeal, Sir John Donaldson M.R., at p. 631 *ibid*, said:

> *"I agree with Hobhouse J. that, where restricted reasons are given and accepted by the parties, the parties must be deemed to have agreed that the reasons cannot be placed before the court. Such an agreement purports to oust the jurisdiction of the court and is void as being contrary to public policy: Czarnikow v. Roth, Schmidt and Co. [1922] 2 K.B. 478. Were it otherwise, the court would be powerless in the face of misconduct or even fraud revealed by the restricted reasons. We can, therefore, look at the arbitrator's reasons, although I hasten to add that no question of misconduct, and still less, of fraud, arises or has ever been suggested."*

From that and other passages in his judgment, the views of the Master of the Rolls can be summarised as follows:

> (a) That where contractually the parties have agreed that the arbitrator should give reasons but subject to restrictions, those restrictions are binding on the parties;
>
> (b) that where such restrictions prevent the court from considering or relying upon the reasons, the agreement in that respect is void as being against public policy;
>
> (c) that, notwithstanding this invalidity, however, there are some circumstances in which "restricted" reasons can be considered, but these are confined and limited: this to reflect the supreme importance of having and maintaining finality in the award;
>
> (d) that an evaluation of reasons is never appropriate simply to allow the Arbitrator to change his mind or alter the result, and
>
> (e) that such reasons can, however, be considered in an application made under sections 22 or 23 of the English Arbitration Act 1950 (being the equivalent of sections 38 and 36 of the Arbitration Act 1954), and where the justice of the application demands that they be so referred to.

20. Whilst Goff L.J. approached the issue in a different manner, the third judgment, being that of Sir Roger Ormrod, supported the summary given above. He said:

> *"Whichever way of looking at this problem is correct, it is clear, to my mind, that the parties themselves cannot blindfold the court; only the court itself can do that and in the vast majority of cases, it will do so. But in those rare cases where an error occurs of the kind which we are considering in this case, the court cannot decline to interfere without gravely prejudicing, in the eyes of the lay world, the machinery of justice." (ibid. p. 641)*

21. This case should not, however, be departed from without indicating how the mistake occurred. Having heard expert evidence from both sides, the Arbitrator. Mr. Clifford Clarke, described by Sir John Donaldson M.R. as "the doyen of the London Maritime Arbitrators", directed the charterers to pay to the owners US$62,402.30 with costs. Unfortunately, however, he transposed the parties for whom this export was appearing. Instead of the award so made, he should have ordered the owners to pay to the charterers US$27,527.87, and if he had, it was most likely that the consequential orders for interest and costs would have been different. As Sir John Donaldson M.R. said, "Homer has nodded": indeed, he had.

22. The developing situation on this issue was not quite as straightforward as the previous view might indicate. The trial Judge in The Montan dealt with the case on the same basis as Goff L.J. did in the Court of Appeal. That was by referring to a letter, written *post*-award, by the Arbitrator, from which his reasons could be detected, it being one which was not marked or otherwise deemed confidential. And so, in such circumstances, there was no reason to look at the restricted document. Indeed, if that had not been the situation, the applicant would undoubtedly have lost in the High Court, as during the course of his judgment, Hobhouse J. ([1984] 1 Lloyd's Rep. 389) expressed a very definite view on the court's use of such a document. At p. 394 *ibid*, he said:

> *"If I was of the opinion that the charterers' case before me depended on their referring me to the arbitrator's reasons, I would have peremptorily dismissed the motion."*

Therefore, whilst the judgment of the Court of Appeal clearly prevailed, judicial thinking was not entirely comfortable on the point.

23. This discomfort may perhaps be explained, at least in part, by the fact that the Arbitration Act 1979, significantly

changed the statutory landscape in England, as it had existed up to then. No longer did the court have power to remit awards where an error of fact or law appeared ex facie. Instead, a limited right of appeal was given on questions of law. Further amendments followed in the Arbitration Act 1996, with the result that under s. 68 thereof, the courts can interfere only where there are serious irregularities which cause significant injustice. The decision of Moore-Bick J. in *Thames Shipping Limited v. Easy Navigation Limited* [2004] 2 Lloyd's Rep. 626 ("*The Easy Rider*") was the first, apparently, since the passing of that Act.

24. That case had a similar problem to the generality of the difficulty presently in discussion. The award was simply a determination of the Arbitrator's final position, with the reasons contained in a separate document which had as its heading the following stricture:

> *"These reasons are issued subsequently to and separately from the Award and do not form part of the Award. They are given for the information of the parties only and on the understanding that no use whatsoever is made of them on or in connection with any proceedings on or related to the Award."*

The trial judge reviewed a number of authorities including *The Montan* and the Atlantic Lines and Navigation Company Inc., the Italmare S.p.A. ("the Apollon") [1985] 1 Lloyd's Rep. 597, where the court held that it could consider such restrictive reasons when deciding on the existence or absence of fraud or misconduct: see the conclusions at paras. 25 to 28 of the judgment. Whilst acknowledging that any express agreement was binding on the parties, Moore-Bick J. felt, having reviewed the case law, that whatever serious irregularity was suggested which might cause substantial injustice, the court, unless the evidence was otherwise available, had no option but to consider the restricted document so as to verify or reject a section 68 application.

25. There is one Irish authority on the point and that is *Uniform Construction Limited v. Cappawhite Contractors Limited* [2007] IEHC 295. In that case, r. 20.1 of the IEI Arbitration Procedure 2000, which applied to the contract, provided that the Arbitrator should not give reasons for the award unless he was requested by at least one of the parties to do so (see paragraph 17 *supra.* for the full rule). Alleging that no such request was made, the defendant sought to have the furnished reasons excluded from consideration. Laffoy J., having looked at the authorities and proceeding on the assumption that the rule had, in fact, been breached, set out her views at p. 6 of the judgment. She said:

> *"In circumstances where an arbitrator, although precluded by the agreement of the parties inter se and with the arbitrator from so doing, gives reasons for his Award, in my view, it is apt to draw the distinction which was drawn by Donaldson M.R. in The Montan between whether the reasons should be looked at and whether they can be used to interfere with the award. Unless the court looks at the reasons, it cannot make a determination as to whether reliance on them would form a proper basis for interfering with the award in the interest of justice. In this jurisdiction, where the reasons are still relevant because of the court's jurisdiction to interfere where there is an error on the face of the award, the purposes for which the reasons can be used must include determining whether the test posited in Keenan v. Shield Insurance Company Limited, that an error of law so fundamental that the court cannot stand aside and allow it to remain unchallenged is disclosed, is satisfied."*

26. From the above authorities, it seems to me that the following propositions emerge:

> (a) That where the parties and the Arbitrator have agreed that there should be a reasoned award, but that such reasons shall issue separately and/or shall not form part of the award and/or shall not be available in any challenge to the award, the agreement, insofar as it ousts the jurisdiction of the court, is void as being against public policy;
>
> (b) that notwithstanding this invalidity, such an agreement contractually binds the parties to it;
>
> (c) the rationale for this reflects the private interest of party autonomy and the public interest in the finality of arbitral awards, as well as allowing arbitrators to express their views without undermining these principles;
>
> (d) that notwithstanding the supreme importance of both of these interests, and despite the invalidity spoken of, where ss. 36, 37 and 38 of the Arbitration Act 1954, or their equivalent are invoked, the court, as part of its enquiry, may consider the reasons given for the award. The rationale for this is based on the public interest of the court being able to meaningfully exercise its role within the arbitral process so that a serious injustice will not go without remedy;
>
> (e) that where the Arbitrator, even in breach of agreement, publishes reasons for this award, those reasons are available for the same purpose and can be used in the same way as if the publication of such reasons did not breach party agreement;
>
> (f) that where such reasons are legally ascertainable from sources external to the "restricted" or "confidential" document, or where reliance upon such reasons is not necessary, desirable or relevant, the courts will normally give precedence to the parties' expressed position and will decline to prioritise the public interest in forcing disclosure;
>
> (g) that having considered such reasons, the courts will only apply or use them if the impugned conduct is so fundamental as to create a serious injustice; that is, to implement the tests set out in Keenan and McStay (para. 58 *infra*.). The conduct referred to is not confined to fraud or criminal misbehaviour but can cover any activity, provided such activity, if left unchallenged, would create the type of injustice spoken of.

27. It therefore seems to me that in applying these principles, this court, when conducting its supervisory role, is entitled to consider the reasons given by the arbitrator for his award; this applies even if the parties have agreed otherwise. Accordingly, in this case, the entirety of the interim award, as published, is available for consideration.

