Neutral Citation Number: [2008] IEHC 429

THE HIGH COURT

2008 6 MCA

IN THE MATTER OF THE ARBITRATION ACTS 1954 – 1988
AND IN THE MATTER OF AN ARBITRATION

BETWEEN

GALWAY CITY COUNCIL

PLAINTIFF

AND
SAMUEL KINGSTON CONSTRUCTION LIMITED
AND GEOFFREY F. HAWKER

DEFENDANTS

Judgment of Mr. Justice McMahon delivered on the 17th day of October, 2008

1. The Application
In these proceedings, the plaintiff seeks to remit and/or set aside the award of the second named respondent [pursuant to sections 36 and 38 of the Arbitration Act 1954 ('the Act')] and to remove the second named defendant as Arbitrator and appoint a new Arbitrator.

2. Factual Background
Galway City Council ('G.C.C.'), the plaintiff in these proceedings, decided to redevelop Eyre Square in Galway and entered into a contract with the first named defendant, Samuel Kingston Construction Ltd. ('S.K.C.') to carry out certain construction works at the site. The contract ('the original contract'), for the sum of €6,362,388.49 inclusive of VAT, was dated the 5th April, 2004, and incorporated, with certain amendments, the standard conditions of contract of the Institution of Engineers in Ireland ('the I.E.I. Conditions').

Work had started on the project in February, 2004 with a period of 78 weeks set for its completion and provision for liquidated damages for delay of €15,000 per week. During the course of the work, the original completion date was pushed back to the 20th October, 2005. S.K.C. made a number of applications for extension of time under clause 44 of the I.E.I. conditions and G.C.C. issued a number of notices under clause 46 which required S.K.C. to "take such steps as are necessary and the Engineer may approve to expedite progress".

Galway City Council was anxious that the work be completed before Christmas, 2005 at the latest. When the delay began to occur a number of meetings took place between the parties in order to find a way of achieving completion within this time frame. These meetings culminated in the conclusion of an "Acceleration Agreement" in or around the 8th March, 2005. Under this agreement, which was never reduced to writing and the exact terms of which were disputed, S.K.C. was to apply additional resources to the project over and above its contractual obligations in order to ensure its completion by November, 2005; in return, G.C.C. would make certain additional payments to S.K.C.

Although resources were increased and certain payments made, delays continued to hamper progress on the project. On the 17th May, 2005, a site meeting took place between the parties at which the parties appear to have agreed that the Acceleration Agreement, as originally scheduled, was no longer achievable. Attempts to renegotiate failed. On the 4th June, 2005, Mr. Frampton of G.C.C. issued Certificate No. 16 which withdrew all sums previously paid under the Acceleration Agreement. On the 27th June, 2005, S.K.C. ceased work on the site and returned the site keys to the Engineer. On the same day, G.C.C's Engineer issued a certificate under clause 63 of the I.E.I. conditions which allowed entry onto the site and expulsion of the contractor in certain circumstances such as bankruptcy or abandonment. Clause 63(6) of the I.E.I. conditions provided that the termination rights under clause 63 "shall not be exercised unreasonably".

This gave rise to a dispute between the parties. On the 26th May, 2006, the parties referred the dispute to arbitration. Upon application by the parties, the President of the I.E.I. appointed Mr. Geoffrey F. Hawker, the second named defendant, as Arbitrator on the 9th July, 2006. A preliminary meeting took place on the 5th September, 2006. On the 3rd October, 2006, the Arbitrator directed that the arbitration would be conducted under the I.E.I. Arbitration Procedure 2000, ('the I.E.I. Procedure') and that hearing of the arbitration would take place in two stages: first a hearing on liability followed then by a hearing on quantum. S.K.C. was the claimant in the arbitral proceedings; G.C.C. was the respondent.

The hearing on liability took place in early July, 2007. This was followed by written closing submissions. On the 8th October, 2007, the Arbitrator issued his award on liability. Subsequently, the parties sought amendments under Rule 21.3 of the I.E.I. procedure. On the 8th December, 2007, the award was republished with certain amendments, accompanied by a 'Note of Explanation'.

3. The Award
In his award, the arbitrator found that there was an Acceleration Agreement which took effect from the 8th March, 2005, and which was repudiated by G.C.C. with the wrongful withdrawal of funds in Certificate No. 16 on the 4th June, 2005. He further found that the wrongful withdrawal of funds directly resulted in the withdrawal of S.K.C's overdraft facility and left the company at risk of trading while insolvent if it continued with its works. The Arbitrator also found, however, that G.C.C's actions of the 4th June, 2005, did not repudiate the original contract. Furthermore, although S.K.C's withdrawal from site on the 27th June, 2005, was a breach of this contract, it was not a fundamental breach or repudiation. The Arbitrator also found that, while the Engineer's Certificate No. 16 under clause 63(1) was procedurally correct, G.C.C's overall conduct was unreasonable within the meaning of clause 63(6).

4. Relevant Legal Provisions
Section 36 of the Act gives the Court the power to remit an award:-

> "(1) In all cases of reference to arbitration, the Court may from time to time remit the matters referred or any of them to the reconsideration of the arbitrator or umpire.
>
> (2) Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order".

Section 37 of the Act makes provision for the removal of the Arbitrator by the Court:-

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

Section 38 of the Act defines the circumstances in which the Court may set aside an award:-

"(1) Where –

(a) an arbitrator or umpire has misconducted himself or the proceedings, or

(b) an arbitration or award has been improperly procured, the Court may set the award aside.

(2) Where an application is made to set aside an award, the Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application."

5. General Comments

There is no mechanism for appeal against the determination of an Arbitrator appointed pursuant to the provisions of the Arbitration Act 1954. Provided an Arbitrator has acted fairly and properly, in accordance with the requirements of the Act, the parties are bound by his determination. In the present case it is accepted that the Arbitrator, a consulting Engineer, had decades of experience as an Arbitrator and great familiarity with forms of contract similar to that in use in the present case. The arbitration ran over eight days; there was a full transcript and detailed submissions were made by the parties. Following the delivery by the Arbitrator of his award on the 8th October, 2007, he was subject to a requisition by both parties pursuant to Rule 21.3 of the I.E.I. Arbitration Procedure 2000, in the course of which he received further detailed submissions from both sides following which he reissued his final award on the 8th December, 2007.

It is a well established policy of the Irish courts to uphold arbitration awards (see *Keenan v. Shield Insurance Company Limited* [1988] I.R. 89 especially per McCarthy J. at p. 96; *McCarthy v. Keane* [2004] 3 I.R. 617 per Fennelly J. at p. 629). In *Limerick City Council v. Uniform Construction Limited* [2007] 1 I.R. 30 at pp. 46 and 47, Clarke J. stated of the arbitration award at issue in that case (which likewise concerned an arbitration under the I.E.I. conditions of contract) at para. 7.3:-

"Furthermore I am satisfied that the arbitration in this case can properly be described as being of the specialist category towards which, the jurisprudence of the court requires, a particular deference should be shown: *Henry Denny and Sons (Ireland) Limited v. Minister for Social Welfare* [1988] 1 I.R. 34 and *Carrickdale Hotel Ltd. v. Controller of Patents* [2004] I.E.H.C. 83 & 185, [2004] 3 I.R. 410)."

6. Legal principles upon which arbitral awards can be challenged

Both parties accept that an arbitral award can only be challenged in limited circumstances and there is broad agreement as to the principles governing such a challenge, which may be based on sections 38 and 36 of the Arbitration Act 1954 ('Act of 1954') or the court's common law jurisdiction.

First, section 38 of the Act of 1954 provides for the setting aside of an award where "an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured…". The term 'misconduct' has a special meaning in this context. As explained by Jenkins L.J. in *London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.* [1958] 1 W.L.R. 661 at p. 665, misconduct is "used in the technical sense in which it is familiar in the law relating to arbitrations as denoting irregularity, and not any moral turpitude or anything of that sort". Similarly, Atkin J., in *Williams v. Wallis and Cox* [1914] 2 K.B. 478 stated, at p. 485, that the expression "does not necessarily involve personal turpitude on the part of the arbitrator" and that it "does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice". This passage was recently cited by Fennelly J. in *McCarthy v. Keane* [2004] 3 I.R. 617, who went on to say, at p. 627, that "the standard or test of misconduct … would be something substantial, something that smacks of injustice or unfairness". Examples of misconduct from the case law include refusing to hear evidence on a material issue, adopting procedures placing a party or parties at a clear disadvantage, acting with clear favouritism towards one party, deciding a case on a point not put to the parties or failure to resolve an issue in the proceedings. However, in order to provide the basis for a successful challenge to the arbitral award, the misconduct must reach the high threshold set out above.

Secondly, section 36 of the Act of 1954 provides that, in all cases of reference to arbitration, the Court "may from time to time remit the matters referred or any of them to the reconsideration of the arbitrator or umpire". According to McCarthy J. in *Keenan v. Shield Insurance Co. Ltd.* [1988] I.R. 89 at p. 95:-

"[s]ection 36 would appear to be the procedure appropriate, for example, to a case of a patent mistake, in monetary calculation, in the giving or not giving of a particular credit, in an award that is on its face ambiguous or uncertain".

In *Portsmouth Arms Hotel Ltd. v. Enniscorthy U.D.C.* (Unreported, High Court, 14th October, 1994), O'Hanlon J., in a passage later approved by the Supreme Court in *Tobin & Twomey Services Ltd. v. Kerry Foods Ltd. & Kerry Group plc* [1996] 2 I.L.R.M. 1, listed four grounds upon which the court was generally considered to be entitled to intervene under this provision: the existence of some defect or error patent on the face of the award, the existence of a mistake admitted by the Arbitrator which he desires to have remitted for correction, the availability of material evidence which could not with reasonable diligence have been discovered before the award was made, and finally misconduct on the part of the Arbitrator, understood to include a situation where there are errors of law on the face of the award. Courts have also remitted awards where there is a "procedural mishap" resulting in unfairness to the parties: thus, for example, in *McCarrick v. The Gaiety (Sligo) Ltd.* [2002] 1 I.L.R.M. 55, Herbert J. remitted an award because the subject of the reference had been ruled upon without the benefit of submissions from both sides and it would have been inequitable to allow the award to stand.

Thirdly, the court has a common law jurisdiction to set aside or remit an award for an error of law on the face of the record. In *Church & General Insurance Co. v. Connolly & McLoughlin* (Unreported, High Court, 7th May, 1981), Costello J. stated that "there is no doubt that at common law the Court can either remit or set aside an award if there is an error of law on its face". This jurisdiction, according to McCarthy J. in Keenan at p. 96, is limited to "an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged". In *McStay v. Assicurazioni Generali SPA & Anor* [1991] 2 I.L.R.M. 237, Finlay C.J. stated at p. 243 that, where an Arbitrator decides a question of law in respect of which the general issue in dispute, but not the precise question of law, is submitted to him, the court "may in its discretion and in particular cases where the decision so expressed is clearly wrong on

its face, intervene by way of remitting the matter or otherwise in the interests of justice". Thus, as noted by Clarke J. in *Limerick City Council v. Uniform Construction Ltd.* [2007] 1 I.R. 30 at p.43, the jurisdiction is "limited and arises only where the error is 'so fundamental' that it cannot be allowed to stand (*Keenan v. Shield Insurance Company Ltd.*) or 'clearly wrong' (*McStay v. Assicurazione Generali SPA & Anor*)".

