Neutral Citation Number: [2007] IEHC 295

THE HIGH COURT

2006 No. 287 SP

IN THE MATTER OF THE ARBITRATION ACTS, 1954 – 1998
AND IN THE MATTER OF AN ARBITRATION

BETWEEN

UNIFORM CONSTRUCTION LIMITED

PLAINTIFF

AND
CAPPAWHITE CONTRACTORS LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 29th August, 2007.

The proceedings
1. These proceedings arise out of an arbitration in which the defendant (Cappawhite) was claimant and the plaintiff (Uniform) was respondent and counter-claimant. The arbitrator, Ciaran Fahey (the Arbitrator), published his Interim Award on 17th May, 2006 (the Award).

2. In the proceedings the plaintiff claims the following reliefs:

> (a) an order pursuant to s. 36 of the Arbitration Act, 1954 (the Act of 1954) that the Award be remitted to the Arbitrator for his reconsideration; or
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> (b) an order pursuant to s. 38 of the Act of 1954 that the Award be set aside.

3. In relation to both reliefs, Uniform also invokes the court's common law jurisdiction.

The arbitration
4. In February, 2001 Uniform was engaged by Limerick County Council as the main contractor for the construction of certain road works forming part of the Limerick Southern Ring Road project. By a sub-contract dated 14th March, 2001 (the sub-contract) Cappawhite was appointed by Uniform as sub-contractor to carry out the main drainage, drainage and water mains works for the road works. The main contract was the standard form Institute of Engineers of Ireland (IEI) Conditions of Contract, 3rd edition, as revised and re-printed in 1990, as amended by the parties thereto. The sub-contract was in the standard form for use with the IEI Conditions of Contract, as amended by Uniform and Cappawhite. Clause 18 provided for the referral of any dispute between Uniform and Cappawhite to the arbitration and final decision of a person agreed between the parties or, failing agreement, appointed by the President for the time being of IEI. It was provided that such reference should be conducted in accordance with the IEI Arbitration Procedure, 1987 or any amendment or modification thereof in force at the time of the appointment of the Arbitrator.

5. Cappawhite entered on site in May, 2001 pursuant to the sub-contract. Having been approximately ten months on site Cappawhite terminated the sub-contract on 4th March, 2002 on the basis that it was entitled to do so because of a repudiatory breach on the part of Uniform. Thereafter the dispute was referred to arbitration pursuant to the sub-contract.

6. It is clear from the evidence that throughout the course of the arbitration, from the acceptance by the Arbitrator of his appointment by the President of the IEI on 1st November, 2002 to the publication of the Award, the issues were addressed thoroughly and comprehensively by the parties and their legal advisers and by the Arbitrator. The claim and defence and counterclaim were the subject of extensive pleadings. The hearing took place over thirteen days between 25th April, 2005 and 22nd November, 2005. Following the hearing the Arbitrator received closing submissions in writing from each party. The closing submissions of Uniform, which were furnished on 6th January, 2006, including an appendix, ran to 71 pages. The closing submissions of Cappawhite, which were furnished on 17th January, 2006, ran to 53 pages. Each party was given the opportunity to furnish a rebuttal submission in relation to the opponent's closing submission and each did so on 10th April, 2006. That of Uniform, including appendices, ran to 47 pages, while that of Cappawhite ran to 27 pages.

7. The Award was a reasoned award. In pages 1 to 49 the Arbitrator outlined the claim, made findings of fact, recorded his understanding of the issues, and the submissions made by the parties and his conclusions on the issues and his reasons therefor. In essence, the Arbitrator found that Cappawhite was entitled to terminate the sub-contract. He dismissed Uniform's counterclaim and he assessed the damages to which Cappawhite was entitled at €336,011.37. On pages 50 and 51 of the Award he set out in tabular form the breakdown of the Award under various headings.

Preliminary objection
8. It was submitted on behalf of Cappawhite, by way of preliminary objection, that the court should not examine the reasons set out in the Award because, it was contended, there was an agreement between the parties for an unreasoned award.