28. Indeed, I should add that even if this line of authority had not been established, I would, nevertheless, have been strongly minded to look at the full award for two reasons. Firstly, the Arbitrator did not, as he said he would, publish his reasons in a document separate from the award itself, and secondly, whilst it might be conceivably possible to separate

the reasons from the findings, it seems to me that given their juxtaposition, the same are, in reality, indistinguishable. Accordingly, I propose to consider the full document.

29. Before leaving this issue, there is one further important point: the affidavit sworn by the Arbitrator in these proceedings. It seems to me that this document can also be taken into account in conjunction with the award although great care must be exercised so as not to permit the Arbitrator, via this means, to express views, conclusions, or reasoning which differ from those reasonably deducible from the award itself. There must be no incompatibility, inconsistency or challenge to the award. There is no room for second-guessing or mind change. He cannot discredit or impeach the award. Subject to such safeguards, however, I see no reason, in principle, why this type of evidence cannot be looked at. Indeed, it is interesting to note that in *The Montan* (para. 22 *supra.*), the non-confidential letter containing the Arbitrator's reasons was resorted to without comment.

30. In a similar, though not identical context, Devlin J., in *Kiril Mischeff Limited v. Constant Smith & Company* [1950] 2 K.B. 616, said much the same where at p. 620, he states:

> *"[I]n considering whether the award contains and error of law, I am not limited to the award and the contract but . . . can look at certain other documents set out in an affidavit and consisting of correspondence between the parties leading up to the reference. It is clear that such documents could not be looked at in order to impeach the award, or to see if any erroneous conclusion of law was reached by the arbitrators. But the position may be different when documents are looked at in order to assist the award. The authorities do not seem to decide the point one way or another. In Russell on Arbitration (14th Ed.) p. 187, there is a reference to the only case. In re. Marshall and Dresser (1842) 3 Q.B. 878, raising the question of an affidavit, and it is inconclusive . . ."*

He continues at p. 621:

> *"It is unnecessary for me to decide whether I can look at these documents for the purpose of construing some provision in the award or of resolving some ambiguity in it. What I am quite clear about is that I cannot . . . extract something from them and insert it as a term into the award. The court has no power to do that."*

I would respectfully concur with this view. Great caution must therefore be exercised as to what use any extraneous document, including, but in particular, an affidavit, which purports to "clarify" an award or the reasoning therefore, can be put to. All too easily, any frailty in the award could be rationalised in retrospect by non-contemporaneous affidavit, procured, perhaps, as the result of threatened or ongoing litigation. A critical approach to such material must therefore always be undertaken.

31. Subject to this stricture, however, it must be acknowledged that from time to time, but sparingly, it may be useful for the court to have an affidavit sworn by the Arbitrator: such may clarify any ambiguity as to the circumstances that surrounded the arbitration; such may allow the Arbitrator to concede or refute any alleged error on the face of the award, and such may allow him to respond to any alleged misconduct, fraud or other impropriety put forth by the parties: (*Societé Franco-Tunisienne d'Armement-Tunis v. Government of Ceylon* [1959] 3 ALL ER 25, [1959] 1 WLR. 787 [1959], 2 Lloyd's Rep. 1; *Annie Fox & Ors. v. P.G. Wellfair Ltd.* [1981] 2 Lloyd's Rep. 214; *Atlantic Lines and Navigation Co. Inc. v. Italmare Spa*. [1985] 1 Lloyd's Rep. 597 considered).

The award

32. The award, which is headed 'Interim Award', in all contains 66 paragraphs with no subheadings, divisions or obvious separation. Paragraphs 1-12 and paragraph 14 deals with what documents constitute the main contract, the existence of the sub-contract, the identity of the engineer and designer, and records some relevant history, ending with the submission on 16th May, 2007. Paragraph 13.1 of the award sets out the fundamental, and indeed, the core, if not the only, question, on the issue of liability. Referring to the contractor as "Mowlem", it reads:

> "13.1 Is Mowlem entitled to an additional payment from DCC for the costs incurred in the fabrication of the structural steel framework for the box girders incorporated in the James Joyce Bridge?"

It should be noted that the applicant nominated H&W as its sub-contractor and as a result, both can be treated as one for the purpose of this dispute and these proceedings.

33. Whilst it is not required to recite the entirety of the award, it is, however, necessary to outline certain conclusions made by Mr. Higgins and the context in which the same were arrived at. This exercise can commence with the following:

1. The design responsibility for the structural steel connections and their satisfactory execution was at all times that of the main contractor, unless the welds were impossible to carry out (clause 13). All experts agreed that whilst these welds were difficult, they were achievable with skilled employees working to the required standards and by using proper equipment with appropriate supervision. Therefore, the contractor was obliged to both design and execute the welds (as per the drawings).

2. In both June and September 2001, Mr. Jim Shaw (Project Manager, H&W), who had told Mr. Andrew Mayoh (engineer's steelwork Inspector) that "these joints" were going to be difficult, was advised that he should bring any concerns in this regard to the written attention of the engineer. Apparently, he did not do so. At the September meeting, Mr. Shaw was informed that the designer (Calatrava) had advised that the weld should be done as per the drawings.

3. There was no record of any difficulties involving these joints between September 2001 and February 2002. On 15th February, 2002, the subcontractor confirmed that the fabrication of the box girders would be completed by the end of that month.

4. Some time in mid-February, difficulties arose with these welds. These continued into March, and an alternative weld,

one not ordered by the engineer, did not work. A procedure using greater pre-heat and slower cooling down (although costly) seemed promising, but was too readily abandoned by H&W, thereby "raising questions" in the Arbitrator's mind. On 19th March, 2002, the subcontractor warned that it would stop work until the engineer revised the design and, in fact, did so as and from 7.30am on 20th March. Later, it confirmed that it would not resume work without a variation order from the engineer. The engineer did not order this work stoppage. By 26th March, 2002, 50% of the welds tested were showing signs of cracking/tearing, but the full extent of this problem could not be determined because of the work stoppage.

34. The circumstances last mentioned led the Arbitrator, at para. 26 of the award, to state, "it is clear that at this stage [26th/27th March], the project as a whole was in a state of crisis" and in the face of "such intransigence" (from the subcontractor), the engineer had to engage with Calatrava so as to seek some solution to this impasse. On 15th April, 2002, H&W confirmed that all work had stopped on the project.

35. Meetings between representatives of all parties continued. On 24th April, 2002, a possible solution (Solution A), suggested by Mr. Mayoh, was sent to H&W for its consideration. The latter rejected this proposal, although, apparently, at an earlier meeting, had accepted it. On 29th April, 2002, the applicant warned that it was taking steps "to demobilise plant and equipment from the site". Communications continued between the parties and while certain steps were taken and orders given, the Arbitrator held that no instruction issued from the engineer in respect of any work prior to 8th May, 2002.

36. Following a further meeting in Belfast on 2nd May, 2002, also attended by representatives from Calatrava, H&W set out, on 3rd May, a detailed method statement for the revised fabrication of the box girders. Enclosing a copy of this statement, the applicant wrote to the engineer on the same day, "demanding an instruction from you to proceed on this matter". Eventually, this method, which, incidentally, was essentially the same as Solution A (which previously has been rejected by H&W), formed the basis for S.I. 005 and S.I. 006.

37. On 7th May, 2002, H&W "required the instruction" to recommence and continue with the work. On 8th May, 2002, S.I. 005 issued, which, in the Arbitrator's view, was almost "a word for word transcription of Harland and Wolff's method statement of 3rd May". It related only to a section of the assembly and did not involve any skilled, extensive or complex work. It was stated that the works would be paid for on a daywork basis.

38. S.I. 006 issued on 23rd May, 2002, and covered the remainder of the box girder and not simply that section referred to in S.I. 005.

39. Having noted the letter from Calatrava to Dublin City Council dated 31st May, 2002, the Arbitrator concluded that the fabrication work had not been performed in accordance with the engineer's instructions or the drawings. That raised for him questions about the skill and care taken by the steel fabricator. Eventually, all the box girders were delivered.

40. Having referred to the clause 66 claims, the Arbitrator then summarised the engineer's decisions thereon, as being: that the applicant was responsible for all the problems which arose during the fabrication of the box girders, that S.I. 006 was issued to remedy breaches of contract, and that the claims for additional payments were not valid claims.

41. In light of the experts' evidence, including that of Calatrava, to the effect that the welds, whilst difficult, could be achieved, the arbitrator asked how could H&W, the fabricator expert of structural steel, not perform these welds? Drawing on the evidence from Mr. John Evans of Flint & Neill Partnership, an independent expert, the Arbitrator agreed with him on what the real causes of the tearing problems were. These did not result from any design fault, but were caused by a "poor choice of build strategy, lack of proper instruction and training of welders, the inappropriate choice of weld procedure and lack of control of the welding itself". Mr. Evans also said, "as is normally the prerogative of the fabricator, it could be said that the design was varied but the fabricator chose his own design, ostensibly fully aware of the implications within the overall sequencing of the works". (Emphasis added).