7. Present Proceedings
In these proceedings the plaintiff is seeking to:-

(a) set aside and/or remit the award; and

(b) remove the Arbitrator and appoint a new Arbitrator.

In support of its contention that the award should be set aside and/or remitted the plaintiff argues that there are, in total, ten fundamental defects in the award which constitute either misconduct of the proceedings, patent errors or errors of law on the face of the record. For ease of reference, these are headed as follows:-

(i) Deciding the issue of "reasonableness" pursuant to clause 63 of the I.E.I. contract when it was not properly before the Arbitrator.

(ii) Failure to take into account evidence relating to S.K.C's insolvency.

(iii) Misinterpreting and wrongly applying the onus of proof in respect to the financial position of S.K.C.

(iv) Deciding the issue of delay without hearing evidence of G.C.C's expert programmer.

(v) The deletion of the words "or at all" at para. 36(6).

(vi) The award of additional payment to S.K.C. in respect of "Muck-Away".

(vii) The conclusion that S.K.C's withdrawal from the site was not a repudiatory breach.

(viii) The use of clause 63 as a substitute for the law on repudiation.

(ix) The conclusion that G.C.C. was in breach of contract when it acted in accordance with the certificate of the Engineer.

(x) The finding of repudiation of the Acceleration Agreement after that agreement was terminated/frustrated.

In support of the contention that the Arbitrator should be removed from hearing this dispute any further and that a new Arbitrator should be appointed, the plaintiff relies on the following grounds:-

1. The Arbitrator fell asleep during the hearing.

2. The Arbitrator made improper unilateral contact with the parties at various stages before and after the hearing.

3. The Arbitrator issued a note which purported to explain various conclusions reached by the Arbitrator in his award, in circumstances where the Arbitrator had no jurisdiction to issue such a note.

8. Consideration of the Plaintiff's Submissions
I will now turn to an examination of each of the grounds advanced by the plaintiff for setting aside/remitting the award.

(i) Deciding the issue of "reasonableness" pursuant to clause 63 of the I.E.I. contract when it was not properly before the arbitrator
Clause 63 of the I.E.I. contract governs the circumstances in which an employer (or contractor) can issue a forfeiture notice on the occurrence of certain events of default on the part of the contractor. Clause 63(6) of the contract states that:-

"In relation to the employer's or contractor's rights of termination such rights shall not be exercised unreasonably."

At paras. 29(a) and 36(8) of the award, the Arbitrator found that G.C.C. acted unreasonably in issuing a notice pursuant to clause 63(1) of the contract. The plaintiff contends that the issue as to whether or not G.C.C. had behaved reasonably (or otherwise) for the purposes of clause 63 was not a matter which was dealt with during the course of the hearing (by agreement) and that G.C.C. was entitled to and now requires, an opportunity to make submissions on that issue before any decision is reached.

In support of this position G.C.C. states that the only reference to the issue of reasonableness was made by S.K.C's solicitor on the first day of the hearing when he stated that if the Arbitrator found against S.K.C. on the repudiation point then "he would have a fallback argument" in relation to the point on the unreasonableness of G.C.C's conduct. However, he went on to state that "we don't expect to be going there". G.C.C. now argue that this meant that the question of reasonableness (or unreasonableness) was parked and was only to be visited at a later date if it was found that G.C.C. did not repudiate the main contract. There was no further discussion during the hearing as to whether clause 63(6) should apply and there was no single instance of any question on the reasonableness issue being put to any of the plaintiff's witnesses. S.K.C. argues that once it was pleaded and flagged at the opening and referred to in its closing submissions, it was a tactical matter as to whether it would be raised at the hearing or not, and if S.K.C. choose not to do so for tactical reasons, G.C.C. had no reason to conclude that the issue was not in play. G.C.C. in support of its position also points out that when the Arbitrator first published his award he wrongly concluded that G.C.C. (i) had not issued a certificate of abandonment in compliance with clause 63; (ii) had not, as clause 63 required sought the advice of its expert Engineer; and (iii) had not sought expert legal advice prior to operating clause 63. The Arbitrator was incorrect in these findings and after submissions he corrected these findings in his final award. G.C.C. argues that these basic errors clearly show that the issue of "compliance and reasonableness" under clause 63 had not been fully debated.

I cannot agree that the factual errors in the Arbitrator's original award can inexorably lead to the conclusion that "reasonableness"

was not considered or canvassed. That factual errors were made in considering clause 63(1) does not mean that clause 63(6), a discrete subsection, was not considered by the Arbitrator.

G.C.C. also adverts to para. 30 of the arbitration award and suggests that it is implicit from this that the issue of "reasonableness" was not discussed: at para. 30 the Arbitrator states:-

> "…however, as the consequences of S.K.C's withdrawal from site and the purported clause 63(1) notice on the 27th June, 2005 has not been debated before me, I consider it proper to reserve further consideration of remedies for those events until the parties have had time to consider their respective positions…."

This argument, however, is not convincing since it is clear from the opening words of this paragraph (not quoted by G.C.C.) that the Arbitrator is concerned with remedies. The paragraph commences:-

> "As for the remedies which ought to flow from the foregoing situations, it is clear that…."

The remedies had not been addressed by S.K.C. in its statement of case or in its closing submissions. For this reason I do not accept G.C.C's argument based on the Arbitrator's wording in para. 30 of the award.

G.C.C. also points out that in his original award the Arbitrator found:-

> "That the respondent did not repudiate the original contract on the 4th June, 2005 or at all."

Having heard S.K.C's submissions, however, the Arbitrator omitted the final three words – "or at all" – in his final award (para. 36(6)). G.C.C. argues that for the Arbitrator to accede to S.K.C's request to allow S.K.C. a further opportunity to make further submissions on whether G.C.C. would be deemed to have repudiated the contract for unreasonable conduct under clause 63 (other than by its conduct on the 4th June, 2005) was incomprehensible. For G.C.C. this made no sense, since if the Arbitrator had determined the question of reasonableness for the purposes of clause 63 why could he not also determine the question of repudiation for unreasonableness. G.C.C's answer is that the Arbitrator did not do so because "reasonableness" was not fully canvassed in the first place, and that the Arbitrator's finding in this matter came as a surprise to S.K.C. as well. (G.C.C. has a discrete and separate objection to the omission of the words "or at all" which will be dealt with separately below.)

Although it may have been the intention of the Arbitrator and the parties at the outset to confine the first phase of the arbitration to "liability issues" and to defer the quantum issues, there can be little doubt that the lines between "liability" and "quantum" were somewhat blurred as the hearing progressed in the arbitration itself. That all "liability" issues have not been fully determined is clear from the substance of the correspondence between S.K.C's solicitor who wrote to the Arbitrator requesting "a procedure for dealing with the remaining issues of liability" to which the Arbitrator responded by stating he will "dispose of all remaining issues of liability before proceeding to a hearing on quantum". It is my view that when the Arbitrator found that G.C.C. acted unreasonably a further question arises for argument, namely, whether the unreasonable conduct so found amounts to repudiation or not, a determination of which will have consequences for what are the appropriate remedies. This is clearly not a quantum issue. It is an issue, however, that was never pleaded or addressed and remains an outstanding issue to be determined by the Arbitrator. When the Arbitrator wrote on the 26th January, 2008, inviting the parties to agree a timetable for dealing with this issue on the basis of "…written submissions and 'on documents' only…" he was not seeking to reopen the liability issue as previously determined by him, contrary to the suggestion G.C.C. advanced. He was merely teasing out the implications of his liability finding and affording the parties an opportunity to address him on this matter. For this reason I cannot find fault with the Arbitrator's approach.

To properly assess the strength of the G.C.C's argument it is appropriate to examine the Arbitrator's findings on this issue as expressed in paras. 29 and 29(a) of his final award. Having cited the provisions of clause 63(6) the Arbitrator continues:-

> "29. The effect of a clause 63(1) notice is merely to terminate the contractor's employment, while leaving all of the parties' other rights and obligations in place. Moreover, I am satisfied on the evidence that Mr. Kingston did not want to abandon the original contract but felt himself forced to suspend operations by the wrongful withdrawal of funds in Certificate No. 16 and G.C.C's earlier failure to pay in full under the Acceleration Agreement. Thus it was open to G.C.C. after the 27th June, 2005, withdrawal to negotiate a revised Acceleration Agreement – which Mr. Kingston was trying to do – or to allow the works to proceed under the original contract by paying S.K.C. the monies called for by the new aborted Acceleration Agreement. Upon the evidence before me and upon a balance of probability, I have no reason to doubt that the works could probably have been completed, albeit not by the end of November, 2006 (sic) but in any event in the early part of 2006. However, I strongly suspect that both Mr. McGrath and the project team (i.e. engineer and quality surveyor) were by no means adverse to and indeed may have welcomed the opportunity to terminate S.K.C's employment, as witness the speed with which both Clause 63(1) Certificate and Notice were issued on the very day of withdrawal and in the light of Mr. Solan's emails to Mr. Frampton (Book 3, pp. 764 and 767).
>
> > 29A. I conclude that the conduct of the respondent, its officers and representatives in this matter has been less than reasonable to the point where clause 63(6) should be brought into play, and that the claimant's rights should be protected and those of the respondents restricted accordingly."

G.C.C. also argued that the Arbitrator ultimately based his finding of unreasonableness on entirely different grounds from those argued by S.K.C. In this regard it pointed to the determination of the Arbitrator at para. 29 where he says that:-

> "…I have no reason to doubt that the works could probably have been completed, albeit not by the end of November, 2006 (sic) but in any event in the early part of 2006."

In its closing submissions to the Arbitrator S.K.C. had argued that G.C.C. had acted unreasonably in terminating the contract "…in all the circumstances of this case…" and with specific attention to:-

> "G.C.C's breaches of the acceleration agreement and its refusal to pay sums due under it;
>
> - G.C.C's refusal to acknowledge the existence of the acceleration agreement;
>
> - G.C.C's withdrawal, through certificates, of monies already paid under the acceleration agreement;
>
> - The fact that the G.C.C. design team had disguised the payments made under the acceleration agreement as

payments made in relation to measured work and preliminaries;

The manner in which extension of time applications were treated by the engineer;

Undue influence and duress supplied by G.C.C. or the engineer in the matter of extensions of time;

The positive commitment of S.K.C. to achieve completion by the end of November, having regard to the fact that S.K.C., well into June, 2005, had continued to apply the resources in terms of manpower and plant required under the acceleration agreement, and over and above those required by the original contract."