9. In accordance with clause 18 of the sub-contract, the IEI Arbitration Procedure 2000 governed the conduct of the arbitration. Rule 20.1 thereof governed whether the Arbitrator should provide reasons for his award and, insofar as is relevant for present purposes, provided as follows:

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

10. Cappawhite's preliminary objection was premised on a factual matter which was in controversy. Cappawhite's contention was that neither party requested the Arbitrator to provide reasons. Uniform, on the other hand, contended that it had requested the Arbitrator to furnish reasons. I will return to that controversy later. However, I propose considering Cappawhite's objection on the assumption that neither party requested the Arbitrator to provide reasons and that, therefore, the provision of reasons contravened rule 20.1 quoted above.

11. While the parties were unable to point to any Irish authority in point, the court was referred to two authorities from the United Kingdom which do give guidance on the issue.

12. The earliest is a decision of the Court of Appeal in *Mutual Shipping v. Bayshore Shipping* [1985] 1 W.L.R. 625. In that case, a dispute between the owners and charterers of *The Montan* was referred to a sole arbitrator. The arbitrator was not asked to give reasons for his award but, in accordance with the practice of London Maritime Arbitrators, he provided the parties with written reasons on the basis that they were not to form part of or to be used in any way in connection with his award. The document revealed that the arbitrator had mistakenly attributed the evidence of the owners' expert to the charterers' expert and vice versa and that, instead of making an award in favour of the owners, he should have made an award in favour of the charterers. When the matter was brought to the attention of the arbitrator, he wrote to the parties admitting the error. In proceedings by the charterers to have the award remitted to the arbitrator for reconsideration, Sir John Donaldson M.R. explained why the practice of giving "restricted" reasons grew up in the following passage in his judgment (at p. 629):

> "I think that it is important to remember why the practice of giving 'claused' or 'restricted' reasons grew up. They are sometimes described as 'confidential' reasons, but this is a misnomer since the only restriction is on using them 'in connection with' the award. The reason for adopting this course was simple. Under the law as it existed before the Arbitration Act, 1979 came into force, it was possible to set aside an award on the ground that it disclosed an error of fact or law 'on its face' but it was not permissible to rely upon any such error, if its existence required evidence not appearing on the face of the award. There was much learning as to what constituted the face of the award and the first part of the arbitrator's rubric is designed to prevent his reasons being in some way linked with and becoming part of the face of his award."

13. Having pointed out that the situation had been changed dramatically by s. 1 of the Act of 1979, which abolished all right to set aside or remit an award for error of fact or law on its face and substituted a limited right of appeal on questions of law, based on the arbitrator's reasons for his award, and that, unless ordered to do so, arbitrators were not required to give reasons, the Master of the Rolls summarised the then current position in the United Kingdom as follows:

> "The present position is that an arbitrator can (a) give reasons for his award without any restriction upon the use to be made of those reasons, (b) give no reasons or (c) give reasons, subject to a restriction as the arbitrator has done. But whether any reasons are or are not issued contemporaneously with or do not form part of the award is now quite irrelevant for any purpose. Probably the arbitrator used this formula before the passing of the Act of 1979 and has never revised it."

14. Later in his judgment, the Master of the Rolls dealt with the issue of whether restricted reasons could be looked at by the court, stating as follows (at p. 631):

> "… where restricted reasons are given and accepted by the parties, the parties must be deemed to have agreed that the reasons cannot be placed before the court. Such an agreement purports to oust the jurisdiction of the court and is void as being contrary to public policy: *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 K.B. 478. Were it otherwise the court would be powerless in the face of misconduct or even fraud revealed by the restricted reasons. We can therefore look at the arbitrator's reasons, although I hasten to add that no question of misconduct and still less of fraud arises or has ever been suggested.
>
> That said, it is important that there shall be no misunderstanding of the purposes for which reasons can be used. They are extremely limited. …
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> The principal supervisory review powers of the English courts are contained in sections 22 and 23 of the Arbitration Act, 1950. Section 23 empowers the court to set an award aside if the arbitrator has misconducted himself or the reference. Section 22 empowers the court to remit an award to an arbitrator for reconsideration. It provides the ultimate safety net whereby injustice can be prevented, but it is subject to the consideration that it cannot be used merely to enable the arbitrator to correct errors of judgment, whether on fact or law, or to have second thoughts, even if they would be better thoughts."