42. On this evidence, the Arbitrator makes the very important point that, in his view, "the fabricator altered the designer's design of this joint to suit his own firm's welding practices and procedures and that he therefore has full responsibility for carrying out the weld successfully" (paragraph 55). He then concluded that both applicant, and its subcontractor, H&W, were in breach of contract from 7th February, 2002, until 8th May, 2002, when S.I. 005 issued, with the reasons therefor being that they failed to provide appropriate skill and diligence in the execution of the works and failed to have in place proper quality control measures to ensure that the work was done in accordance with the required standards. This breach, according to Mr. Higgins, was compounded "by their unilateral ceasing of all work on the box girders on 20th March, without the written approval of the engineer, and by their demobilising of plant and equipment without the approval of the engineer".

43. Based on these events, the arbitrator, at paragraph 58, said, "I find that S.I. 005 and S.I. 006 were both issued under duress and that payment for the fabrication of the steel boxes should be made once and once only. No further monies were due in this regard". (Emphasis added). He found, at para. 59 of the award, that an extension of time was not justified and also found that Dublin City Council was not entitled to any compensation arising out of the delays.

44. At para. 62, he stated, "I will disallow the amendment to the claimant's case as outlined at para. 11(a) of its closing submission and I deem the submissions and authorities put forward in support of the amended case inadmissible." (Emphasis added) (paragraphs 47-49 *infra.*).

45. Finally, he directed that the applicant should bear all the costs relating to the arbitration and he also specified a rate of interest in that regard.

Principal issue

46. As appears from para. 3 (*supra*: first indent), the applicant's first and most important complaint arises out of the manner in which the Arbitrator dealt with a submission made to him by Mr. Philip Lee on 16th May, 2007. The point at issue arises in this way. At the outset of the arbitration hearing, which commenced on 16th April, 2007, and after a short verbal presentation by Mr. Quigg in which he said that he would deal with the legal and contractual issues in his closing, it

was agreed that the City Council would not make an opening statement (as it did not wish to), that at the conclusion of the evidence Mr. Lee would make the first closing submission in which he would deal with all factual and legal matters, that Mr. Quigg would follow in which, likewise, he would deal with such matters, and that a decision would then be taken as to whether any further submissions could thereafter usefully be made. So, in terms of dealing with the contractual issues, the sequence was clear. Mr. Lee would go first, followed by Mr. Quigg. Indeed, this is precisely what happened, save that Mr. Lee was also permitted, rightly so, to reply to the applicant's closing submission.

47. At the commencement of his submission, Mr. Quigg stated that the main issue was whether S.I. 005 and S.I. 006, which involved the fabrication of the structural steelworks to the box girders, were variations which had issued under clause 51 of the conditions ("clause 51 variations"): if they were, they accordingly fell to be valued under clause 52 and paid for under clause 60 thereof. If such "instructions" were "variations", then without more, the contractor was entitled to be paid: this applied, even if they were issued to remedy a breach of contract, because the exclusion in this regard, although contained in clause 13(3) was not carried forward to clause 51 of the condition (paras. 7 and 9 supra.). He continued by pointing out that since the site instructions were variations, clause 13(3) directed one's attention to clause 51 which was the contractual provision under which his client claimed. That being the case, the question of breach of contract (denied, in any event), was not relevant. He supported this view of the legal position by reference to Abrahamson, '*Engineering Law and the I.C.E. Contracts* (4th Ed.)'(2003), and Hudson '*Building and Engineering Contracts* (11th Ed.)' (1995), both authors of textbooks on this subject. Moreover, reliance was also placed on the case of *Simplex Complex Piles Limited v. The Mayor, Alderman and Councillors of the Metropolitan Borough of St. Pancreas'* (1958) 14 B.L.R. 8, in which the court held, as put by Mr. Quigg, that:

> "Even where the variations issued to help the contractor overcome that breach, he was entitled to be paid for it."

In essence, once there is a clause 51 variation, a contractor gets paid. That was Mr. Quigg's principal submission on this point, a point which he also made at paragraph 11(a) of his closing skeleton argument. Having dealt with other issues, the applicant's submissions then concluded.

48. In his reply, Mr. Lee suggested that the applicant had gone "very very significantly beyond" what a reply to a closing should be. He said that Mr. Quigg had changed "the structure of his case and introduced a fundamentally different approach to the case [as pleaded] . . ." He developed this by alleging that the applicant was claiming for the first time in its closing that S.I. 005 and S.I. 006 were issued under clause 51 of the conditions and not, as had previously been the position, under clause 13.

49. The Arbitrator's initial decision, to afford Mr. Quigg an opportunity of dealing with Mr. Lee's reply, was objected to by the latter. On that objection, the Arbitrator said:

> "I am going to take my own legal advice on these matters that have been raised today. I am going to stop the hearing now because so far as I am concerned the hearing is closed and I will uphold your objection and I will not allow Mr. Quigg to come back on that issue. I will, however, seek my own advice as to how I should deal with it."

It is clear that the object of this ruling was Mr. Lee's opposition to what he termed the "fundamental change" in the presentation of the case. In further exchanges before concluding, the Arbitrator agreed that he would send to the parties any legal advice which he received and would permit them an opportunity of commenting thereon. Without so doing, however (in fact, as events show, he did not seek any such advice), the Arbitrator published his award on 31st July, 2007.

50. As we know, there are two Site Instructions involved. Although S.I. 005 was stated to have issued under clause 51 and S.I. 006 under clause 13, no distinction of significance has been made between them as to the ultimate relief sought in these proceedings. Nor has any point been made that part of the financial claim related to works carried out prior to the issuing of S.I. 005. Accordingly, I may refer from time to time to both Instructions as one.

51. By reference to the pleadings, it is claimed by the applicant, that at all times it was part of its case that S.I. 005 and S.I. 0006 were, in fact, variations which issued, either under clause 13 or under clause 51 of the conditions. Therefore, it was a fundamental mistake to have described Mr. Quigg's submission as constituting an "amendment or alteration" to the claim. Accordingly, the Arbitrator misconducted himself when, at paragraph 62 of the award, he said:

> "I will disallow the amendment to the claimant's case as outlined in para. 11(a) of its closing submission and I deem the submission and authorities put forward in support of the amended case inadmissible." (Emphasis added)

In essence, although clearly within the pleadings, the Arbitrator made his award without giving any or any proper consideration to, or otherwise adjudicating on, this central and core submission. In the same context, he acted contrary to natural justice in preventing Mr. Quigg from responding to Mr. Lee's objection: who, if given the chance, would have shown the complaint to be erroneous. In those circumstances, this court, by applying the principles of law hereinafter set forth, should set aside the award and remove the Arbitrator.

52. In response, the City Council asserts that, as understood, the applicant's case was that the additional works were carried out under an instruction issued pursuant to clause 13 and that "this opened up [the applicant's] right to additional payment under clauses 51 and 52". To place reliance, however, on either of these clauses, the applicant would firstly have to overcome the defence that such instructions were issued to remedy a breach of contract. The viewpoint of the applicant's case has been described by the Council as the "deemed variation case". At no stage was the "variation simpliciter" case made, which was that S.I. 005 and S.I. 006 issued directly under clause 51. In support of this submission, reference is made to the Arbitrator's decision disallowing the amendment, to Mustill and Boyd '*Commercial Arbitration'* (1982) at p. 266, and to the authority relied upon for the proposition therein claimed. (*Yamashita Shinnihon Steam Ship Co. Ltd. v. Elios SPA the Lily Prima* [1976] 2 Lloyd's Rep. 487).

53. In addition, and/or in the alternative, it is also alleged that the Arbitrator did, in fact, consider the "variation *simpliciter*" argument, and having rejected that proposition, he disallowed the amendment, as he was entitled to so do, as

in effect not being relevant. This is supported by the Arbitrator in his affidavit of 5th November, 2007. Therefore, in all of these circumstances, there is no basis for setting aside the award or removing the Arbitrator.

Powers under the Arbitration Acts 1954-1998

54. The Arbitration Acts 1954-1998, confer on the High Court a certain jurisdiction over arbitrations. The purpose of this role is supervisory and is designed to ensure that the arbitration procedure is conducted fairly. Further, court supervision gives parties confidence in the process by assuring the participants that if there is breach of fair procedures, or if an injustice is caused, they can invoke this jurisdiction to remedy the same. In addition, without this safeguard, every arbitration clause which, by its nature "supplants" the jurisdiction of the court, would be void, including every Scott v. Avery ((1859) 25 L.J. Ex. 308) clause. Further, although this role is limited and restricted, it is important also because under s. 27 of the Arbitration Act 1954:

> *"[An] award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively . . ."*

This section applies subject to any contrary indication.