A close reading of para. 29 clearly shows that the Arbitrator did not find unreasonableness simply because G.C.C. did not allow works to proceed when the works could have been completed "in the early part of 2006". It is my view that the Arbitrator's finding in para. 29 of his award was fully open to him on the basis of the submissions made by S.K.C. in this regard.

It is also significant to note that although the Arbitrator had not provided for rejoinder submissions, G.C.C's advisor made additional submissions to the Arbitrator by letter dated the 17th August, 2007. In these it is noteworthy that G.C.C. did not object to S.K.C. originally making its submissions to the Arbitrator in relation to clause 63(6); did not seek to have the hearing reopened to enable them to adduce evidence, or cross-examine witnesses, in relation to the issue of clause 63(6) unreasonableness; did not write to either the Arbitrator or S.K.C's solicitors to complain that they had been, in effect, taken by surprise by S.K.C's submissions in relation to clause 63(6) and did not seek to advance any submissions whatsoever themselves in respect of clause 63(6). They allowed the Arbitrator to proceed to finalise his award on the basis of the submissions filed and left him at large on the clause 63(6) issue.

The first time G.C.C. attempted to argue that the Arbitrator had no jurisdiction to address S.K.C's submission pursuant to clause 63(6) was in the post-award letter it sent to the Arbitrator pursuant to r. 21.3 of the I.E.I. procedure. The Arbitrator in responding to G.C.C's complaint on that occasion at para. 9.4 in his ruling under r. 21.3 stated:-

> "The facts relevant to any consideration of reasonable (or unreasonable) conduct are not in issue and the consequences which might flow from such conduct had been reserved for later discussion. For the rest, the said conduct was pleaded and was discussed at hearing and/or after the hearing in closing submissions before the award."

Bearing in mind once again that the matter was pleaded and adverted to explicitly in the closing submissions by S.K.C., and for the reasons just outlined I reject the arguments advanced by G.C.C. under this heading.

The case law cited by G.C.C. in support of its position does not impress me. In *Omnibridge Consulting Ltd. v. Clearsprings (Management) Ltd*. [2004] E.W.H.C. 2276 (Comm), the arbitrator clearly adopted an approach which was contrary to the parties common position. In *Thomas Borthwick (Glasgow) Ltd. v. Faure Fairclough Ltd.* [1968] 1 Lloyd's Law Reports 16, Donaldson J. states that if the Tribunal considers that both parties have missed the point it should invite the parties to deal with the point. Whether the parties have missed the point is a question of fact in each case. It will be determined by standing back and looking at the hearing as a whole and in its entirety (*Interbulk Ltd. v. Aiden Shipping Co. Ltd., (the "Vimeira")* [1984] 2 Lloyd's Law Reports 66, see Goff L.J. at p. 74). At p. 76 of Vimeira, Ackner L.J. said:-

> "The essential function of an arbitrator or, indeed, a Judge is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point…the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it."

I have no difficulty accepting this as an accurate statement of the law and it is not surprising that such cases might be considered to be tainted by serious irregularity when they arise. But this is not the case here. There was evidence which would justify the Arbitrator deciding that the issue was in play and in reaching the conclusion he did. The facts as already outlined confirmed this: the matter was pleaded, it was mentioned briefly in the opening by S.K.C., it featured in the submissions and G.C.C. did not make an issue of it either in its submissions or in its letter submitted to the Arbitrator with additional submissions on the 17th August, 2005. Furthermore G.C.C. was represented at all stages by an experienced and competent legal team. This in my view is not a case where the Arbitrator was guilty of misconduct in failing to draw the attention of G.C.C. to the issue of reasonableness as it was referred to in clause 63(6). It is certainly not a "substantial injustice" as the term is used in *Warborough Investments Ltd. v. S. Robinson & Sons (Holdings) Ltd.* [2003] E.W.C.A. Civ. 751.

In sum, clause 63 generally was a matter discussed and debated at great length; thus, clause 63(6) which formed an integral part of the mechanics of clause 63 and a necessary incident thereof, was undoubtedly in play; moreover, it was something which fell to be assessed objectively on the basis of all the relevant evidence and, while questioning and cross-examining on the reasonableness or unreasonableness of the parties' conduct may have shed some extra light on the issue, the absence of such examinations does not in any way bar the Arbitrator from making a decision thereon. It was the parties' decision not to canvass the issue in more depth during the hearing and this may have been a strategic decision for the parties, both wishing for different reasons that the Arbitrator would not have to get to it. The concern in *Vimeira* that the Arbitrator give the parties an opportunity to deal with the issue is misplaced here. In the end, and after some confusion, he did need to get to it and, even if his decision might not concur with the parties' or court's view of reasonableness, it was within his jurisdiction to make this assessment and there is accordingly no basis for remittal.

In reaching this conclusion I am in line with the deferential policy of the Irish courts towards arbitral awards as can be seen in *Keenan v. Shield Insurance Company Limited* [1988] I.R. 89, and *McCarthy v. Keane & Ors* [2004] 3 I.R. 617, and in Re Via Net Works (Ireland) Ltd. [2002] 2 I.R. 47.

(ii) Failure to take into account evidence relating to S.K.C's insolvency

Under this heading G.C.C. essentially criticises the Arbitrator for accepting evidence he should have rejected and for failing to assess evidence or to acknowledge or accept evidence produced by G.C.C.

In particular G.C.C. argues that the Arbitrator was unfair when he accepted the evidence that "Kingston was advised by his auditors" of the risks of insolvency. G.C.C. said that this was mere hearsay and in any event was contradicted by Mr. Kingston who in direct evidence suggested S.K.C. was insolvent. It also criticised the S.K.C. for not calling the auditors or its accountants to give evidence on the solvency or insolvency of the company, and the Arbitrator for not assessing for himself the accounts for 2005. Moreover, the evidence of the auditor related to the company's position as of the 10th June, and was not evidence of the company's financial

situation on the 27th June, when the G.C.C's Engineer terminated the agreement. Finally, it complained that the Arbitrator ignored all of G.C.C's evidence on the financial affairs of S.K.C. as presented at paras. 33 – 36 of Mr. Owen's second affidavit.

Bearing in mind the court's policy to respect the arbitration process and to intervene only in extreme and exceptional circumstances, the G.C.C. undertakes a particularly difficult task in making this argument. In effect it is arguing that the Arbitrator misconducted himself in assessing and weighing the information put before him. As already noted the courts have shown great reluctance in intervening in such a manner especially where the challenge is to the weight and value given by the Arbitrator to the evidence put before him. In this context the dictum of Morrison J. in the case of *Fidelity Management S.A. & Ors v. Myriad International Holdings B.V. & Anor* [2005] E.W.H.C. 1193 (Comm), 9th June, 2005, is a salutary reminder of what the courts' approach should be in cases of this nature:-

> "The need for caution when a commercial court judge is dealing with an arbitral award is that much greater, because the parties have chosen an autonomous process under which they agree to be bound by the facts as found by the arbitrators and from whose findings of fact there is no appeal. I approach the award on the basis of an assumption that the arbitrators understood their function and knew how to perform it…. And, further, that it would be wrong for this court to undertake a narrow textual analysis of the award so as to conclude that there has been a serious irregularity of the sort required under section 68 of the Act."

Although given in a different context and relating to different statutory provisions, I have no difficulty in adopting this dictum as a proper guide for this Court in this case.

As a preliminary point it is worth recording that S.K.C. responded to G.C.C's arguments under this heading by stating that G.C.C. was wrong in targeting the insolvency issue at the hearing and in its subsequent submissions as S.K.C. never pleaded the actual insolvency of the company. What it did deal with at the hearing was S.K.C's reasonable fear of possible insolvency because of the auditor's warning as expressed by Mr. Kingston in his witness statement. It was clearly its choice in these circumstances not to call other witnesses (such as its auditor or its accountants) to give evidence on S.K.C's financial situation. What appears surprising, however, in view of its own pleadings was that G.C.C. called no evidence on this issue during the hearing. G.C.C. did, however, comment extensively (20 pages) in his closing submission on the state of S.K.C's finances, although a close reading of this documentation also reveals some uncertainty on its part as to its position on S.K.C's solvency. At para. 1.2.15, for example, G.C.C. states that "in the absence of any evidence to the effect that the claimant was technically insolvent…" the S.K.C. case "…must fail…". Again at para. 1.8.2, this sentiment is repeated where it states that "there is absolutely no evidence as to whether the claimant actually became legally insolvent or any evidence as to when the claimant actually became insolvent". On the other hand at para. 1.3 of G.C.C's submission it is stated that "all of the above evidence would suggest that the claimant was insolvent long before June, 2005". And again in a similar vein at para. 1.8.3 it is stated that "it is entirely possible that the claimant became legally insolvent long before June, 2005 and all the facts would certainly suggest that this was the case".

In the event the Arbitrator, in his award pursuant to the r. 21.3 applications, rejected all of G.C.C's additional submissions on these matters (see paras. 8.1 – 8.6).

In considering S.K.C's arguments on these matters it might be noted that under the I.E.I. Procedure (r. 7.3(d)) the Arbitrator is given full power to decide:-

> "…whether to apply the strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other), sought to be tendered on any matters of fact or opinion…"

This clearly means that the Arbitrator was entitled to accept Mr. Kingston's evidence as to his auditor's attitude and assessment notwithstanding its hearsay character. The Arbitrator also gave his reasons for preferring the reported auditor's assessment (i.e. that the company was at risk of trading while insolvent) to Mr. Kingston's own direct evidence (that the company was insolvent) and it would be wrong for this Court to find fault with his finding in these circumstances. The auditor's alleged attitude and assessment as to S.K.C's financial position referred to the 10th June, more than two weeks prior to the issuing of clause 63 certificate by G.C.C's Engineer, was a matter which in the circumstances of the case made no difference, and was something well within the Arbitrator's discretion and he cannot be seriously criticised for that reason. Moreover, if S.K.C. choose not to call additional witnesses on the financial position of S.K.C., this is something which, given their pleadings was not unreasonable and certainly was not something which would compel the Arbitrator to make an adverse finding.