15. As will appear later, the last sentence in the above quotation was implicitly approved of by the Supreme Court recently.

16. Sir Roger Ormrod considered the status of the arbitrator's reasons in the following passage in his judgment (at p. 640):

> "The exact status of these reasons may be a matter for discussion. To an inexperienced eye it looks difficult to derive their quality of confidentiality from contract, particularly where, as in this case, they were supplied on the initiative of the arbitrator himself, labelled, as they were, 'confidential'. Perhaps it would be safer to regard confidentiality as a matter of practice which is generally accepted by all concerned and recognised by the court which will support it to the extent of usually in its discretion refusing to look at such reasons, in order to preserve the finality of awards.
>
> Whichever way of looking at this problem is correct it is clear to my mind that the parties themselves cannot blindfold the court, only the court itself can do that and in the vast majority of cases it will do so. But in those rare cases where an error occurs of the kind which we are considering in this case, the court cannot decline to interfere without gravely prejudicing in the eyes of the lay world the machinery of justice. For my part I do not think that either conclusion will significantly endanger the finality of arbitral awards. …"

17. More recently the question whether, and, if so, in what circumstances, a party to arbitration proceedings who seeks to challenge the award may rely in support of his application on reasons published by the arbitrator separately from the award and expressly on terms that no use shall be made of them in any proceedings relating to it, was considered by the Queen's Bench Division (Commercial Court) in *Tame Shipping Limited v. Easy Navigation Limited (The "Easy Rider")* [2004] 1 Lloyd's Rep. 626. The question was considered in the context of an application under s. 68 of the Arbitration Act, 1996 to set aside an award for serious irregularity. In dealing with that question, Moore-Bick J. stated as follows (at p. 634):

> "The principle of party autonomy in relation to arbitration proceedings is clearly recognised by the Act and it is both consistent with that principle and with the general public interest in securing finality in arbitration proceedings that arbitrators should be free to publish reasons that do not form part of the award if the parties to the proceedings so agree. On the other hand, it is difficult to see what public interest there could be in allowing either arbitrators or the parties themselves to suppress evidence of serious irregularities, whether that evidence is to be found in the arbitrator's reasons or elsewhere.
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> 25. The authorities establish that if by agreement with the parties the arbitrator publishes his reasons in a separate

> document on terms, express or implied, that the parties are not to refer to them in connection with any proceedings relating to the award, the parties are bound by contract to each other and to the arbitrator not to make use of them in that way. They also establish, however, that an agreement of that kind cannot preclude the Court from accepting the reasons in evidence if it considers it right to do so: see *The Montan* … Where the evidence of the alleged irregularity is entirely contained in confidential reasons, however, the court is faced with the difficulty that it cannot discover whether the allegation is well founded without examining the reasons."

18. Later, Moore-Bick J. indicated the solution to the difficulty: the court, if it is to look at the reasons, should hear the parties on the significance which is to be attached to them, which, in practical terms, amounts to admitting the evidence. He interpreted the decision of the Court of Appeal in *The Montan* as not limiting the scope of the inquiry to evidence of fraud or criminality. His conclusion was that a court can and should look at the arbitrator's reasons in any case in which they are alleged to disclose an irregularity of a kind that would cause a serious injustice.

19. It is well established that the common law jurisdiction to set aside or remit the award of arbitrator which shows on its face an error of law has survived in this jurisdiction. Moreover, error on the face of the award is recognised in this jurisdiction as one of the grounds on which the court has a discretion to remit a matter to an arbitrator under s. 36(1) of the Act of 1954. However, it is also well established that the error of law must be "so fundamental that the courts cannot stand aside and allow it to remain unchallenged" or "obvious error" (per McCarthy J. speaking for a court of five in the Supreme Court in *Keenan v. Shields Insurance Company Limited* [1988] 1 I.R. 89) or a "decision … clearly wrong on its face" (per Finlay C.J. in *McStay v. Assicurazione Generali SPA & Anor*. [1991] I.L.R.M. 237).