55. Under s. 36 of the Act, the court has jurisdiction to remit a matter for reconsideration by the Arbitrator. The applicant has not sought an order under this section. The reason, according to the City Council, is that if it did, it would still be bound by his core findings, which, of course, is precisely what the relief sought is designed to avoid.

56. Section 37 of the Act states:

> *"Where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him."*

Section 38 is the section which the applicant seeks to utilise and provides that:

> *"Where-*
>
> *(a) an arbitrator or umpire has mis-conducted himself of the proceedings, or*
>
> *(b) the arbitrator or award has been improperly procured*
>
> *the Court may set the award aside."*

This last section, unlike sections 35 and 36, sets at nought all findings of the Arbitrator.

57. It is worth noting that the origin of s. 37 is found in s. 11. of the Arbitration Act 1889, as amended by s. 23 of the [English] Arbitration Act 1934, which was re-enacted in s. 23 of the [English] Arbitration Act 1950, which corresponds virtually word for word with sections 37 and 38 of the Irish Arbitration Act 1954.

Policy considerations: court's interference with awards

58. McCarthy J. in *Keenan v. Shield Insurance Company Ltd*. [1988] I.R. 89 and 93, stated that the purpose of arbitration is to provide:

> *"a comprehensive scheme whereby matters commercial, such as in construction, insurance, financial services, shipping and kindred and other industries might be resolved without recourse to the courts and, in many instances, by those best equipped for that purpose by training and experience in the particular field."*

He continued at 96 that:

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

Such finality must, however, be consistent with ss. 36, 37 and 38 of the Act. This conformity is breached where:

> *"an award . . . shows on its face an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged." (ibid* p. 96*)*

Or where there is an "*obvious error*" (*ibid* p. 96) or where the "*decision is clearly wrong on its face*" (*McStay v. Assicurazione Generali Sp & Anor*. [1991] ILRM 237 at 243), or where the complaint, whether it be a misconduct error or error *simpliciter*, is "something substantial, something smacking of injustice or unfairness". (McCarthy v. Keane [2004] 3 I.R. 617 at 627: see paragraph 72 infra.).

59. When looking at the effects which the Arbitration Acts have had on the general common law power of removal, or remittal, Clarke J., in Limerick City Council v. Uniform Construction Ltd. [2007] 1 I.R. 30 at 43, noted that:

> *"There is noting . . . which would convey any suggestion that, in the view of the Supreme Court, the jurisdiction to*

set aside or remit on the basis of error of law had been, in any way, extended or enlarged by the enactment of the Arbitration Act 1954. It is striking that the common law jurisdiction is described as arising only in circumstances where the award shows 'on its face an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged'."

60. It is also worth re-echoing the comment of Devlin J. in *Kiril Mischeff Ltd. v. Constant Smith & Co*. [1950] 2 K.B. 616 at 622, where he stated that:

"[T]he court should have in mind the fact that the parties have chosen this form of tribunal and the arbitrators, and, if it is available, they are not to be put to the expense of starting de novo."

I respectfully agree with this proposition; the award of an arbitrator should only be set aside in exceptional circumstances. To apply the court's discretion more liberally, apart from undermining the stated *raison d'être* of arbitration, could ultimately lead to much hardship for all parties, an example of which would be the great costs in re-running an entire arbitration. No justice would be served in setting aside an award for error "*per se*", either on the face of the award, or otherwise; such an error must be fundamental to the award in contention.

Remittal

61. On the question of remittal, the general case law identifies four circumstances in which this action may be appropriate:

(a) where there has been misconduct on the part of the arbitrator;

(b) where there is some defect or error patent on the face of the award;

(c) where the arbitrator has admitted to some mistake and desires to have the matter remitted to correct it and;

(d) where new significant evidence, which despite all reasonable diligence was not discovered before the award, has since come to light.

62. In *McCarrick v. The Gaiety (Sligo) Ltd. [*2001] 2 I.R. 266, Herbert J., when considering, in the context of s. 36, whether a broader scope to this traditional jurisdiction existed, quoted with approval the Court of Appeal in *King v. Thomas McKenna Ltd*. [1991] 2 Q.B. 480, where Lord Donaldson M.R. held at p. 491:

"In my judgment, the remission jurisdiction extends . . . to any cases where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspects of the dispute which has been the subject of the reference has not been considered and adjudicated upon as fully or in a manner which the parties were entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the arbitrator. In so expressing myself, I am not seeking to define or limit the jurisdiction or the way in which it should be exercised in particular cases, subject to the vital qualification that it is designed to remedy deviations from the route which the reference should have taken towards its destination (the award) and not to remedy a situation in which, despite having followed an unimpeachable route, the arbitrators have made errors of fact or law and as a result have reached a destination which was not that which the court would have reached."

63. Fennelly J., in *McCarthy v. Keane & Ors*. [2004] 3 I.R. 617 at 629, notes in this regard that:

"I would certainly be prepared to agree that the power to remit is not necessarily limited to the four well-established circumstances . . . [However}, [i]t would be inimical to the autonomy and certainty of the arbitral process if the notion of 'procedural mishap' were to become an additional ground of potential complaint. Donaldson M.R. emphasized, in particular, that it would have to be 'inequitable to allow the award to take effect'. He also described as a 'vital qualification' and one of 'fundamental importance' that the power was 'designed to remedy deviations from the route which the reference should have taken toward its destination'. Donaldson M.R. also recalled his own earlier decision in Mutual Shipping v. Bayshore Shipping [1985] 1 W.L.R. 625 at p. 632 to the effect that the power 'provides the ultimate safety net whereby injustice can be prevented, but it is subject to the consideration that it cannot be used merely to enable the arbitrator to correct errors of judgment, whether on fact or law or to have second thoughts, even if they would be better thoughts'."

The learned Judge did not consider it necessary to give a definitive view on s. 36 as the facts did not fall even within the broader interpretation of that section. The matter for the present rests thus.

Error on the face of the award

64. In view of the conclusion arrived at at para. 27. *supra*. (that the entire award can be looked at), it seems to me that no issue arises as to what other documents (if any) might be associated with the award for the purpose of deciding the presence or absence of an error on the face of the award; although, for other reasons, the affidavit of the Arbitrator can also be looked at. Therefore, the only additional point which should be made in this regard is neatly summarised by Lord Dunedin in *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Company Ltd*. [1923] A.C. 480, 487; 39 T.L.R. 253, where he says that:

> *"An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."*

65. I would thus finish on this point; interference in the arbitration process by the courts is an exceptional and, I might note, a rarely successfully invoked, jurisdiction.

Acts amounting to "misconduct"

66. Although there is no definition of misconduct in the legislation, in looking at this concept, reference in particular should be made to the judgment of Atkin L.J. in *Williams v. Wallis & Cox* [1914] 2 K.B. 478, because the description of misconduct, as given, was expressly approved of by the Supreme Court in *McCarthy v. Keane* [2004] 3 I.R. 617. The learned Judge said:

> *"That expression does not necessarily involve personal turpitude on the part of the arbitrator and any such suggestion has been expressly disclaimed in this case. The term does not really amount to much more than a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice." (Williams v. Wallis & Cox [1914] 2 K.B. 478 at 485).*

Given the use of the phrase "*substantial miscarriage of justice*", it is clear that not every act of misconduct will automatically result in the setting aside of an award. To do so, the misconduct complained of must cause or result in an injustice which must be undone.

67. In considering misconduct, an arbitrator does not misconduct himself merely because he gets the decision wrong, as long as the decision is within the jurisdiction of what the arbitrator has been asked to determine. In *Sheahan v. FBD Insurance plc*. (Supreme Court, Unreported, 20th July, 1999), Keane J. stated that:

> *"Ultimately, however, these were entirely matters which it was within the jurisdiction of the Arbitrator to determine. However dissatisfied either party might be with any of his findings, they were bound by them and the High Court has no jurisdiction to interfere unless . . . the award carried on its face an error so fundamental that it should be set aside."*

68. As observed in '*Russell on Arbitration* (20th Ed.)' (1992) at p. 422:

> *"It is not misconduct on the part of the arbitrator to come to an erroneous decision whether his error is one of fact or law, and whether or not his findings are supported by evidence."*

Mustill & Boyd, '*Commercial Arbitration'* (1982) at p. 602, also states that:

> *"It has been clear for at least 200 years that it is not misconduct for an arbitrator to make a mistake of fact or law."*

A footnote from this passage does, however, note that there is an exceptional jurisdiction to set aside the award for error on the face of it.