Insofar as G.C.C. complained that the Arbitrator failed to assess and discuss in his award, the audited accounts of S.K.C. for the year 2005 and that this amounted to "a factual omission on his part which renders the award unfair", I take guidance from the following statement of the law in Russell on Arbitration (23rd Ed.):-

> "An allegation that the arbitrators failed to take into account a particular piece of evidence said to be relevant to an issue or drew incorrect inferences from the evidence is not a failure to deal with an issue. The assertion that the arbitrator failed to take proper account of the evidence could, in an exceptional case, give rise to a challenge if 'an arbitrator genuinely overlooked evidence that really mattered, or got the wrong end of the stick in misunderstanding it. But there is all the difference in the world between such cases and an arbitrator evaluating evidence but reaching factual conclusions on it (as will happen in most arbitrations) which one party does not like." (Sutton, Gill & Gearing, *Russell on Arbitration*, 23rd Ed., (Sweet & Maxwell, London, 2007) at p. 489,para. 8.082)"

There is no evidence in this case that the Arbitrator overlooked evidence that really mattered or that he "got the wrong end of the stick" in misunderstanding it. All the evidence relating to S.K.C's insolvency had been set out in G.C.C's final submission and rehearsed in the r. 21.3 application when the arbitrator revisited his award. One must assume that he took all the evidence into account in reaching his determination; there is no evidence to the contrary. The fact that he has not dealt with it in meticulous detail – item by item – is not sufficient to compel a contrary conclusion. Quoting from *Russell on Arbitration*, I am in agreement with the learned authors when they say:-

> "The tribunal is not expected to recite at great length communications exchanged or submissions made by the parties. Nor is it required to set out each step by which it reached its conclusion to deal with each and every point made by the parties. It is sufficient that the tribunal should explain what its findings are and the evidential route by which it reached its conclusions." (at p. 286, para. 6.032.) (See also *Hussman (Europe) Limited v. Al Ameen Development &Trade Company* [2000] 2 Lloyd's Law Reports 83 at 97 (para. 56))".

Finally, the issue of insolvency under clause 63(1) was the subject of an amendment under Rule 21.3. While it was initially regarded in

error by the Arbitrator as the only possible basis for invoking clause 63(1), this was not so and the Arbitrator rectified his award to reflect the true position, i.e. G.C.C's reliance on 'abandonment' for invoking this clause. Thus, the Arbitrator's findings in relation to insolvency no longer formed the basis for his decision and, although some of these findings remain within the final award, they are merely obiter and do not form a binding part of the award.

For the above reasons I reject the arguments advanced by G.C.C. under this heading.

(iii) Misinterpreting and wrongly applying the onus of proof in respect to the financial position of S.K.C.
In the initial award the Arbitrator in error, indicated that clause 63 (the termination clause in the main agreement) was triggered by the certificate issued by G.C.C. indicating the insolvency of S.K.C. After submissions the Arbitrator corrected this and acknowledged that clause 63 came into operation not because of S.K.C's insolvency, but because the G.C.C's Engineer certified that S.K.C. had abandoned the site.

After this correction the insolvency issue became irrelevant in the context of clause 63. Instead of being the reason why clause 63 came into operation, the insolvency of S.K.C., or more correctly "the risk of trading while insolvent" was the explanation furnished by S.K.C. for quitting the site. This risk in turn was attributed to G.C.C's Certificate No. 16 which withdrew monies due to S.K.C. under the accelerated agreement. In short, S.K.C. said:-

> "We quit the site because G.C.C's conduct caused the bank to react in such a way that we were at risk of trading while insolvent."

In this new situation insolvency was no longer the issue; the central issue in S.K.C's defence then was that it left the site because there was a risk that it might be trading while insolvent. This of course was something that S.K.C. then had to prove if the Arbitrator was to be convinced. In fact it did so to the satisfaction of the Arbitrator, the evidence relating to this matter being (i) S.K.C's accounts for 2005; and (ii) the evidence from Mr. Kingston that he was warned by his auditors. In the event the Arbitrator accepted this evidence (and rejected other evidence produced by G.C.C.), as well as Mr. Kingston's own evidence relating to his bankers, and it was on this basis that the Arbitrator came to his conclusions as set out in para. 28(b) of the final award.

Although the reference in para. 28(a) to the historic finding is somewhat confusing I construe that paragraph as an indication that the Arbitrator had regard to "the only two pieces of relevant evidence before me" when he reached his decision.

At para. 28(b) the Arbitrator shows that he was satisfied that on the evidence before him, that S.K.C. had discharged the onus of proof regarding its defence that it withdrew from the site only because it considered there was a risk of trading while insolvent. Paragraph 28(b) reads in full:-

> "28(b). There has been considerable discussion (by way of correspondence since the 24th October, 2007 (about S.K.C's general financial position). However, it was both pleaded (claimant's statement of case, paragraph 5.4.6) and deposed by Mr. Kingston (paragraph 29 of his witness statement) that – in Mr. Hussey's words – 'Mr. Kingston had been advised by his auditors, who are financial experts, that the claimant ran the risk only of trading while insolvent'. This statement has not been challenged by the respondent and I find it almost inconceivable that auditors would merely warn of a risk of insolvency if they knew (or ought to have known) that their client was already insolvent. I conclude upon the evidence before me that on the 27th June, 2005, S.K.C. was neither bankrupt nor insolvent and that S.K.C's withdrawal from site was motivated only by a risk that, if S.K.C. continued with the works, it might in due course find itself trading while insolvent."

In reaching this conclusion the Arbitrator's findings were well within his entitlement (his "margin of appreciation") to determine the relevant facts on the basis of such evidence before him as he found persuasive and compelling. I do not find that the Arbitrator misunderstood the points of dispute between the parties on this issue.

Once more it appears that G.C.C's real complaint in this regard relates to the weight and nature (e.g. hearsay) of the evidence accepted by the Arbitrator in this matter and its argument on this issue was considered elsewhere in this judgment.

(iv) Deciding the issue of delay without hearing evidence of G.C.C's expert programmer
To appreciate the argument of G.C.C. here it is necessary to understand the immediate background to the "delay" issue. One of the main bones of contention as the works proceeded was the failure of S.K.C. to keep to the original timetable and to the various extensions of time given as the contract progressed. The causes of these delays – whether it was S.K.C's fault, G.C.C's fault or no one's fault – might clearly have a bearing on G.C.C's right to terminate under clause 63. In preparation for this issue, G.C.C. engaged the services of Mr. Johnson, an expert on delay and time extensions in construction contracts, who prepared an eighty page report on the causes of delay in the Eyre Square contract [The Linacre Report]. A dispute arose as to the necessity of having Mr. Johnson give evidence and the parties (with the Arbitrator's approval) came to an agreement on the matter. S.K.C. argued that Mr. Johnson's report could have no bearing on the liability issue and should for that reason be excluded. G.C.C. contested this. The agreement reached on this issue by the parties is recorded in the transcript and referred to in Mr. Hussey's affidavit and I will reproduce here the relevant passage which records the agreement:-

> "In the overall, I [i.e. Mr. Hussey for S.K.C.] would be suggesting that what we do is that we make closing submissions to you the arbitrator after this hearing. I will be saying to you, in the closing submissions, that there is nothing in the Johnson report, that even if Mr. Johnson gave evidence and sustained his evidence, that there is nothing in the report which would affect or should affect your decision on liability. Mr. Solan [for G.C.C.] will, presumably be saying otherwise. If, when you come to consider the issue of liability, you agree with him rather than me then, before you issue your award on liability we would have to deal with the Johnson issue. That's the way that I propose that we deal with it. That I would make my submissions as to why it wouldn't affect matters. Mr. Solan makes submissions as to why it should affect matters and then you decide whether or not it would or could …."

Mr. Dudley Solan, solicitor for G.C.C., then said:-

> "…. As I understand what Mr. Hussey has proposed there it sounds to me like a pretty sensible, practical proposal as to how we would deal with it. I am content to do that. I have to say I am pleased to hear it put in those terms …"

It seems clear to me from this that the Arbitrator agreed that reference could be made to Mr. Johnson's evidence in the closing submissions, and that if he did consider it relevant to the issue of liability he would inform the parties and Mr. Johnson would be called to give evidence (or, at the very least further submissions could be made on the admissibility of his evidence).

As it turned out, the Arbitrator did not rely on the evidence (although it seems to have been before him to some extent e.g. in examining witnesses etc.). In his note of explanation, he states that he reached his conclusions on delay in light of the evidence of those actively involved in the works (from both sides) in contrast to Mr. Johnson who "was not even instructed until 5th April 2007 and could therefore have no personal knowledge of events some two years earlier".

Of course, this basis for preferring the evidence of the other witnesses to Mr. Johnson is misconceived and even erroneous. The fact that an expert has no personal knowledge of the events does not mean that the expert evidence is inadmissible; if that were so, such evidence would rarely if ever be admissible.

However, the Arbitrator is, as noted elsewhere, left with a very wide margin of appreciation in his determination of the evidence and facts which are before him. He is entitled to a far greater freedom in assessing the admissibility, relevance or weight of evidence than is usual in civil litigation. And within this margin, he is entitled to assess the evidence and to prefer first-hand evidence to expert evidence on a particular issue. While again his reasoning on this point may be ambiguous and mistaken, nevertheless it is not clear – particularly in light of the limited finding he made in respect of delay – that the error is so fundamental as to warrant the question being remitted.

This is so, a *fortiori*, where the parties themselves have expressly left the issue of determining the relevance or otherwise of particular evidence to the Arbitrator: if there was any agreement between the parties, it was that the Arbitrator would choose whether the evidence was relevant and required further submission. The issue of delay was always going to be in issue in liability, whether directly or indirectly; this agreement merely concerned one aspect of the consideration of this issue. He came to his conclusion on the basis of evidence from witnesses directly involved and called by both sides. In this context, there seems to be a degree of backtracking/hindsight on the part of GCC: having left the issue to the Arbitrator, but ultimately not being content with his conclusion, they now seek to resile from their earlier position. This is not a case where the Arbitrator of his own motion refused to hear this evidence; the parties left that decision with him (albeit on certain conditions which seem to have been or have become unclear).

Finally, Mr. Hussey for S.K.C. also argued that Mr. Johnson's evidence should also be excluded on grounds of "estoppel" and "failure to plead". These points are not relevant to the present challenge, however, because the Arbitrator did not exclude the evidence of Mr. Johnson for these reasons.

(v) The deletion of the words "or at all" at paragraph 36(6)
In his original award, published on the 8th October, 2007, the Arbitrator determined that "the respondent (G.C.C.) did not repudiate the original contract either on the 4th June, 2005 or at all". (Emphasis added). When the award was subsequently republished in December with amendments, the words 'or at all' were deleted. The Arbitrator omitted the words at the request of S.K.C. whose submission was made under r. 21.3 and which was furnished to G.C.C. at the time. G.C.C. now contends that the Arbitrator did not have the jurisdiction or power to make an amendment of this nature, that it constituted misconduct of the proceedings, that it amounted to bias and that it amounted to an error of law. Section 27 of the Arbitration Act 1954 states that unless the contrary intention is shown the "award to be made by the arbitrator…shall be final and binding on the parties and the persons claiming under them respectively". Section 28 of the Arbitration Act 1954 however qualifies this and states:-

> "Unless a contrary intention is expressed in the arbitration agreement, the arbitrator or umpire shall have power to correct in an award any clerical mistake or error arising from any accidental slip or omission."