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

21. As I have already noted, there was controversy in this case as to whether the Arbitrator was requested to provide reasons. The initiation of these proceedings pre-dated the coming into operation of Order 84B and Order 84C of the Rules of the Superior Courts, 1986 in February of this year. Accordingly, the proceedings were initiated by way of special summons grounded on affidavit. In the replying affidavit filed on behalf of Cappawhite, it was averred that neither party requested the Arbitrator to give reasons for his decision, either before, during or after the arbitration. That averment was not controverted on affidavit by any deponent on behalf of Uniform. However, counsel for Uniform in their submissions submitted that it was Uniform's case that a request for reasons was made by it, although there was no written record of such request. It was also submitted that it would have been extraordinary for the Arbitrator to have proceeded to prepare and publish a carefully reasoned award had he not been requested to do so. Apparently, neither party canvassed the views of the Arbitrator on whether a reasoned award was requested. At any rate, his views were not put before the court.

22. The only evidence before the court is that no request was made to the Arbitrator to provide a reasoned award. If that evidence represents the true factual position, he exceeded his authority in giving a reasoned award. Nonetheless, for the reasons set out earlier, I consider that the court is entitled to look at the reasons to determine whether, in accordance with the jurisprudence of the courts of this jurisdiction, Uniform has established that a ground exists for remitting or setting aside the Award.

23. Finally, in relation to the preliminary objection, I do not accept the argument advanced on behalf of Cappawhite that the Award is severable as between the substantive award, which it was contended is to be found on pages 50 and 51, and the reasons, which it was contended are to be found on pages 1 to 49. On a basic point, one has to go to page 48 to find out that Uniform's counterclaim was dismissed.

The substantive issue

24. It is not in dispute that the core issue for the Arbitrator was whether Cappawhite was entitled to terminate the sub-contract on 4th March, 2002 by reason of Uniform having repudiated. It was contended on behalf of Uniform that at the time, on 4th March, 2002, the sole reason for termination advanced by Cappawhite was alleged failure of Uniform to pay monies which Cappawhite claimed were due to it, but that Cappawhite in its pleadings and submissions subsequently extended the basis of its entitlement to terminate to the following alleged failures on the part of Uniform: failure to give access to the site or part of the site; failure to provide information on programming and planning of the earthworks; failure to provide setting out levels for the sub-contract works; failure to ensure the supply and delivery of materials to site to enable the sub-contract works to progress in good time or at all; failure to ensure the prompt payment of monies due and owing to Cappawhite; failure to make payment of all monies due and owing to Cappawhite; failure to notify Cappawhite of any deductions to be made by Uniform from sums otherwise due; and failure to do all that was reasonably necessary to enable Cappawhite to carry out and complete the sub-contract works.

25. In the Award, the Arbitrator addressed the alleged failures on the part of Uniform. Having stated that a great deal of time and effort were spent during the arbitration in attempting to establish whether there was sufficient work for Cappawhite during the time it was on site, on the overall issue of availability of work from May, 2001 to March, 2002, he stated "frankly" that he found it impossible to draw any meaningful conclusions (p. 44). He concluded that ultimately it was not a question of money which caused the final break but instead the manner in which the work was to be carried out. He found that there was consensus in March, 2002 as to what Cappawhite was to be paid to return to the site and continue working, but identified the breaking point as Uniform's insistence that Cappawhite should make five gangs available immediately in a situation where Cappawhite felt that there was insufficient work for them (p. 46). That requirement of Uniform, the Arbitrator stated, was not a new approach to the sub-contract by it but was an effort to reinstate the status quo. While the approach adopted by Uniform would have been appropriate if the sub-contract works were to be done by direct labour, it was not provided for within the sub-contract, under which Cappawhite was to provide all labour and plant to carry out the works in accordance with the details and programme to be provided by Uniform. The Arbitrator found that the manner in which the sub-contract operated between May, 2001 and March, 2002 removed Cappawhite's discretion or independence as regards the programming and planning of work and put it at significant disadvantage.