69. With regards to the threshold for removal of an arbitrator, Russell, at pp. 398-399, puts the matter thus:

> *"As regards misconduct on the part of the arbitrator, if the misconduct is of such a kind (e.g. fraud) as will justify removal of the arbitrator, the Court will set aside the award rather than remit it . . . if, however, the misconduct is not such as to disqualify the arbitrator or umpire from acting, or to make it impossible for the Court to trust him, the Court, in its discretion, may remit the award rather than set it aside."*

70. In *MacPherson Train & Co. Ltd. v. Milhem & Sons* [1955] 2 Lloyd's Rep. 59, the Court of Appeal stated that it is not misconduct for an arbitrator to misstate or misconceive the arguments addressed to him.

71. The test for misconduct is an objective one. Judge Richard Seymour Q.C. summarised the position in *Miller Construction Ltd. v. James Moore Earth Moving* [2001] B.L.R. 1 (1st November, 2000, Queen's Bench Division) thus:

> *"[T]he test of whether an arbitrator should be removed for misconduct is objective. In Hagop Ardahalian v. Unifert International S.A. ("The Elissar") [1984] 2 Lloyd's Rep. 84, Ackner L.J. at p. 89, having referred to the decision in Modern Engineering (Bristol) Ltd. v. C. Minkin & Son Ltd., formulated an objective test based upon the reaction of the 'reasonable person'. He said that the test was:*
>
> *'Do there exist grounds from which a reasonable person would think that there was a real likelihood that [the arbitrator][sic.] could not, or would not, fairly determine the [relevant issue of issues][sic.] on the basis of the evidence and arguments to be adduced before him?'" (ibid. paragraph 21)*

72. In *McCarthy v. Keane* [2004] 3 I.R. 617 at pp. 626-627, Fennelly J., in the Supreme Court, held that:

> *"32. Not surprising, cases in which arbitral awards have been set aside for misconduct are few and far between. We can leave aside obvious or extreme cases of financial misbehaviour or personal misconduct, such as simple*

neglect by the arbitrator to perform his task. Real cases of misconduct may arise in the conduct of arbitration where the arbitrator acts unfairly, either by clear acts of favouritism towards a party or adopts procedures which place one or other party (perhaps even both) at a clear disadvantage.

33. It seems to me that the standard test of misconduct of such a nature will be something substantial, something that smacks of injustice or unfairness."

Decision

73. In the clause 66 decisions, the engineer sets out his understanding of the basis of the applicant's claims in respect of S.I. 005 and S.I. 006. He refers to a section of clause 13(3) and notes that "if such instructions require any variation to any part of the works, the same shall be deemed to have been given pursuant to clause 51". In rejecting the claims, the engineer took the view that "such instructions", in the context of clause 13(3), excluded instructions issued to remedy a breach of contract. He therefore rejected the claims and in the process listed the contractor's breaches of the main contract. Implicitly, he must also have held that the instructions were not clause 51 variations, or that even if they were, once issued to remedy a breach of contract, there was no entitlement to payment. Whichever, and whether he was right or wrong in such a view, is entirely irrelevant. What highly material, however, is the fact that the applicant sought to make the case that S.I. 005 and S.I. 006 involved variations under clause 51; admittedly, *via* clause 13(3). Whether there is any practical difference between an instruction issued under clause 13(3), which is acknowledged or proven to be a clause 51 variation *simpliciter*, under clause 51, is a doubted point. In any event, it seems quite clear that the applicant's purpose in making this argument was that if the instructions were clause 51 variations, payment must be made, breach or no breach.

74. From the extensive pre-trial documentation in this case, which includes a statement of case, notices for and replies to particulars, witness statements and skeleton arguments, I am satisfied beyond hesitation of the following. Firstly, that the applicant advanced a claim that S.I. 005 issued under clause 51(1) of the contract; indeed, on its face, it clearly and expressly states to have been so. Secondly, that instruction was "superseded" by S.I. 006 on 23rd May, 2002. Thirdly, the wording of the specified works in both was virtually identical save as to scope and location. Fourthly, it was part of the applicant's argument that notwithstanding the express reference to clause 13 in S.I. 006, the works were, in fact, a clause 51 variation, and accordingly, issued either under clause 13 and/or under clause 51. This interpretation of the claim is supported by reference to paragraph 88 of the statement of case where it is pleaded:

> "It is the claimant's position that S.I. 006 was an instruction to vary the works given pursuant to clause 51 of the contract. Therefore, the work has to be valued under clause 52 of the contract."

75. Even, however, if I disregarded that paragraph and simply read the documentation as a whole, noting the process the emphasis placed on the last sentence of clause 13(3) (para. 7 *supra*.) and the repeated references to the method by which the works were to be valued, I would likewise have come to the same conclusion. In essence, it was critical to have the works classified as a clause 51 variation so that value could be measured under clause 52 and payment obtained under clause 60. As there is nothing indicating a contrary intention in the notices for or replies to particulars, I would hold, as a matter of fact, that on the pleadings it was open to the applicant to make the submission that S.I. 006 was, or became, a clause 51 variation, having issued either under clause 13 or 51. To allege in the affirmative is a perfectly normal and acceptable method of pleading: *Phonographic Performance (Ireland) Limited v. Cody* [1990] 2 I.R. 504 at 511. This view holds, notwithstanding a point which I freely acknowledge, namely, that greater emphasis was placed on the instruction becoming a clause 51 variation via clause 13(3) rather than having directly issued under that clause. I, therefore, believe that the submission made by Mr. Lee on this point was not a sound one (nor was his suggestion that Mr. Quigg's closing was in "response" to his, and thus should be limited: nothing, however, turns on this). This finding, however, provides no support for any inference that, if considered (assuming it was not), the argument should have been accepted. The present issue is one of consideration, not decision. Tagged to this is the fair procedure point that the Arbitrator refused to allow Mr. Quigg respond to Mr. Lee's objection. In fact, this is the point which I will deal with first. It can, by reason of the following circumstances, be disposed of quickly.

76. Between 16th May, 2007, when the oral submissions concluded, and 31st July, 2007, when the award was made, the following correspondence passed between the parties and the Arbitrator:

> (i) On 18th May, 2007, Mr. Quigg submitted to the Arbitrator a copy of the "*Simplex* case" which he had referred to in his closing.
>
> (ii) On 25th May, Mr. Lee reiterated his position on the "fundamental change" in the plaintiff's case.
>
> (iii) On 29th May, the Arbitrator confirmed that he would give both sides an opportunity to comment "on any legal opinion or legal advice" which he received.
>
> (iv) On 30th May, Mr. Quigg, responding to Mr. Lee's position, now well declared, refers to the "statement of case" as making it quite clear that, as pleaded, the instruction required a variation and must be valued in accordance with contract.
>
> (v) On 7th June, 2007, the Arbitrator indulges both parties by affording them a further opportunity to make "a final submission" in writing, prior to 25th June, 2007. He confirmed that he would seek legal opinion in the matter and communicate that opinion to them.
>
> (vi) Mr. Lee duly made a six-page submission on 25th June, which he also sent to Mr. Quigg.
>
> (vii) The latter replied, through the Arbitrator, on 26th June, and once again dealt with the objection taken by Mr. Lee on 16th May. In rejecting any question of an amendment, Mr. Quigg pointed out that his submission was in accordance with the statement of case, which statement was quite clear as to the basis upon which the applicant

intended to present its case. In conclusion, he invited the Arbitrator "to proceed with the award".

77. Assuming that the Arbitrator should have permitted Mr. Quigg to reply on 16th May, any deficit in that regard and certainly any consequences by reason thereof, were fully abated by the opportunities afforded to the parties in the period just mentioned. Not only did correspondence freely flow between them, but the Arbitrator expressly invited both to make further submissions, if they so wished, allowing them a period of almost 21 days in which to do so. No restriction of curtailment was put on the issues which could be dealt with. Therefore, Mr. Quigg was afforded a full opportunity on a number of occasions to redress any imbalance, as he saw it, in not being allowed to respond to Mr. Lee on 16th May. In face, he did so on two occasions. I am therefore fully satisfied that there is no question of fair procedures having been breached in this regard.

Did the Arbitrator consider the "core submission"?