Under the I.E.I. Arbitration Procedures, which the parties adopted, clause 21.3 states:-

> "The arbitrator may, within 28 days of the date of the award, correct an award so as to remove any clerical mistake, error or ambiguity, and may also make an additional award in respect of any matter which was not dealt with in the award."

Quite clearly clause 21.3 of the I.E.I. Arbitration Procedures expresses "a contrary intention" within the meaning of s. 28 and accordingly it is the relevant provision which governs the rights of the parties in the present context.

It is significant at the outset to note that the wording of s. 28 and clause 21.3 is different and clearly this is intentional. First, the omission of the phrase "arising from any accidental slip or omission" expands the kinds of errors covered in the contractual clause. Second, the punctuation in the clause links "error" and "ambiguity" together: the adjective "clerical" cannot govern one and not the other. Third, clause 21.3 also enables the Arbitrator to deal with omissions which are not accidental.

In freeing the word "error" from the restrictive phrase "arising from any accidental slip or omission" in s. 28 the drafters of clause 21.3 are unlikely to have intended to restrict the word at the same time by linking it to the adjective "clerical". Such a construction would make little sense.

It is instructive in construing clause 21.3 of the I.E.I. Arbitration Procedures to look at the history of the provision. Section 28 of the Act of 1954 which gives the Arbitrator power to correct "in an award any clerical mistake or error arising from any accidental slip or omission" was taken directly from s. 17 of the former United Kingdom Arbitration Act 1950. This in turn was first used in the Arbitration Act 1889 and when it was first adopted in that Act it purported to apply to arbitrators the "slip rule" which was available to High Court judges in relation to their judgments. (For current version of the slip rule, see O. 28, r. 11 of the Irish Rules of the Superior Courts). In addition to this power of correction however, judges also had an inherent power at Common Law to correct their judgments for error when this occurred. (*Mutual Shipping Corporation of New York v. Bayshore Shipping Co. of Monrovia "the Montan"* [1985] 1 All E.R. 520 at 528 per Goff L.J.) Arbitrators did not have such a general power under the old legislation but in the Arbitration Act 1996, the earlier Arbitration Act 1950 was repealed in England. Section 17 of 1950 Act was however re-enacted ("the slip rule") but an added power to correct for ambiguity was given to the Arbitrator.

Following this amendment the English Institution of Civil Engineers adopted their "Arbitration Procedure (1997)" and set out for the first time the new text of clause 21.3 which the I.E.I. "Arbitration Procedure (2000)" adopted as the appropriate procedure to govern arbitrations in Ireland under that procedure. As already mentioned clause 21.3 now gives the Arbitrator power "…to correct an award so as to remove any clerical mistake, error or ambiguity…" as well as also giving the Arbitrator power to make an additional award in respect of any matter which was not dealt with in the award. From this history it can be seen that neither the English Act of 1996, the English (Institute of Civil Engineers) Arbitration Procedure 1997 nor the Irish I.E.I. Arbitration Procedure (2000) intended that the power to correct for ambiguity was to be restricted by the word "clerical". That this is the correct interpretation can be seen from the statement in *Russell on Arbitration* (23rd Ed.) when it speaks of the ambiguity provision under the English legislation. At pp. 336-337, para. 6.170 of that treatise it is stated:-

> "This would cover a situation where the tribunal's reasoning or decision is not sufficiently clear and clarification or correction is therefore warranted. The courts have drawn a distinction between seeking to effect a change in the tribunal's decision and referring a matter to the tribunal for clarification of what it has decided. An award which contains inadequate rationale or incomplete reasons for a decision is likely to be ambiguous and need clarification. The sub-section may therefore provide a means to request further reasons from the tribunal or to request reasons where none have previously been given in relation to a particular issue but only where there is genuine ambiguity."

From this it can be seen that the word ambiguity in the English Act is not restricted in any way by the word "clerical", and since it is linked in the text of clause 21.3 of the Irish Arbitration Procedure (2000) with the word "error", both words must enjoy that freedom. Had there been a different intention, the drafters of this clause would have reproduced the s. 28 phraseology which restricts correction to errors "arising from any accidental slip or omission".

I am of the opinion when the Arbitrator agreed to omit "or at all" all he was doing was merely recognising that in his award he had focused only on S.K.C's argument that the engineering Certificate No. 16 issued by G.C.C's Engineer on the 4th June, 2005, had repudiated the original contract. He did not address his mind to the argument that if G.C.C. had acted unreasonably under clause 63, that too might be construed as a repudiation. In fact neither party had addressed that point in their submissions. It was for this reason, having considered the provisions of r. 21.3, that he omitted the words "or at all" and effectively reserved this issue for another day. In doing so I do not believe that he was guilty of any misconduct. In my view, given the context, the three words constituted an error within the meaning of clause 21.3 and was something he was entitled to correct.

Neither do I believe that the Arbitrator showed any bias or fell into an error of law in so deciding. Both parties proceeded under the amendment procedure of Rule 21.3 and engaged in written correspondence with the Arbitrator. Each was aware of the others' requisitions and were provided with an opportunity to have their views heard.

(vi) The award of additional payment to S.K.C. in respect of "Muck-Away"
The background to S.K.C's "Muck-Away" claim arose in the following way. From the commencement of the works until around the end of June, 2004, S.K.C. had deposited waste material excavated from Eyre Square at a land reclamation site in Galway Docks. At the end of June, S.K.C. were informed by the Environmental Enforcement Officer that the deposition of this waste material required a waste permit licence and that the material could only be transported by a licensed haulier with a collection and tip permit, and disposed of in a registered waste tip. As a result, S.K.C. incurred additional costs in disposing of the materials and sought reimbursement of this cost from Galway City Council, designating the claim as "Muck-Away". The claim was rejected by G.C.C. However, S.K.C. maintained the claim and contended that one of the terms of the Acceleration Agreement, as pleaded by it, was that it would require payment in addition to its acceleration costs under that agreement of the full value of its "Muck-Away" claim.

The "Muck-Away" claim was extensively canvassed in evidence and was argued at some length at the hearing. In evidence Mr. Kingston somewhat refined his claim and the new refinement was dealt with in evidence and referred to by both parties in their closing submissions.

The Arbitrator carefully assessed the issue of "Muck-Away" at paras. 33 – 35 of his award and found that while S.K.C. had no valid claim to extra remuneration for the disposal of "Muck-Away" if it was already billed, it was entitled to compensation for the disposal to the waste tip rather than to G.C.C's depot of useable material, together with the extra unforeseen costs in the disposal of muck and waste caused by the temporary closure of the tip at Galway Port.

The Arbitrator's award was the subject of a requisition under Rule 21.3 by G.C.C. The parties again made submissions and the Arbitrator gave reasons for refusing G.C.C's requisition and for his decision. The Arbitrator made clear that all issues were "… argued at some length and supporting evidence adduced from both sides". G.C.C. does not dispute that this was so. In its submissions to the Court, G.C.C. argues that the Arbitrator reached a finding that S.K.C. was entitled to certain additional payments in respect of "Muck-Away". It argues that S.K.C. did not plead that it was entitled to these payments and, accordingly, the Arbitrator acted beyond his jurisdiction in making findings in relation to points which were not before the Arbitrator. At paragraph 5.61 of its submissions to the Court it sets out its case:-

> "In relation to "Muck-Away", S.K.C. pleaded that it came to an agreement with Galway City Council that, in return for accelerating the works, S.K.C. would be paid its "Muck-Away" costs in full. It is clear from paragraph 78 of Mr. Hussey's second (sic) [this should read the replying affidavit of Mr. Hussey dated the 5th March, 2008] affidavit that what S.K.C. actually sought (and this was its pleaded case in terms of the Acceleration Agreement) was the payment of its "Muck-Away" claim instead of what it claimed it was due for forgoing extensions of time, which was approximated at €130,000.00. Thus, the maximum which S.K.C. claimed was "Muck-Away" instead of €130,000.00. S.K.C. did not seek more than this. The arbitrator in fact awarded S.K.C. "Muck-Away" plus €130,000.00. This is a manifest and patent error especially considering the arbitrator's acknowledgement in his note of explanation that "Mr. Hussey agrees that at no time did S.K.C. suggest that it was entitled to payment for buying back extensions of time in addition to "Muck-Away" *but that is not the point*." [Emphasis added].
>
> "However, with respect to the arbitrator, this is precisely the point. Again, the arbitrator has decided an issue on a premise which was not before the parties and which was not debated before the hearing. G.C.C. had always maintained that there was never an entitlement to "Muck-Away" payments. Whilst S.K.C. did claim "Muck-Away" payments, it had agreed to forgo payment for buying back time if it got payment for "Muck-Away". The possibility that S.K.C. could get payments for buying back time in addition to "Muck-Away" is an entirely new point not previously contemplated at the hearing. In those circumstances, it was incumbent on the arbitrator to bring this new "approach" to the attention of the parties. Furthermore, there is clear authority that such conduct amounts to misconduct, particularly where the arbitrator awards a party more than what it actually sought." (At paras. 5.61 and 5.62)

Much of the confusion and difficulties relating to this case stem from the fact that the Accelerated Agreement was not reduced to writing and there was a good deal of dispute between the parties as to what the terms of the agreement were. The Arbitrator having heard all the evidence concluded that the Acceleration Agreement did not include payment whether upfront or otherwise for "Muck-Away", but that it did include a payment of €130,000.00 not by way of bonus for due performance (as suggested by G.C.C.) but rather as the price for G.C.C's "buying out" of S.K.C's rights to E.O.T. (Extensions of Time) up to the 8th March, 2005. Having made this finding it was quite within the Arbitrator's rights to consider the "Muck-Away" claim separately. This he did having heard all the evidence and all the arguments and after extensive submissions. In the event he disallowed the major part of the "Muck-Away" claim but granted an undetermined amount in respect of the additional "Muck-Away" costs incurred by S.K.C. Bearing in mind the general principle of deference which the Court should show to the arbitration process, I am not prepared to interfere with the Arbitrator's determination on this issue. Had I any doubt that these matters were fully thrashed out in the arbitration process, I might take a

different view. Having read the extensive documentation and the lengthy submissions I am satisfied that there has been no serious irregularity which would cause substantial injustice in this determination.

(vii) The conclusion that S.K.C's withdrawal from the site was not a repudiatory breach
To appreciate the arguments advanced under this heading it is important to recall the sequence of events at issue. On the 4th June, the Engineer for G.C.C. wrongfully withdrew Certificate No. 16 for monies already certified and paid. On the 27th June, S.K.C. felt compelled to withdraw from the site. On the same day, G.C.C. invoked the clause 63 procedure.