26. The Arbitrator found that the contract which Cappawhite was performing was very different from the one which it had signed up to. He saw that difference as being fundamental, referring to the test posited by Sellers L.J. in *Hong Kong Fir Shipping Company Limited v. Kawasaki Kisen Kaisha Limited* [1962] 2 Q.B. 26 as to whether there is or is not a fundamental breach of contract. The test, which he had quoted earlier (at p. 28), was framed in the following terms:

> "If what is done or not done in breach of the contractual obligation does not make the performance a totally different performance of the contract from that intended by the parties, it is not so fundamental as to undermine the whole contract."

27. The Arbitrator found that the test as to the existence of fundamental breach was in fact satisfied and concluded:

> "Thus as I see it there was a fundamental breach by Uniform arising from the manner in which the [sub-contract] and in particular the allocation of work was set up and carried out and this goes back to their failure to provide the programme information. It will be clear from what I have set out that during and after the meeting of 12 March, 2002 this was the issue which sealed the rupture between the parties and consequently as I see it I must take this into account rather than confining myself to the alleged underpayment."

28. Uniform's contention was that what the Arbitrator did was to determine that Uniform was in fundamental breach of the sub-contract on the basis of the application of a principle (that the failure of Uniform to provide programme information on its own constituted a fundamental breach) which was not pleaded or canvassed by the parties and in respect of which the parties had not been afforded an opportunity to call evidence or make submissions. This, it was submitted, gave rise to gross procedural unfairness and amounted to misconduct of the proceedings so as to give rise to an entitlement to have the Award set aside under s. 38 or, alternatively, constituted a fundamental error of law on the face of the Award which entitled Uniform to have the matter referred back to the Arbitrator under s. 36 or, alternatively, under the court's common law jurisdiction.

29. In essence, Uniform's case on the substantive issue was that the Arbitrator decided the case on a point which Uniform had not had an opportunity to address. In making the case that this was a sufficient basis for the court interfering with the Award, counsel for Uniform relied on two authorities.

30. The first was the decision by the Court of Appeal in *Société Franco-Tunisienne D'Armement-Tunis v. Government of Ceylon* [1959] 3 All E.R. 25. That case involved a dispute between the charterer and the owner of a ship. The charterer acknowledged liability for demurrage in a certain sum, but the shipowner claimed demurrage in excess of twice that sum. The dispute had been referred to arbitrators, but, on their disagreement, the matter was referred to an umpire. The umpire found that no demurrage was due and awarded to the charterers despatch money, which they had not claimed. The Court of Appeal held that the correct method of computing demurrage, which depended on the interpretation of the charterparty and its application to ascertained facts, was a question of law, yet the point taken by the umpire was a new one, which should have been made clear to the parties and on which they should have had an opportunity to make submissions. On the evidence the point had not been made clear with the consequence that the shipowners had not had an opportunity to submit contentions concerning it. Therefore, the award was remitted to the umpire to reconsider the amount of demurrage.

31. Morris L.J. in his judgment set out the ratio of the decision as follows (at p. 34):

> "It seems to me that the point that occurred to the umpire was a point that would bring about a dramatic development of the case, and I am satisfied that the import of it was not communicated to the shipowners' arbitrator in such a way as enabled him to deal with it. I have no doubt that something was said, but it was essential, in view of the way in which the case had been presented and the way in which it had proceeded for very nearly two years, that, if some entirely new point was being taken, which was not taken by the charterers and ran quite counter to their willingness to pay a sum, it should be made quite clear. The new point which appealed to the umpire – it may be right or it may be wrong, it is not for me to say – involved a complete departure from the course followed in the litigation up to that moment."