78. As appears from the transcript of the proceedings, Mr. Quigg, in his closing submission, was given every facility to present his arguments, and he did so as exhaustively as he wished. In the course of his presentation, he outlined the basis of his client's claim in a clear and definite way. He made several references to the basis of the claim and in support of his submissions cited textbooks and case law. At no point before he concluded was he interrupted. Quite evidently, therefore, and he makes no complaint in this regard, he was afforded every chance to present his case. In addition, objection having been taken, he was permitted to rejoin in writing, which once again he did on both 30th May and on 26th June, 2007. Therefore, the entirety of his case, including what is now described as his "core submission", was, in my view, fully outlined to the Arbitrator.

79. That being so, it cannot be doubted but that the Arbitrator was fully apprised of the claim and both understood and appreciated its significance. One must, therefore, look at his award to see whether, as a matter of fact and reality, as distinct from form, he did or did not deal with the submission, although perhaps not so expressly stating. It is a well known principle that an arbitrator is agreed upon or nominated for his acknowledged expertise; in this case, in the field of construction and engineering, and not for the perfection of his English, his style of writing or, in this instance, his grasp of the law.

80. Mr. Higgins, who is a highly qualified engineer as well as a highly qualified arbitrator, was appointed by the President of the IEI to arbitrate in this dispute. The dispute in question most comfortably falls within the type of activity referred to by McCarthy J. in *Keenan* (para. 58 *supra*.) as being one which is peculiarly suitable for resolution by a person with expertise and understanding: in the instant case, in the intricate and complex field of major construction works. It is therefore no surprise to see the Arbitrator's decision at para. 29 of the award to set aside each party's version of events, instead preferring "to work out the likely sequence for myself, and this I have done". In addition, it is quite clear that he had "a feel" for the site, demonstrating his understanding of the situation by finding at para. 26 of the award, that "it is clear [that] at this stage (26th/27th March, 2002), the project as a whole was in a state of crisis", and by his reference to the engineer's difficulty in dealing with the "intransigence of the contractor". These remarks, which were entirely justified by the preceding events, which included a unilateral stoppage of work, a threat to demobilise plant and an insistence that work resumption would only be undertaken after the issue of an instruction, show an intimate understanding of the situation. It is only experience in the given field which allowed this. I would therefore have no doubt but that his engagement with the process was anything but an abstract one: rather, it reflected his real association with the dynamic events of 2001 and 2002.

81. For an "instruction" to become a "clause 51 variation", the works in question must, presumably, at the very least represent a change to the contract requirements, not being one taken at the contractor's discretion which he remains responsible for. Mr. Higgins was satisfied that the "works" requirements of the contract included the design of the welded joint and its execution (paragraphs 18 and 19). He decided that the difficulties in this regard were not due to impossibility of execution of the specified joint (paras. 19 and 52), but rather resulted from the failure by the contractor to perform the work properly. These conclusions are entirely consistent with the essential rationale of the engineer's clause 66 decisions.

82. With the contractor having stopped work, both the engineer and the designer were obliged to engage with it so that some solution to the impasse could be found. At the contractor's insistence, the engineer was obliged to issue instructions for the implementation of the solution, and he did so by S.I. 005, later replaced by S.I. 006 (paragraphs 24 and 25). However, and this is crucial in answering the question posed, the Arbitrator held that S.I. 005 was "an almost word for word transcription of H&W's method statement of 3rd May". Evidently, the same finding would attach to S.I. 006. As such, that method statement should only have required engineer's approval under clause 14(3), but the contractor, by his declared position, refused to recommence work unless an instruction was given. It was the Arbitrator's perspective, therefore, that the engineer was induced to give the instruction in respect of works, which, in his opinion, were included within the original contract works. This method of procuring the instruction was then used as the basis upon which Irishenco made its claim for additional monies. However, no payment is available under clause 13(3) in respect of an instruction issued to remedy a breach of contract or to cover works foreseeable at tender, that is part of the scope of the works tendered.

83. It seems to me that a reasonable interpretation of what occurred on and after 16th May, 2007, is as follows. At the legal submission stage, the Arbitrator had not, of course, reached any conclusion and, not being a lawyer, would, of necessity, be cautious in immediately adjudicating on a legal argument. Hence, his reference to taking legal advice, and if obtained, to permit, rightly so, the parties to comment on it. However, when reviewing the evidence from an engineering point of view, he arrived at the conclusions expressed in his award. These were to the effect that the scope of S.I. 006 was not additional to the contract and that the instruction under clause 13 involved works only within the ambit of the contract. Therefore, the works specified in S.I. 006 were part of the contract; the instruction issued for its implementation was to overcome a breach. As such, it could not be a clause 51 variation and therefore could not come within the confines of that provision. This conclusion necessarily obviated any need to seek legal advice on Mr. Lee's objection, whether S.I. 006 was a "deemed variation" or a "variation *simpliciter"* became irrelevant. Simply put, it was neither. Therefore, the Site Instruction could not end up under clauses 51 or 52 by whatever route.

84. This, in my opinion, is the correct way in which to read the award. Whilst it would, of course, have been preferable,

had the Arbitrator expressly dealt with it in a more understandable, indeed, legal way, nevertheless, as I have said, he was not nominated for his prowess in English or his knowledge of law. His expertise was in engineering and in construction. Therefore, para. 62 should be read in light of the preceding method of logical deduction as he saw it, and from the facts and circumstances presented so thoroughly to him. I therefore firmly believe that from the award itself, one can discern a rejection of the applicant's "core submission" after its due consideration. It is only in that way that paragraph 62 should be read. At worst, the wording of the latter is ambiguous, but that cannot be a ground for either setting aside the award or removing the Arbitrator.

85. This interpretation of the award is fully supported by the affidavit of Mr. Higgins himself. At paragraph 15, having referred to Mr. Lee's objection to the applicant's "core argument", he said:

> "This seemed to me to involve a legal problem and I indicated that I would obtain legal advice on it. I said that the legal advice obtained by me would be transmitted to both parties. Having subsequently considered the matter, I am satisfied at that stage that by reason of the fact that I did not consider the work in question to be a variation, clause 51 was inapplicable and therefore the argument as to whether or not Mr. Quigg is entitled to raise the clause 51 argument became irrelevant. It was thus unnecessary for me to take legal advice as to whether there was some technical or pleading bar to Mr. Quigg raising the clause 51 argument. I never did seek such advice and accordingly the necessity of informing the parties of such advice did not arise."

86. At paragraph 18 of the affidavit, he deals with paragraph 62 of the award and states that the variation argument, howsoever made, was rejected as being inapplicable. Of course, by that simple change of phraseology, the matter is entirely clear. If, however, that explanation had been inconsistent or incompatible with the reasoning in his award, I would have had to seriously question whether its inclusion stemmed from hindsight or from a change of mind. But in my view, it is entirely compatible with the award when read as a whole. Therefore, I am satisfied that the applicant's argument under this heading cannot prevail.

Secret advices

87. The applicant contends that there was no evidence given during the course of the arbitration that the Site Instructions were not variations. In other words, the Arbitrator could not have come to the conclusion which he did. Before deciding on what evidence there was, some comments should be made on the legal position.

88. From the case law, it would appear that the Court may enquire as to whether there was evidence upon which the Arbitrator could arrive at the decision which he did. Such an enquiry is not a review for the purpose of deciding whether he was right, merely whether there was any evidence before him to support his conclusions. Flood J., in the High Court in *Doyle v. Kildare County Council* [1995] 2 I.R. 424 at p. 429, stated:

> *"[T]he court is entitled to look at the evidence from which the arbitrator derived his decision, not for the purposes of in any way enquiring into the merits of the case, but solely to ascertain whether there could be a valid evidential base to ground the award in the form herein, having regard to the evidence tendered to the arbitrator."*

Having considered the evidence tendered in relation to a disputed property valuation, Flood J. concluded that:

> *"It is certainly not an invasion of the arbitrator's domain to comment that he must have virtually discarded the evidence tendered by the plaintiffs' experts on market value. The fact that he did so or may have done so is, in my opinion, clearly within the ambit of his discretion and jurisdiction. The fact that he opted to apparently follow, in part at least, valuations which were effectively ninety per cent less than those tendered by the plaintiffs' adviser, in no way establishes that such a course was unreasonable, irrational or perverse, if the premises on which the first defendant's valuation were arrived at commended themselves more to him than those of the plaintiffs' advisers. See Sharpe (P&F) Ltd. v. Dublin City and County Manager [1989] I.R. 701 and State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642. In my opinion, having considered the expert testimony tendered on behalf of the first defendant, there is an ample case to warrant, in principle, the arbitrator's decision and accordingly I would refuse to grant the relief claimed under this heading." (Emphasis added)*

This part of his decision was upheld by Hamilton C.J. in the Supreme Court (ibid. p. 445), although ultimately the appeal was allowed on different grounds.