At para. 36(7) of the award, the Arbitrator concludes that:-

> "The claimant's withdrawal from site on the 27th June, 2005 was a breach of the original contract, but not a fundamental breach or repudiation…"

G.C.C. contends that this finding constitutes a fundamental error of law on the face of the record. Once the Arbitrator concluded that S.K.C's withdrawal from the site was a breach of contract, it had to follow logically that it was a fundamental breach which repudiated the contract.

In support of its argument G.C.C. relies on several statements of the law as they appear in the textbooks. In *Keating on Building Contracts* (7th Ed.), drawing from the speech of Lord Simon in *Heyman v. Darwins* [1942] A.C. 356, at p. 378 and 398 repudiation is defined at para. 6.68 as where "one party so acts or so expresses himself as to show that he does not mean to accept the obligations of a contract any further". Under the heading "Repudiation by contractor" Keating goes on to say:-

> "Refusal or abandonment. An absolute refusal to carry out the work or an abandonment of the work before it is substantially completed, without any lawful excuse, is a repudiation." Furst & Ramsey, *Keating on Building Contracts*, 7th Ed., (Sweet & Maxwell, London, 2001) at p. 190, para. 6.84.

Again in connection with the non-completion of construction projects, Keating states that "if the contractor fails to complete in breach of contract, his breach will normally amount to a repudiation". The plaintiff deduces from this that if the failure to complete is a breach "it follows logically that it is a repudiatory breach".

Again quoting from *Hudson's Building and Engineering Contracts* (11th Ed.), under the heading "What breaches are repudiatory?" the plaintiff quotes the following:-

> "[A]bandonment of the site by a contractor or removal of plant or site offices and huts will prima facie be a clear fundamental breach, in the absence of some very special explanation." (Wallace, *Hudson's Building and Engineering Contracts*, 11th Ed., Volume 1 (Sweet & Maxwell, London, 1995) at para. 4.209.

It will be noted that G.C.C., even from these authorities, is overstating its case when it says that withdrawal from the site meant that "it had to follow logically that it was a fundamental breach which repudiated the contract". All the quotations relied on clearly indicate that the general rule is not absolute and is capable of exceptions.

The starting point in an analysis of repudiation is the rule that the person in breach must have intended this consequence, and while walking off the site may be indicative, it can not always lead to the inevitable conclusion suggested. It is only a prima facie assessment and it admits of lawful excuse. In the present case the evidence was that S.K.C. walked off the site because it had been warned that because of G.C.C's withdrawal of Certificate No. 16 there was a risk of being found to be trading while insolvent. The Arbitrator was entitled to find that this was a primary motive for S.K.C. leaving the site. Moving off the site in these circumstances did not speak inevitably of an intention to repudiate. Moreover, the Arbitrator also noted that Mr. Kingston continued to negotiate after that date in the hope that the matter could be resolved. G.C.C. argues that such post-event discussions cannot be enlisted to justify S.K.C's conduct on the 27th June. I disagree to this extent: in referring to Mr. Kingston's subsequent efforts at negotiations the Arbitrator was not using this evidence to "justify S.K.C's actions", but rather as an indicator to determine S.K.C's intention on the 27th June. The Arbitrator was entitled to infer from the subsequent efforts at negotiation that S.K.C's intention on the 27th was not to repudiate. If S.K.C. wrote a letter, for example, after the 27th June, explaining its conduct, would not the Arbitrator be entitled to use this to identify the intentions of S.K.C. on the relevant date? It may or may not be determinative, but it certainly is not irrelevant. What weight was to be given to such subsequent conduct in concluding what S.K.C's intentions were on the relevant date was a matter for the Arbitrator.

G.C.C. also argues that since the Arbitrator's finding was merely that S.K.C. did not wish to abandon the contract, this did not amount to a finding that S.K.C. did not intend to do so. In my view it must be inferred from the Arbitrator's actual finding that this is exactly what he was determining.

The determination of the intention of S.K.C. was a matter which was clearly within the Arbitrator's remit and there was evidence before him which entitled him to come to the conclusion that there was no repudiation of the main contract by S.K.C. when it removed much of its machinery from the site on the 27th June.

Finally, G.C.C. argues that the Arbitrator in his award, contrary to S.K.C's suggestion, made no finding that S.K.C. was forced to withdraw due to the actions of G.C.C. If this were true, according to G.C.C., then the Arbitrator could not have concluded that S.K.C. had breached the contract in the first place. The case law is quite clear, according to G.C.C., that where an employer is the one responsible for non-completion of a project then the employer will be the party guilty of the repudiation and the contractor will not be deemed to be in breach of contract. This argument in my view does not help G.C.C. The actions of G.C.C. involved a breach of the Acceleration Agreement (indeed a repudiatory breach – see para. 26 of the Arbitrator's award). But repudiation by G.C.C. of the Acceleration Agreement did not, in the view of the Arbitrator, constitute repudiation of the original contract. Thus, the employer's breach of the Acceleration Agreement did not taint the main contract.

Where there are two separate agreements, as we have here, the single reciprocity or symmetry argument necessary to sustain G.C.C's argument is not present.

This issue, that the withdrawal from the site was a repudiatory breach, was never pleaded in the arbitration process. Neither did G.C.C. at the relevant time seek to rely on any alleged repudiation on the part of S.K.C. in withdrawing from the site on the 27th June. In such circumstances the Arbitrator was not requested to rule on the issue and it would not have been open to him to do so in the circumstances. Even if G.C.C. had a right to repudiate, which was not determined, properly in my view, in opting for its remedy under clause 63, G.C.C. made a binding election which would have prevented it from later resorting to the repudiatory remedy even if

it were available.

For these reasons the Arbitrator's failure to find S.K.C's withdrawal from the site was not a repudiatory breach of its original contract, did not constitute misconduct or a fundamental error of law on the record.

(viii) The use of clause 63 as a substitute for the law on repudiation
At para. 24 of the award the Arbitrator noted that both parties had accused the other of repudiation of contract. He then went on to say, at para. 27 of his award:-

> "Work on the original contract was in fact brought to an end by S.K.C's withdrawal from the site on the 27th June, 2005 – but I do not need to consider the general law of repudiation, since the I.E.I. clause 63 provides the means for handling this situation."

The plaintiff contends "that this is an error of law on the face of the record and constitutes a misunderstanding of the function of clause 63 of the I.E.I. conditions of contract. Clause 63 deals with rights of forfeiture. It specifies that on the occurrence of certain events the employer or the contractor, as the case may be, will be entitled to take certain steps and exercise certain rights without having to avoid the contract. However, clause 63 does not displace or make irrelevant the law on repudiation (a proposition with which Mr. Hussey [Solicitor for S.K.C.] has agreed)." This is because events which give rise to rights of forfeiture may or may not also amount to a repudiation of contract. G.C.C. argues that in the present case the Arbitrator fell into error by assuming that clause 63 effectively replaced the law on repudiation and thereby disabled himself from properly assessing whether S.K.C's withdrawal from site constituted a repudiatory breach of contract.

To determine the strength of G.C.C's objection to this finding it is necessary to consider the wording of clause 63 in detail. The relative part of clause 63 which is quoted by the Arbitrator at para. 28 of the award is as follows:-

> "63(1). If the contractor shall become bankrupt or…if the engineer shall certify in writing to the employer that in his opinion the contractor:
>
> (a) has abandoned the contract; or…
>
> (b) …
>
> (c) …
>
> (d) despite previous warning by the engineer in writing his failing to proceed with the works with due diligence or is otherwise persistently or fundamentally in breach of his obligations under the contract…then the employer may after giving seven days notice in writing to the contractor enter upon the site and the works and expel the contractor therefrom…"

Significantly in reproducing this quotation of the relevant part of clause 63 in his award the Arbitrator does not include the important phrase that immediately follows the above quotation:-

> "…without thereby avoiding the contract or releasing the contractor from any of his obligations or liabilities under the contract or affecting the rights and powers conferred on the employer or the engineer by the contract and may himself complete the works…."

The fact that the clause is also contained in a section of the contract which is headed "Remedies and Powers" with a marginal descriptive word "Forfeiture", also confirms the view that the clause is not concerned with termination of the contract at all.

It is clear from a close reading of clause 63(1) that it is not concerned with the issue of whether there was a breach or a repudiatory breach but is concerned solely with giving the employer (G.C.C.) a right to enter and expel the contractor when the Engineer has certified that the contractor has "abandoned" the contract. And even in that case he can only do so after giving seven days notice. If the contract was terminated why would it be necessary for the employer (by the Engineer's certificate) to wait to assert his rights? It would seem that the change merely empowers the employer to repossess the site and the works, something he may wish to do in order to secure the works and complete the job if appropriate. The clause does not determine the rights of the parties or determine the liability of the parties inter se for their respective conduct leading up to the Engineer's certificate. It marks a crisis in the progress of the contract and provides a practical solution relating to control of the site and uncompleted works. It merely provides the employer with justification for entering and expelling the contractor in the interim without effecting the contractual rights or obligations of either party. I have no doubt that the Arbitrator fully appreciated the meaning of clause 63(1) as outlined by me here.

It is puzzling, therefore, when one reads at para. 29 of the Arbitrator's award referring to clause 63(6) which concerns the right of termination, that the Arbitrator makes this statement:-

> "The effect of a clause 63(1) Notice is merely to terminate the contractor's employment, while leaving all of the parties other rights and obligations in place."

For reasons already stated, I do not read this as holding that the contract was terminated by virtue of Clause 63(1), but rather that the contractor's rights to enter the site and works, after the required notice period, are terminated. Other rights and duties under the contract continue in existence and are determined by other considerations.

I do not read paras. 27 and 29 of the Arbitrator's award in the same way as G.C.C. does. In my view a closer reading of para. 27 indicates that the Arbitrator was only referring to work being brought to an end on the site by S.K.C's withdrawal on the 27th June, 2005. Provision for this situation is governed by I.E.I. clause 63 and all the Arbitrator seems to be saying is that, for that reason, the general law of repudiation does not come into play in that narrow context. I do not read the Arbitrator's finding as saying or suggesting that clause 63(1) effectively replaced the general law on repudiation.

In this case, the Arbitrator made a finding that there was a repudiation of the Acceleration Agreement. He found at the same time that there was no repudiation of the original contract. This is a factual and legal determination. On the facts – particularly the parties' actions and attempts to continue the agreement as well as the withdrawal from the site in disputed circumstances – he was entitled to come to this conclusion on the evidence before him. On the law, having been addressed "at length" on the law on repudiation (para.24), he was also entitled to come to this conclusion. It is for this reason that he did not "need to consider the general law of

repudiation".