32. In his judgment, Pilcher J. was of the same view, stating (at p. 39):

> "The probabilities are overwhelmingly in favour of the view that, while the umpire no doubt had these things in mind, he never brought them clearly, if he brought them at all, to the attention of the two arbitrators. That being so, I cannot help feeling that the trial of this matter was unsatisfactory, because the shipowners' arbitrator might have presented an interesting and important argument to the umpire and might have invited the umpire to state his award in the form of a Special Case. On the view which I take of the facts he never had that opportunity. Consequently I think that the hearing before the umpire was of so unsatisfactory a nature that this Court is justified in saying that the case must be remitted to the umpire to consider further the whole question as to the amount of demurrage, if any, which was due to the owners at Colombo."

33. The second authority relied on by Uniform, coincidentally, arose out of a dispute between Uniform and Limerick County Council, which was the subject of proceedings under the Act of 1954: *Limerick County Council v. Uniform Construction Limited* [2005] IEHC 347, in which judgment was delivered by Clarke J. on 1st November, 2005. In that case, it had been submitted that the arbitrator had applied a test which Limerick County Council contended "he invented for himself", thus depriving Limerick County Council of the right to address further argument on the case which it had to answer. In addressing that submission, Clarke J. stated at para. 13.8:

> "It is undoubtedly the position that deciding a case on a point not put to the parties can amount to a misconduct of the proceedings. *Société Franco-Tunisienne D'Armement-Tunis v. Government of Ceylon* … . However, given the construction which I have placed on the award … I am not satisfied that the arbitrator in fact applied a test which had not been canvassed."

34. The judgment of Clarke J. in the *Limerick County Council* case contains an analysis of the court's jurisdiction both at common law and under the Act of 1954 to set aside or remit an arbitral award with which I agree. In particular, I agree with his observations in relation to the significance of the decision of the Supreme Court in *Keenan v. Shield Insurance Company Limited* to which I have already referred in the context of recording the survival of the common law error jurisdiction as a basis for the court interfering with an arbitral award and to identify the test laid down by the Supreme Court to justify such interference: an error of law so fundamental on the face of the award that the court cannot stand aside and allow it to remain unchallenged. In my view, in any case in which the court is asked to interfere with an arbitral award, it is important to bear in mind the following passage from the judgment of McCarthy J. (at p. 96):

> "Arbitration is a significant feature of modern commercial life; there is an International Institute of Arbitration and the field of international arbitration is an ever expanding one. It ill becomes the courts to show any readiness to interfere in such a process; if policy considerations are appropriate as I believe they are in a matter of this kind, then every such consideration points to the desirability of making an arbitration award final in every sense of the term. *Church & General Insurance Company v. Connolly & McLoughlin* (Unreported, High Court, Costello J., 7th May, 1981) itself is an example of

the type of fine-combing exercise which courts should not perform when it is sought to review an arbitration award."

35. In the most recent decision of the Supreme Court to which this Court was referred, *McCarthy v. Keane* [2004] 3 I.R. 617, in which the legal principles applicable to the interference by a court with an arbitral award were considered, the passage from the judgment of McCarthy J., which I have just quoted, was referred to by Fennelly J. in his judgment (at p. 627) as setting the tone for the correct judicial approach to arbitral awards, although it was not dealing with an allegation of misconduct. That comment was preceded by a statement that the standard or test of procedural misconduct of a nature which justifies a court in setting aside an award is "something substantial, something that smacks of injustice or unfairness". Fennelly J. then set out the following analysis as to what constitutes misconduct:

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

36. Later, in the context of the court's jurisdiction to remit under s. 36, Fennelly J. considered the decision of this Court (Herbert J.) in *McCarrick v. The Gaiety (Sligo) Limited* [2001] 2 I.R. 266 and the decision of Donaldson M.R. in *King v. Thomas McKenna Limited* [1991] 2 Q.B. 480 and stated (at p. 629):