Thus, where there is clear evidence upon which the Arbitrator could have based his decision, it is "*clearly within the ambit of his discretion and jurisdiction*" to come to that conclusion, even in the face of significant evidence to the contrary. Such a conclusion can be seen in a similar light to the court's curial deference to or unwillingness to interfere in the decision of specialist Tribunals which may be in a better position than the court to decide on technical issues.

It might be noted that some suggestion has been made that even where an arbitrator based his decision on no evidence at all, that may not amount to misconduct. In *Gillespie Bros. v. Thompson Bros*. [1922] 13 Lloyd's Rep. 519, Atkin L.J. at pp. 524-525, stated:

> *"It is no ground for coming to a conclusion on an award that the facts are wrongly found. The facts have got to be treated as found . . . nor is it a ground for setting aside an award that the conclusion is wrong in fact. Nor is it even a ground for setting aside an award that there is no evidence on which the facts could be found, because that would be mere error in law, and it is not misconduct to come to a wrong conclusion in law and would be no ground for ruling aside the award unless the error in law appeared on the face of it . . ."(Emphasis added)*

Relevant in this regard, although also different evidently, is the case of *Oleificio Zucchi v. Northern Sales Ltd.* [1965] 2 Lloyd's Rep. 496 at p. 516, where, albeit in circumstances involving a special case stated to the Court, McNair J.

commented that:

> *"I think it is relevant to observe at this stage that on the consideration of the special case, the Court is not entitled to consider whether these findings, in so far as they are supported by the evidence, or, indeed, whether there was any evidence, but must accept these findings as accurate for the purpose of the special case."*

The learned Judge continues at p. 521:

> *"[T]he making of a finding of fact of which there is no evidence does, of course, raise a question of law and if the arbitrator does so, the party has no remedy unless he raises this point in a special case if it does not appear on the face of the award itself . . .*
>
> *"[I]t is never possible to set aside an award merely because there was no evidence supporting a particular finding, unless it appears from the award itself that there was no evidence to support the finding . . . [T]he findings of the arbitrator are final, and it is of no avail to state on the grounds for setting aside the award that the findings were erroneous."*

89. Whilst I certainly would not endorse all of these views, nonetheless, the decisions are illustrative of the level of misconduct which is required to set aside an award. As between Doyle and the other cases mentioned, the decision is clear-cut. There must, in my opinion, be some rational evidence which could allow an arbitrator to come to a conclusion, in principle, which he did.

90. Reverting to the facts in this case, it is claimed that the only evidence given supports a finding of a clause 51 variation and not otherwise. The applicant draws attention in its affidavits to the evidence of Mr. Meighan, the engineer, and the questions put to him by the Arbitrator, one of which was that "it was a variation to the contract". This, it is contended, precludes the Arbitrator from coming to the conclusion that the instructions were not clause 51 variations. The quotations contained in the applicant's affidavits, however, present an incomplete picture of the evidence given as a whole. It is clear from a reading of the transcripts and the award that evidence was adduced to the effect that:

> (a) The responsibility for the design and execution of the welds was always on the main contractor.
>
> (b) The problem arose because of contract breaches, namely, a failure to properly carry out the welds in question, to properly supervise the works and to have available adequate workmanship and equipment, all compounded by the unilateral downing of tools until a Site Instruction was issued.
>
> (c) The instructions issued were to remedy a breach of contract.
>
> (d) The instructions were in almost identical terms to the method statement suggested and it was only at the behest of the sub-contractor, and under pressure from it, that the instructions were issued in the form of Site Instructions.
>
> (e) The contractor was not, in the circumstances, entitled to pay for the work done on foot of these Site Instructions.

Mr. Meighan's evidence in its totality makes it clear that he did not consider the works to be a variation for the purposes of clause 51, otherwise the above summary is meaningless, or else he did not understand the differing consequences which exist between an instruction and a clause 51 variation, however arrived at; this is unlikely. Even if I am wrong in this regard, I would still conclude that despite Mr. Meighan's description, there was evidence upon which the Arbitrator could conclude as he did, and in the process, refuse further payment.

91. In coming to this view, Mr. Higgins may have brought his own personal experience and knowledge to bear to the matter. If he did, he was entitled to do so. He is perfectly within his rights to use his special knowledge to understand (though not to supplant) the evidence given, to make findings and to arrive at conclusions therefrom. It must be remembered that what was in issue was the "nature and scope" of the works: were they within the provisions of the contract or, being outside it, were they within clause 51? Bringing his intimate knowledge of the sector to this complex and technical problem was, I feel, well within both his factual and legal remit. It if was otherwise, his expertise would have no value.

92. Regardless, as already stated above (para. 90 *supra*.), I am satisfied that the Arbitrator did have evidence before him which allowed him in principle to find the works were not variations for which the contractor was entitled to payment under clauses 51 and 52. That is not to say that he was correct in this regard, merely that he had evidence before him which allowed him potentially to come to this conclusion. That is sufficient. Thus, I find that the Arbitrator has not misconducted himself in this regard as he did not come to a conclusion completely unsupported by the evidence.

93. The second complaint of misconduct under this heading relates to the question of legal advice. On behalf of the applicant, is it claimed that on several occasions, the Arbitrator assured the parties that if he obtained legal advice on any matter, he would send them a copy and consider their responses. As the applicant never received advices, evidently, the parties could not comment on them. The resulting complaint is pleaded in the alternative. Firstly, on the assumption that such advices were received, the Arbitrator is said to have misconducted himself by not adhering to the assurances previously given and in the process acted unfairly. In the alternative, it is claimed that if no such advices were received, then he was equally guilty of misconduct in that, having relied on his assurances, the contractor acted to its detriment.

94. On a number of occasions, prior to the close of submissions, the Arbitrator indicated, quite rightly so, that he would notify the parties of any legal advice received and consider their comments. That procedure also was intended to cover any technical advices. In the events which occurred, the instant complaint, under this heading, now relates solely to Mr. Lee's objection (paras. 48 and 49 *supra.*). On 29th May and 7th June, 2007, the Arbitrator also indicated either that he would obtain legal advice or if he did, that he would afford the parties an opportunity of commenting upon it. For the

reasons set forth above, he did not, in fact, obtain any such legal advice and therefore the question of referral did not arise.

95. It will be recalled that the entire dispute centred on whether the applicant was entitled to allege that S.I. 006 was a variation issued under either clause 13 or clause 51 and in any event fell to be valued under clause 52. As previously stated, (para. 84 supra.), whatever the true contractual position might have been in that regard, the applicant firstly had to satisfy the Arbitrator that the instruction was in fact a clause 51 variation. If it failed to do so, it mattered not whether Mr. Quigg or Mr. Lee was correct, for the simple reason that unless the instruction was a clause 51 variation, there was no question of valuing the works under clause 52. Therefore, having arrived at his decision in this regard, there was no legal issue upon which the Arbitrator would have been justified in seeking advice. Consequently, given the fact that Mr. Quigg, without interruption, made a full presentation of all his arguments on 16th May, 2007, and was afforded several opportunities thereafter to further address the objection made by Mr. Lee, I cannot accept that the Arbitrator acted in any improper way by not obtaining such advice. Again, this ground of complaint, in my view, cannot succeed.

Favouring written evidence over oral evidence

96. This issue arises out of a meeting which Mr. Jim Shaw, on behalf of the applicant, had with Mr. Andrew Mayoh, who was the Structural Steelworks Inspector employed on behalf of the engineer. Mr. Shaw gave oral evidence at the arbitration and was available for cross-examination. Mr. Mayoh was not. However, an email dated 22nd April, 2005, from him to Mr. Desmond Leong was placed before the Arbitrator. It is alleged by Irishenco that the Arbitrator made a finding based upon this "documentary hearsay evidence" in preference to the oral and direct evidence of Mr. Shaw. This, it is therefore claimed, is another example of how the arbitration was mishandled. To test the validity of this complaint, it is necessary to firstly identify the area of difference within the evidence and then see what use, if any, the Arbitrator made of such difference.

97. No assistance is obtained from the grounding affidavit of Mr. Quigg in this context.

98. From Mr. Lee's affidavit, it would appear that Mr. Mayoh accepted that a meeting, or indeed two meetings, in June and September 2001, took place between himself and Mr. Shaw, at which Mr. Shaw remarked that the cruciform joint was going to be difficult. This was precisely what Mr. Shaw gave evidence in relation to. However, the email goes on to say that Mr. Mayoh advised Mr. Shaw to put in writing any concerns of his in this regard if he so wished. This is disputed by Mr. Shaw.