However, the finding that there was no repudiation does not exclude there being circumstances giving rise to the procedures under clause 63. The work was in fact brought to an end by the withdrawal from the site and clause 63, an express contractual provision governing such circumstances, provides the means for "handling that situation". Clause 63 does not involve termination of the contract. It may involve termination of the employment of the works provided for under the contract, certainly for all practical purposes, but as the Arbitrator acknowledges, this leaves other rights and obligations in place e.g. the arbitration or liquidated damages clauses.

In this light, the Arbitrator's determination is not to the effect that clause 63 effectively replaces the common law. It is that, in these circumstances, there was no repudiation or termination under common law; however, there were circumstances giving rise to the invocation of clause 63 of the contract which in practice may amount to a termination of the work under the contract but not the contract itself.

Moreover, the plaintiff never in fact sought to terminate the contract under the common law, whether on the basis of repudiation or otherwise. It was the plaintiff which invoked and initiated the procedure under clause 63 and thus treated its rights and obligations as falling thereunder (including this entire arbitration process although the arbitration clause could be regarded as severable).

The phrasing of para.27 is certainly confusing and inelegant at the very least. Understood in its context, however, it does not amount to the Arbitrator treating clause 63 as a substitute for the law on repudiation. While the manner in which the Arbitrator expressed his reasoning on this point is once again not beyond reproach, this was a matter on which the Arbitrator had been addressed and which was specifically left to him for his determination both as a matter of fact and as a matter of law. The conclusion he came to was one which he was entitled to come to on the basis of the evidence and legal submissions before him. Moreover, while the fact that his failure to set out in detail his reasoning and analysis on this point is not wholly satisfactory, it does not necessarily render his conclusion erroneous or amount to such a substantial injustice to justify the court's intervention (in accordance with the principles outlined under other headings above).

(ix) The conclusion that G.C.C. was in breach of contract when it acted in accordance with the certificate of the Engineer
At para. 26 of the award the Arbitrator concludes as follows:-

> "I conclude that this withdrawal of monies [by the Engineer issuing Certificate No. 16] was a breach of the agreement so serious as to strike at the root of the agreement and thus amounted to an act of repudiation for which, as both the Engineer and Mr. Turner were its agents, G.C.C. must bear the consequences."

The plaintiff argues that the employer cannot be guilty of repudiatory breach through the acts of the Engineer in circumstances where the Engineer had a duty to act independently. In finding that the employer (Galway City Council) was vicariously liable through the acts of its Engineer, its agent, the Arbitrator committed an error of law on the face of the award since it is clearly established in law that G.C.C. could only be liable for the Engineer's acts if there had been fraud, collusion or undue influence. There was no express finding of such fraud or collusion, etc., and such a finding could not be implied. The plaintiff relies on cited legal authorities in support of his argument.

The defendant, (S.K.C.) replies that there was no duty on the Engineer to certify in the Acceleration Agreement, his only duty in that regard being confined to the main contract. In issuing Certificate No. 16 the Engineer acted beyond his authority and G.C.C. became liable because it subsequently ratified his action.

In responding in his Note of Explanation to submissions on this issue the Arbitrator at para. 7.3 explains his reason for holding the employer liable for the Engineer's actions:-

> "7.3 As for Mr. Solan's paragraph (ii), there is an implied warranty by the Employer to the contractor that the Engineer will perform his duties under the contract consciously and independently. The Employer is thus vicariously liable to the contractor for the Engineer's mistakes and has, in principle, a right of action against the Engineer for any losses thereby incurred – but this last is not a matter for the Arbitrator."

The explanation raises serious questions. In the first sentence of para. 7.3 the Arbitrator states that the employer warrants the Engineer's conduct. This is followed by the second sentence which begins with the phrase:-

> "The employer is thus vicariously liable for the engineer's mistakes …"

In using the word "thus" the Arbitrator indicates that the proposition contained in the second sentence is a logical consequence of the first proposition. This, of course, is not so. If the employer warrants the Engineer's conduct, liability for the Engineer's conduct is not a vicarious liability, but one which follows from the breach of warranty itself, which is owed directly to the contractor. The second proposition – the employer is thus vicariously liable to the contractor – is a legal *non sequitur* being wholly unconnected with the liability, if such there be, under the first proposition. The explanation therefore in the Explanatory Notes, whatever its status, is confused and is wrong in law; there is no connection between liability under a warranty and vicarious liability.

While the legal arguments advanced by G.C.C. in this regard have some merit insofar as they go, there is one significant factor which has not been adverted to by G.C.C. which to my mind overrides G.C.C's objections. Even if the Arbitrator was incorrect in his reasons for attributing liability to G.C.C. for the mistakes of the Engineer in issuing certificates under the Acceleration Agreement, G.C.C. nevertheless ratified the action of the Engineer when it proceeded to move on the certificates issued by the Engineer and in particular when it adopted certificate No. 16 by withdrawing the monies. By doing so it adopted and ratified the Engineer's conduct and rendered itself liable for this reason alone. Correcting the Arbitrator as to the reasons he gave for imposing liability on this issue would make no difference to G.C.C. at the end of the day.

For this reason I refuse to remit this issue also.

(x) The finding of reputation of the Acceleration Agreement after that agreement was terminated/frustrated
The plaintiff argues that because both parties had agreed on the 17th May, 2005, that the Accelerated Agreement was no longer achievable, the plaintiffs could not have repudiated the contract on the 4th June, 2005, as the Arbitrator found (see para. 36(2)). The consensus of the 17th May, 2005, the argument runs, in effect amounted to a frustrating event and the contract was extinguished by operation of law on that date. Accordingly, there was nothing that could be repudiated on the 4th June.

I do not find this argument convincing. The realisation by both parties on the 17th May, did not dissolve the Accelerated Agreement by itself. Nor did the parties treat it as being at an end. Mr. Kingston (for the defendant) in particular continued to see if the matter could be rescheduled.

The doctrine of frustration as it applies in contract law, usually arises only when some event destroys the basis of the agreement so that it can no longer be achieved.

Typically, the doctrine operates to discharge a contract that can no longer be performed according to the terms of the bargain struck between parties because of some supervening, usually external, event which destroys the basis of the contract. If for example in a contract for personal services (to sing at a concert) the singer dies (*Stubbs v. The Holywell Railway Company* [1867] L.R. 2 Exch. 311.), or if, in a leasing contract for a particular performance, the venue is destroyed (*Taylor v. Caldwell* [1863] 3 B. & S. 826) then the courts will hold that the contract is discharged. The courts will only come to such a conclusion, however, in exceptional circumstances and not because a contract has simply become less profitable or more onerous for one of the parties.

The leading case in this jurisdiction on the doctrine of frustration is the decision of the Supreme Court in *William Neville and Sons Ltd. V. Guardian Builders Ltd*. [1995]1 I.L.R.M. 1, where Blayney J. at p. 7, made the following statement:-

> "The circumstances in which frustration takes place were defined as follows by Lord Simon in *National Carriers Ltd v. Panalpina (Northern) Ltd* [1981] A.C. 675 at p. 700F:
>
> > 'Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performances.'
>
> In the same case Lord Roskill in his speech analysed the circumstances in which frustration occurs in terms which I am satisfied are virtually identical in their effect where at p. 717D he stated as follows:
>
> > 'There must have been by reason of some supervening event some such fundamental change of circumstances as to enable the court to say; 'this was not the bargain which these parties made and their bargain must be treated as at an end' – a view which Lord Radcliffe himself tersely summarised in a quotation of five words from the *Aeneid: non haec in foedera veni*.'
>
> I am satisfied that these two quotations from the decision of the House of Lords represent a correct statement of the principles of law applicable to frustration in our law and I am prepared to adopt them as being a correct statement of principle."

It is clear that the purported frustrating event must be of such significance that to continue with the contract would lead to one party carrying out actions that were clearly not contemplated in the contract. Much of course will depend on the terms of the contract itself. Whether the event is such as to prevent the realisation of the original contract is something that the courts will have to assess in each case comparing the objects of the original contract with the situation that prevails in the wake of the supervening event. In *Neville* the plaintiff sought specific performance of an agreement concluded with the defendant. Part of the agreement mandated that the defendant provide an access road for a development between the parties. The defendant resisted the claim for specific performance on the ground that the contract between the parties had been frustrated as the access road could not be provided by the defendant at a location that had originally been envisaged. The Supreme Court held that, although the access road could not now be provided along the original desired route, this event did not supervene to significantly change the nature of the defendant's general obligation to provide the access road. The obligation to provide access had now become more onerous but nothing more. (See also *Zuphen & Ors v. Kelly Technical Services (Ireland) Ltd. & Ors* [2000] E.L.R. 277.)

There is no such seismic event in the present case. In this case all that happened was that the parties realised that the schedule could not on the present arrangements be completed within the contemplated timetable. This appreciation did not abort the contract. It might have caused the parties to reconsider their respective positions; it might have led to renegotiations; it might have amounted to a breach by one or both parties, but it did not have the profound effect of terminating the contract by operation of law.

Moreover, the Arbitrator's finding on this matter clearly does not use language that would suggest that the Arbitrator contemplated such consequence. It is worth reproducing the Arbitrator's finding on this issue in full.

> "21. Be that as it may, at a site meeting on the 17th May, 2005, both sides seemed to have been in agreement that the acceleration programme as originally tabled was no longer achievable, yet there still remained over six months before the end of November, 2005, during which a recovery could have been staged. Indeed, Mr. Kingston made several efforts to negotiate fresh acceleration arrangements, first with Mr. Frampton and Mr. Turner and later direct (sic) with G.C.C's Mr. Connell and Mr. MacGrath, but without result. Finally, on the 4th June, 2005, Mr. Frampton at Mr. Turner's behest issued his certificate number 16 withdrawing all monies previously certified in respect of the Acceleration Agreement, thereby in my view bringing that agreement to an end."

Finally, the fact that Mr. Frampton of G.C.C., at Mr. Turner's behest, issued his Certificate No. 16, on the 4th June, 2005, clearly indicates that he continued to operate within the framework of the contract/agreement after the 17th May. Had G.C.C. concluded otherwise, he would have written to claim that the contract was terminated by frustration, something he did not do.

For these reasons, I reject the plaintiff's argument under this heading.

9. Grounds advanced by the plaintiff for removal of the arbitrator

G.C.C. advances three reasons why the Arbitrator should be removed for the remainder of the arbitration:

> (i) The Arbitrator fell asleep during the hearing.
>
> (ii) The Arbitrator made improper unilateral contacts with the parties.

(iii) The Arbitrator had no jurisdiction to issue a note explaining his findings in the award.

Each of these grounds must be examined in turn in greater detail to determine whether the Arbitrator was in such breach of his obligations that his removal by the court is warranted. Before doing so, however, the court must bear in mind that to justify removal there must be a serious dereliction of duty by the Arbitrator.