> "It is true that section 36 does not in terms set any limits to the exercise of the discretion. That does not mean that the discretion is unlimited. The policy of the law is to uphold the certainty of arbitral awards, once they have been made. Furthermore, the courts will not interfere without very good reason in the arbitration process. I believe these propositions are consistent with the statement of McCarthy J. in *Keenan* … and with many others. I would certainly be prepared to agree that the power to remit is not necessarily limited to the four well established circumstances. These have, on the other hand, been developed by the courts after careful consideration over many years. Normally the arbitrator should be allowed, subject to the overriding obligation of fairness, to be master of procedure. It would be inimical to the autonomy and certainty of the arbitral process if the notion of 'procedural mishap' were to become an additional ground of potential complaint. Donaldson M.R. emphasised, in particular, that it would have to be 'inequitable to allow the award to take effect'. He also described as a 'vital qualification' and one of 'fundamental importance' that the power was 'designed to remedy deviations from the route which the reference should have taken towards its destination'. Donaldson M.R. also recalled his own earlier decision in *Mutual Shipping v. Bayshore Shipping* … at p. 632 to the effect that the power 'provides the ultimate safety net whereby injustice can be prevented, but is subject to the consideration that it cannot be used merely to enable the arbitrator to correct errors of judgment, whether on fact or law or to have second thoughts, even if they would be better thoughts."

37. Returning to the complaint concerning the Arbitrator's conduct of the arbitration, the main plank in Uniform's case is that the Arbitrator conducted the arbitration in a fundamentally unfair manner in not giving Uniform an opportunity to demonstrate to him that it would be fundamentally wrong to hold that the absence of programme information of itself constituted a fundamental breach of contract. Matters which Uniform would have and could have made on that point, if given the opportunity to do so, were outlined in the submissions to the court. It was also submitted that the Arbitrator acted contrary to the principles of natural justice in not affording Uniform that opportunity.

38. Having considered the submissions made on behalf of Uniform in the light of what the Arbitrator stated in the Award and also by reference to the closing submissions and the rebuttal submissions made by both parties, I am constrained to the view that, as counsel for Cappawhite submitted, Uniform has engaged in the type of "fine combing" which McCarthy J. deprecated in *Keenan v. Shield Insurance Company Limited* and, to use the more colloquial terminology used by counsel for Cappawhite, what it is doing is looking for "another bite of the cherry" on the basis of some alleged misjudgement.

39. There is no doubt that in its closing submission Cappawhite did not urge on the Arbitrator that any single alleged failure by Uniform to fulfil its obligations under the sub-contract would constitute a fundamental breach. In fact, what was urged was that the various alleged breaches to provide adequate materials in time, to provide Cappawhite with a programme of works and to provide sufficient work to allow the sub-contract works to proceed, coupled with Uniform's refusal to make payment, were tantamount to a repudiation (para. 163). It was emphasised that it was accepted by Cappawhite that non-payment of itself is not generally sufficient to give rise to a claim of repudiation, but it was submitted that the various breaches by Uniform together evinced an intention on the part of Uniform that it did not intend to be bound by its contractual obligations (para. 165). Cappawhite's submission was that Uniform's conduct and cumulative breaches were the confidence-shattering factors (p. 170), a reference to the test for fundamental breach suggested by Salmon L.J. in *Decro-Wall International v. Practitioners in Marketing* [1971] 2 All E.R. 216 (" breaches … such as reasonably to shatter the plaintiff's confidence in the defendants' ability to pay for the goods with which the plaintiff supplied them").

40. It is clear from Uniform's closing submission that Uniform understood it to be Cappawhite's case that it was the "collective effect" of Uniform's alleged failure to pay the monies due together with the other alleged breaches which entitled it to terminate the sub-contract, and that this line of argument had been signposted in Cappawhite's opening statement in which it was acknowledged that the breaches complained of, if taken singly, might be considered insufficient to found a claim for repudiatory breach (para. B1.2, p. 38). In the segment entitled "Introduction and Overview" of its closing submissions, Uniform made the point that section B of its submission contained rebuttals of the allegations of the other and additional breaches of contract and submitted that, even if there were some breaches of the type alleged, "they were of a minor nature and could in no way, either singly or collectively, amount to an evincement by Uniform of an intention not to be bound by the terms of the sub-contract".