99. The Arbitrator, at paragraph 20 of his award, refers to these meetings, to the observations of Mr. Shaw and to the disputed content of the email. However, apart from noting these events as a matter of historical record, I cannot see that the Arbitrator made any use whatsoever of the disputed evidence. He made no findings thereon and drew no inference therefrom. This is entirely unsurprising as, in my view, whether or not this remark was made is utterly irrelevant and played no part in any of the findings arrived at. Therefore, this point of complaint is groundless.

The appearance of bias on the part of the expert witness

100. The evidence of Mr. John Evans, an independent expert who was called on the third day of the trial, was heavily relied upon by the Arbitrator in making his award (paragraph 41, *supra*). Complaint is made that Mr. Evans was a partial witness and that his presence and his evidence at the arbitration gave rise to the appearance of bias. In this regard, three points are made. Firstly, it is claimed that this expert passed notes to Mr. Lee during the course of the arbitration. Secondly, that at some point, he had been employed in the firm of Roughan & O'Donovan, the engineer for the project, and, thirdly, that his present firm had, subsequent to the arbitration, obtained a commission from the City Council.

101. The essence of this allegation, in my view, is entirely disposed of by the opening exchanges which the Arbitrator had with Mr. Evans even before he gave his evidence. The Arbitrator said:

> "I do feel that I have to say something to you about your impartiality and your duty to me as the arbitrator, and I just wish to remind you that I am relying on your advice and that I depend upon your advice being impartial and upon it being completely unbiased. I am aware that at one time you were engaged by (the engineer) to advise them, and I will wish to question you and query you about the role that you fulfilled at that time and I think that, Mr. Lee, I should tell you that it does not appear to me that there could well be conflict of interest, and I do not want to get that in the way of the evidence you might give to me."

102. Subsequently, this expert witness was examined by Mr. Lee as to any potential conflict which he might have in his role at the arbitration. He gave evidence to the effect that there was no such conflict. Thereafter, he was cross-examined by Mr. Quigg who had every opportunity to question him about his impartiality, however so arising, about his role and conduct at the arbitration and about his former or present employment. He was never so questioned. In addition, there is no evidence whatsoever that his engagement as an expert and the obtaining of a commission were in any way related. Accordingly, in my view, there is nothing in this allegation.

Site Instructions issued under duress

103. At paragraph 58 of the award, the Arbitrator says, "As a consequence, I find that S.I. 005 and S.I. 006 were both issued under duress". (Emphasis added). The applicant takes objection to this, and by reference to certain passages of the engineer's evidence, argues that such a finding is "unreasonable and irrational and contrary to the only evidence given on that point".

104. Disregarding the Arbitrator's affidavit on this point for a moment, it is important to bear in mind that this finding was arrived at only after his designation of the unfolding events which preceded the making of these Site Instructions. It is again worth recalling that on 15th February, 2002, the subcontractor confirmed that fabrication of the box girders would be completed by the end of February, that they would then be transported to the site and in situ and would be constructed in accordance with the agreed site assembly sequence. Either on 14th or 25th February, 2002, there being a dispute about the precise date, a problem about the weld was first raised. On 19th March, 2002, H&W wrote to the applicant and stated that an alternative proposal was not working and that it had no option but to stop work until the

engineer issued a revised design. H&W wrote a second letter on 21st March, and asked the engineer to note that, "all work on the box girders has stopped as of 07.30am on 20th March, and will only start when instruction on how to proceed is given by the engineer". On 26th March, 2002, this firm again wrote, indicating that 50% of the welds tested had a problem but that other welds were incomplete and could not be tested due to "hold being put on the work". The engineer did not order this stoppage, the subcontractor unilaterally deciding to cease work. On 27th March, H&W insisted that nothing further would be done, not even on a trial basis, unless it got a variation order from the engineer. The Arbitrator noted the "intransigence" of the subcontractor's position and when outlining what followed, described the project "as a whole [being] in a state of crisis". He then described what next occurred (paragraph 27), leading ultimately, of course, to the issuing of these Site Instructions in May 2002.

105. At paragraph 57, the Arbitrator finds that the applicant was in breach of contract from 7th February, 2002, to 8th May, 2002, when S.I. 005 was issued. He then listed the reasons for this breach, namely, lack of appropriate skill and diligence and a failure to have proper quality control to ensure that the work was done in accordance with the appropriate welding specifications. He continued by stating that this breach was compounded by the unilateral ceasing of all work on 20th March, "without the written approval of the engineer and by demobilising of plant and equipment without the approval of the engineer". This is the background; the build up to the finding, at paragraph 58, that the Site Instructions were issued under duress.

106. When one looks at the entire of the engineer's evidence, which touches on this issue, it is clear that he did feel pressure, but that he had experienced such pressure before. His answer to a specific question about "duress" was not completed and therefore one cannot say how he might have fully answered that question. The evidence, insofar as it goes, did not, in any way, prevent the Arbitrator from coming to the conclusion that by reason of the subcontractor's conduct, the engineer had no choice but to issue the Site Instructions: he had too, if the impasse was to be broken and the project restarted. It is only in that context that the word "duress" should, in my view, be understood. That this is so evident from the extracts which I have quoted from his award which are demonstrably supported by the original material. I therefore cannot hold that the description complained of could be categorised in any way as misconduct.

107. The Arbitrator, in his affidavit at paragraph 13, explains that when using the word "duress", he did not intend it to have the legal meaning of somebody's will being completely overborne. He used it to convey "the sense of crisis and concern that was engendered by the protracted and unlawful stoppage of the work required for the erection of the James Joyce Bridge". Even without such an averment, which I have approached in the same way as the rest of his affidavit (paras. 29-31 *supra*.), it is that meaning only which can be taken from the award when read as a whole.

Excess of jurisdiction

Extension of time

108. The applicant complains that this issue did not arise for the Arbitrator's consideration, given the parties' agreement that he would only deal with the question of liability. His affidavit response was to the effect that he did not deal with any quantum issue, and his comments on programming and on the critical path formed part of the applicant's claim for an extension of time.

109. This is dealt with at paragraph 59 of his award. Based on his views as to design responsibility, breach of contract and the period thereof, he finds that at the relevant time, the critical item was the delivery of the arch tubes and not the box girders: in fact, these never became a critical element. Therefore, no extension of time on this basis would be granted.

110. Even if strictly speaking, this item should have been deferred, his dealing with it, having regard to the earlier findings, could not amount to misconduct.

Costs and interest

111. The parties expressly agreed that these matters would be left over, pending the determination of the other issues. Mr. Higgins acknowledged that when dealing with costs and interest, he overlooked this agreement. Whilst the City Council has argued that even in the face of this agreement the order in respect of thereof should be allow to stand, I cannot agree. He had no jurisdiction to adjudicate on either. Those findings in his award should remain. I will therefore remit that part of the award which deals with both interest and costs for the purpose of the Arbitrator correcting the record in respect thereof.

Conclusion

112. Irrespective as to how acts of misconduct are alleged to have arisen, including those *ex facie,* an arbitration award will only be set aside if the impugned conduct is "so fundamental" that it cannot be allowed to stand and "remain unchallenged" (Keane). Or being substantial, "it smacks of injustice or unfairness" (McCarthy).

113. In this case, the core question before the Arbitrator was whether the applicant was entitled to payment "for the costs incurred in the fabrication of the structural steel framework for the box girders" used in the bridge (paragraph 13.1 of the award). In approaching that issue and in answering that question, Mr. Higgins, on the factual and technical merits of the case, made critical findings, all against the applicant, which has mounted no challenge to them. These included:

(a) That the design and construction responsibility for the welds lay at all times with the contractor.

(b) That the welds were capable of being carried out as *per* the contract drawings.

(c) That the problems arose because the contractor's experts, H&W, failed to employ competent welders, failed to have available proper equipment and failed to properly supervise.

(d) That as a result, the applicant was in breach of contract between 7th February, 2002, and 8th May, 2002, and

(e) that it unilaterally ceased all works on 20th March, 2002, without express approval.

As a result he held no payment was due.

114. In these circumstances, it would be grossly unfair to the City Council if all of these findings were set at nought by setting aside the award and removing the Arbitrator. The pre-trial procedure was most extensive, the documentation substantial, the expertise of the assembled witnesses renowned, with most if not all, meeting in the U.K. for four days before the arbitration started. In addition, costs to date must be very significant, as of course would be the costs of a rerun.

115. On the other hand, I cannot see any hint of an injustice to the applicant, which lost on every fact/technical issue before the Arbitrator, if his award should stand. Its complaints to the Court do not relate to any such issues. Consequently, I do not see any injustice, must less grave injustice, in refusing the reliefs claimed, save as to those which relate to costs and interest.