G.C.C. is willing to accept the Arbitrator's findings to date but requests the court to remove the Arbitrator for the remainder of the hearing and for all outstanding issues. S.K.C. opposes such a proposal, and in particular argues that the Arbitrator should not be removed before he had determined the remaining issue of liability left open by him. To remove the Arbitrator now would greatly increase the costs and would cause unwarranted further delay according to S.K.C. I now turn to consider each of these grounds in turn.

(i) It is accepted by both sides that the Arbitrator fell asleep on a number of occasions during the hearing. The legal representatives discussed the problem on the first day of the hearing and steps were taken to better ventilate the room and to take more coffee breaks. For cost reasons and to avoid further delay neither party wished to terminate the hearing prematurely and the issue was never raised with the Arbitrator himself.

Clearly, when an Arbitrator falls asleep during a hearing a very serious issue can arise. In many cases it might of itself justify removal. Whether removal is warranted for this reason alone, however, depends on all the circumstances of the case. A momentary loss of consciousness may not be sufficient, whereas prolong lapses over an extended period undoubtedly would be treated more seriously. S.K.C. argues that in the present case all of the witnesses had provided witness statements in which their primary evidence was set forth, that full submissions were made at the closing stage by both parties and a full transcript of the hearing was available to the Arbitrator. Moreover, G.C.C. did not see fit to requisition the judge for his inattention and it could be argued that it acquiesce in the entire hearing and adjudication process.

I accept the force of these arguments insofar as the present award is concerned: the G.C.C. has acquiesced in the process to date. Presumably, it is for this reason that G.C.C. is not seeking to attack the Arbitrator's award handed down as issued on the 8th October, 2007 and republished on the 8th December, 2007.

The acquiescence, however, has less significance insofar as the future hearing is concerned and insofar as unresolved issues are still to be determined. As the process moves forward it is vital that both parties continue to have full confidence and trust in the Arbitrator and I find from the established facts that the requisite confidence is not present as far as the G.C.C. is concerned in this case. Bearing in mind that it is essential that all the relevant evidence and testimony during the hearing be fully assessed, evaluated and considered by the tribunal, I find from the facts that the G.C.C. has real doubts that the Arbitrator is capable of fulfilling this role fully.

In opposing such an order S.K.C. relies on *R. v. Betson* [2004] E.W.C.A. Crim. 254 where the appellants had been convicted of conspiracy to rob for which substantial terms of imprisonment were imposed. One of the grounds of appeal relied on the fact that the judge had displayed:-

> "…inadequate vigilance during the trial and falling asleep on a number of occasions so that prejudice occurred to (the appellant) and he did not receive a fair trial."

Even though the facts were extreme – on one occasion the judge was awoken by the sound of his own snoring – the Court of Appeal rejected this ground of appeal. S.K.C. relies on the decision of the Court of Appeal on this matter and reproduces the court's holding in support of its argument:

> "47. There remains the ground in relation to the judge's falling asleep. Because the appearance as well as the actuality of justice being done is important, no judge ought, in any circumstances, to fall asleep during any stage of a criminal trial. It is highly regrettable that this judge did so.
>
> *But because a judge falls asleep or, for any other reason, allows his or her attention to wander, it does not necessarily follow that the trial is unfair, or that any ensuing conviction is unsafe. It is the effect, not the fact, of such inattention which is crucial.* This must, in each case, depend on all the circumstances, including the period of inattention, both absolute and as a proportion of the length of the whole trial; the stage of the trial at which the inattention occurs; and, of primary importance, the impact of that inattention, if any, on the course and conduct of the trial. We give two examples by way of illustration. First, if a judge is inattentive, however briefly, during a defendant's evidence in chief and, in consequence, fails to register and, in due course, sum up to the jury, a piece of evidence crucial to the defence, the conviction may be regarded as unsafe. The unsafety arises not because the judge slept or was otherwise inattentive but because, in consequence, the summing-up was defective in that the defence was not properly put before the jury. Conversely, a conviction is unlikely to be regarded as unsafe if, during a lengthy trial, a judge is inattentive, even for substantial periods, if, in consequence, he missed no significant point meriting inclusion in his summing-up and did not fail properly to control the admissibility of evidence, the conduct of counsel or some other aspect of the proceedings.
>
> 48. In the present case, the judge, as he frankly and properly admits, was, for a time, asleep during the speeches of counsel for (the appellants). We are prepared to accept that he was also asleep on a few other occasions, sometimes to the extent that he woke himself by the sound of his snoring. It is however of some significance that, at the trial, no defendant, no counsel in the case, (of whom there were a total of 13), and no juror, was sufficiently concerned to raise the matter with the judge, other counsel, or the court usher. It is of greater significance that, before this Court, it has not been shown that, because he slept, the judge missed and failed to sum up to the jury any significant feature of the evidence or speeches. On the contrary, this summing up, extending to approximately 250 pages of transcript and delivered, as we have said, over four days, shows every sign of having been carefully prepared. It was comprehensive and balanced, accurate as to the law and detailed as to the evidence. The defence of each defendant was fully put. Had the judge been awake when he was asleep, the appearance of justice would, of course, have been obviously enhanced. But the trial would have followed no different course. Furthermore, regrettable though it is that the judge occasionally slept, no objection having been made at the time, we are un-persuaded that the jury was, even arguably, unfairly prejudiced against any defendant, bearing in mind also the length of trial, the full, fair and accurate summing-up, the lengthy period of retirement, the pertinent question asked by the jury, and the compelling, powerful evidence against the defendants." (Per Rose L.J.)

I do not think that the *Betson* case is of much assistance in the present case for the following reason. *Betson* related to a trial judge

falling asleep in a criminal trial. It must be remembered of course that in such a case the judge's role is not primarily a decision making one. His main function is to ensure that the trial is conducted in accordance with the rules of procedure and to charge the jury and if he carries out this latter duty effectively his role in the trial is not tainted and the process is not affected. Moreover, that he has correctly charged the jury can be verified by the Court of Appeal from the charge itself which is available to the Court of Appeal. This is exactly what happened in *Betson*: the Court of Appeal was able to confirm from the transcript that the charge was "comprehensive and balanced, according to the law and detailed as to the evidence". In the present case, however, the Arbitrator is the decision maker – it is his job to assess the witnesses and to weigh the evidence and to make a call on credibility – and there is no objective way of verifying that his decision would not have been different had he remained awake during the hearing.

Taking all the circumstances into account, however, and bearing in mind the costs implications and the logistics of replacing the Arbitrator at this late stage, I am not convinced that it would be just to do so in the circumstances. Furthermore, now that the matter has been flagged, it is unlikely that the Arbitrator is going to expose himself to such a criticism in the remainder of the hearing.

(ii) G.C.C. complained that the Arbitrator made improper unilateral contact with parties on three occasions in particular and that this constitutes grounds for removing the Arbitrator. First, such contact was made by the Arbitrator shortly after he was appointed when he rang the solicitors for S.K.C. to arrange a preliminary meeting with both parties. Shortly after this contact the Arbitrator phoned the solicitor for G.C.C. but since he was not there the Arbitrator left a message with his secretary. When he learned that the preliminary meeting had been set for the 6th September, the solicitor for S.K.C. attempted to contact the Arbitrator to indicate that he was not going to be available at such short notice. In the event, the preliminary meeting went ahead. Before the meeting, however, the solicitors spoke to each other and agreed a number of issues relating to the preliminary meeting including that there should be a hearing on liability first followed by a hearing on quantum. The preliminary hearing proceeded in the absence of the representation on behalf of G.C.C. and it is noteworthy that the Arbitrator's order for directions granted "…full leave to apply, in such manner as may be convenient". The second informal unilateral contact was made by the Arbitrator when he telephoned on the 17th October, (after his award was delivered and after S.K.C's solicitors had lodged their request under r. 21.3) and when the Arbitrator discussed with Mr. Owens the amendments sought by S.K.C. G.C.C's solicitor, however, seemed to be alive to the irregularity of the contact and indicated to the Arbitrator that he would correspond with him in relation to the issues in question. Subsequent communications on this issue were in writing.

Finally, on or about the 29th February, 2008, when the present proceedings were commenced, the Arbitrator contacted solicitors for S.K.C. by telephone to request whether they would be agreeable to providing a law clerking service for him for the purposes of enabling him to file his appearance in these proceedings. On the same day, the Arbitrator telephoned G.C.C's solicitor, enquiring whether G.C.C. would have any objection to such a law clerking service being provided. Thereafter, on the same date the Arbitrator wrote a letter addressed to both solicitors confirming the arrangements in this regard.

There can be no doubt that the contact made by the Arbitrator with the S.K.C's solicitors on the 17th October, 2007 was a serious matter and was irregular to say the least. Nevertheless, G.C.C's solicitor did not make an issue of it at the time and made the full written submissions on the issue discussed. (The Arbitrator disputes G.C.C's solicitor's version of what transpired in the conversation on the 17th October, 2007 and I have taken G.C.C's case at its highest for the purposes of this argument.)

That the Arbitrator should request one of the solicitors to act for him even in a clerical capacity in the present proceedings was with hindsight also imprudent. It is true that the Arbitrator lived outside the jurisdiction and was named as a co-defendant in the proceedings but it would have been preferable had the Arbitrator maintained his independence in the circumstances. Nevertheless, he did fully disclose his intentions to both parties and confirmed his actions in correspondence thereafter. For this reason I do not think it was of such magnitude as to disqualifying him from continuing with the arbitration to its completion.

The case of *Norbrook Laboratories Ltd. v. Tank* [2006] E.W.H.C. 1055 (Comm), was cited by G.C.C. in urging the court to come to a different decision in this matter. There are dicta in that case to the effect that "the making of direct unilateral telephone contact by the Arbitrator with the parties is generally to be deprecated…" and "…Arbitrators invariably communicate with the parties in writing on even the most trivial matters of administration and do so by copying the opposite party". I agree wholeheartedly with these sentiments. They are not, however, absolute rules of law. They must be applied in the circumstances of the case which comes before the court. The facts in *Norbrook* were quite extreme – in that case, the Arbitrator had directly contacted the witnesses, and had failed to make an exact record of what they had said; nor had he disclosed such record to the other parties. Moreover in *Norbrook*, one of the parties had previously objected to the Arbitrator making such unilateral telephone calls even on administrative matters. In spite of this, however, the Arbitrator some weeks later had further contact directly with one of the parties by telephone.

Given the lateness of the complaint now lodged by G.C.C., the fact that no substantive injustice was done to either party as a result of the unilateral communications and given that the communications at their height, on two occasions, concerned procedural or administrative matters, I am not prepared to disqualify the Arbitrator from completing the arbitration in the circumstances. The costs and the further delay that would arise if I were to accede to G.C.C's request in this regard are also factors which I have to bear in mind.

For these reasons I reject the application of G.C.C. in this regard.

10. Conclusion

For the reasons stated above I have not been able to find merit in any of the objections raised by the plaintiff in these proceedings and accordingly I refuse to remit or set aside any part of the award of the second named defendant.