41. I can see no parallel between the conduct of the umpire in the *Société Franco-Tunisienne* case which gave rise to an entitlement to have the matter remitted to the umpire and the basis on which Uniform contends for such relief here. In the former case the umpire clearly adopted a new point in calculating the demurrage, which was to have a "dramatic" effect, without canvassing the views of the parties. Both parties had computed demurrage based on time counting from 18th October, 1956, when the ship arrived in Colombo, whereas the umpire based his calculation on time running only from 29th October, 1956, when all five hatches were available to the charterers for discharging, including three which had been overstowed under a clause in the charterparty. The ship owner's case for remission was that the umpire had never suggested that they were not entitled to claim any time was lost in waiting for a berth because part of the charterer's cargo had been overstowed with cargo, a point on which they would have made additional submissions if the umpire had done so. Here, as was recorded in Uniform's closing submission, the issue was whether Cappawhite was entitled to terminate the sub-contract because Uniform had evinced an intention not to be bound by it because of alleged breaches of the sub-contract on the part of Uniform. The Arbitrator considered the alleged breaches, having assessed the evidence, the legal principles applicable and their application to the facts on the basis of the submissions made by the parties. The conclusion he reached was that the manner in which Uniform set up and operated the sub-contract, in particular in relation to allocation of work, which he

linked to the failure to provide programme information, constituted a fundamental breach on the part of Uniform which entitled Cappawhite to terminate. The Arbitrator did not base his finding of liability on the part of Uniform on any new point. He implicitly rejected Uniform's submission that the alleged breaches on the part of Uniform did not, either singly or collectively, constitute a fundamental breach on the part of Uniform. What Uniform's case boils down to is an assertion that, once the Arbitrator had decided to find against it, it should have been afforded a further opportunity to elaborate on the submissions it had already made. Even if, to adopt the terminology used by Donaldson M.R. in *The Montan*, such approach would have resulted in the Arbitrator having "better thoughts", neither the court's statutory nor common law jurisdiction can be used to facilitate that approach.

42. A number of subsidiary points were advanced in support of the case that the Arbitrator failed to follow fair procedures in the conduct of the arbitration. It was alleged that the failure to provide programme information was not pleaded by Cappawhite as a basis for repudiation, nor was such failure linked to the manner in which the allocation of work was set up and carried out. It was also argued that the Arbitrator took into account post-termination events in reaching his conclusions without inviting submissions or comments on the propriety of so doing. It was submitted that the Arbitrator, in concluding that the sub-contract required Uniform to furnish a written programme to Cappawhite, it being common case that there was no express contractual requirement to do so and no implied contractual term having been pleaded, substituted his own arguments for those of the parties. Finally it was submitted that the Arbitrator drew inferences as to Uniform's approach to the contract which were neither pleaded nor canvassed in the submissions.

43. None of the foregoing matters, in my view, gives rise to an entitlement to have the matter remitted or to have the Award set aside. The IEI Arbitration Procedure, 2000, which applied to the arbitration, gave the Arbitrator full discretion to decide all procedural and evidential matters. I have already referred to the thoroughness and comprehensiveness of the submissions furnished by both parties to the Arbitrator. The parties had the opportunity to address all aspects of the arbitration, the appropriate procedures, the assessment of the evidence, the issues to be decided, the relevant legal principles and the application of the law to the facts, and they did so. In particular, on the basis of the documentation before me, I believe that Uniform's legal advisers addressed most of the matters which they now wish to have another opportunity to address, either directly or indirectly.

44. In summary, therefore, I have come to the conclusion that –

> (a) Uniform has not established any error of law on the face of the Award so fundamental that it cannot be allowed to stand, and
>
> (b) Uniform has not established misconduct of the arbitration which meets the standard suggested by Fennelly J. in *McCarthy v. Keane* – "something substantial, something that smacks of injustice or unfairness".

Order

45. The proceedings will be dismissed