Neutral Citation Number: [2005] IEHC 347

THE HIGH COURT
COMMERCIAL

[2005 No. 420 S.P.]
[2005 No. 72 COM]

IN THE MATTER OF THE ARBITRATION ACTS 1954 TO 1998
AND IN THE MATTER OF AN ARBITRATION

BETWEEN

LIMERICK CITY COUNCIL

PLAINTIFF

AND
UNIFORM CONSTRUCTION LIMITED

DEFENDANT

Judgment of Mr. Justice Clarke delivered on the 1st November, 2005

1. Introduction

1.1 There are currently two sets of proceedings involving the above parties before the Commercial Court. In the first proceedings (record number 2005 No. 420 SP.) Limerick City Council ("Limerick") seeks various reliefs which challenge certain aspects of an interim award published in arbitration proceedings between Limerick and Uniform Construction Limited ("Uniform"). The arbitration arose principally from the forfeiture by Limerick of a contract between Limerick and Uniform for the installation of approximately 2.6kms of sewer by open cut and trenchless methods underneath the city of Limerick. The tendered price for completion of the works required by the contract (which was known as contract 4.2) was IR £7,537,500 (the approximate equivalent of euro €9.57million). That contract formed part of a much larger infrastructural project known as the Limerick Main Drainage Project which involved the connection of the existing Limerick city drainage system to a new treatment works.

1.2 The second proceedings (record number 2005 No 445 SP.) again had Limerick as plaintiff and Uniform together with George David Guy Cottam as defendants. Mr. Cottam, ("the arbitrator") is the arbitrator in the arbitration proceedings to which I have referred. In these latter proceedings Limerick make application under s. 35 of the Arbitration Act, 1954 for an order directing the arbitrator to state certain questions of law in the form of a special case for the decision of this court.

1.3 On 8th September, 2005, the Commercial Court ordered the consolidation of the two proceedings.

1.4 It being common case that Limerick's application in the second proceedings is largely contingent (save in respect of one matter which Limerick contends but Uniform does not accept is not contingent) on Limerick succeeding in the first proceedings in obtaining an order setting aside or remitting the contested portion of the award, it was agreed between the parties that I should determine the issues in the first proceedings and leave over further consideration of the second proceedings until that determination.

1.5 For that reason this judgment is concerned solely with the first proceedings.

2. The first proceedings

2.1 In the first proceedings Limerick seeks a series of orders each of which attempts to interfere with the first interim award of the arbitrator issued and published on 27th June, 2005 ("the award"). The jurisdictional bases relied upon are alternatively:-

> (a) S. 38(1) of the Arbitration Act, 1954 whereby it is sought to have the interim award set aside on the grounds of the misconduct by the arbitrator of either himself or the proceedings;
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> (b) S. 36(1) of the Arbitration Act, 1954 whereby it is sought that certain matters be remitted to the reconsideration of the arbitrator; and/or
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> (c) the courts common law jurisdiction to the extent that same allows that certain matters be set aside or remitted to the reconsideration of the arbitrator on the basis of an error of law on the face of the award

2.2 While there are certain differences between the specific issues relied upon under each heading, it is fair to say that the totality of the matters which Limerick says entitles it to one or other of the above reliefs can be enumerated as follows:-

> (a) It is said that the award shows on its face two fundamental errors of law made by the arbitrator in reaching a conclusion that Uniform was entitled, as a matter of contract, to tunnel at a lower level than that contained in the original design and that, as a consequence, a letter of 13th of June, 2000, instructing Uniform to tunnel at an original design level amounted to a variation instruction under Clause 51 of the contract. It will, of course, be necessary to return in more detail to both the context and substance of those contentions in due course;
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> (b) Secondly it is suggested that the arbitrator failed to consider and decide a central issue in the arbitration namely the effect of a letter written on 18th May, 2000, by the project engineer to Uniform;
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> (c) Thirdly it is contended that the award shows on its face a fundamental error of law made by the arbitrator in reaching a conclusion (which he did) that Uniform was not in "persistent" breach of the contract;
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> (d) Fourthly it is contended, in relation to the decision by the arbitrator as to whether Uniform was in persistent breach of its obligations, that the test applied by the arbitrator was one which, as Limerick contends, "he invented for himself" and that the arbitrator thus deprived Limerick of its right to address further argument on the case which it had to answer; and
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> (e) Fifthly it is contended that the arbitrator failed to make any decision as to whether a reasonable engineer could have issued a certificate under Clause 63 of the contract so as to permit the termination of the contract on the grounds of persistent breach.

2.3 In summary Limerick suggests that each of the above five grounds amount to misconduct entitling them to an order under s. 38 setting aside the award.

2.4 Secondly it is contended that a jurisdiction to remit under s. 36(1) arises in circumstances where there are present on the face of

the record fundamental errors of law (and it is contended that items 1 and 3 above amount to same) or where there is misconduct by the arbitrator of the proceedings (and it is contended that items 2 and 4 amount to same for these purposes) or where there is the presence of a fundamental mishap which renders the proceedings unfair (where it is again contended that the matters set out at paragraphs 2 and 4 give rise to the courts jurisdiction).

2.5 Finally in respect of the common law jurisdiction it is contended that the above identified alleged errors of law entitle the court to exercise such jurisdiction.

3. Background

3.1 The contract with which these proceedings are concerned was clearly a major public contract and was, as a matter of European Union Law (E.U. Council Directive 93/37/EEC (the "works directive") (as amended) required to be put out to tender using the open tender procedure.

3.2 Uniform submitted, on 21st May, 1999, an unqualified tender to carry out the construction of the works contained in contract 4.2 in the sum of IR£7,537,500 inclusive of VAT. Limerick had appointed a consortium consisting of three firms of consulting engineers as its Engineer for the purposes of the project. The consortium was known as Barry/Gibson O'Connor/Punch or BGP ("the Engineer"). Each of the tenderers were provided with drawings and specifications which undoubtedly specified the sewer concerned as requiring to be constructed at a certain depth or level ("the design level"). Further to a request from the Engineer on 23rd July, 1999, Uniform provided a document containing what it described as "post-tender information". This document indicates that two methods of construction had been considered. The document indicates that one such method (the use of a micro tunnel boring machine or "MTBM" – a machine controlled remotely from the surface) would require a rationalisation of various shafts and some realignment of the tunnel and would also require the tunnel to be lowered.

3.3 Representatives of the Engineer met with representatives of Uniform on 4th August, 1999, to discuss Uniform's tender. There would appear to have been a difference of opinion at that meeting with the Engineer contending that any aspect of the tender which operated on the basis of the omission of a significant number (11) of shafts would not constitute a compliant tender while Uniform expressed the view that s. 7 of the specification allowed the omission of shafts but accepted that any alternative routes or shaft omissions or methods of connection would be subject to the approval of the Engineer.

3.4 In that context it should be noted that in common with many major civil engineering projects the tender documents in this case provided that the engineer could require any tenderer to submit a "method statement" which would specify in some detail the way in which the tenderer proposed to go about carrying out the works.

3.5 In a letter of 20th August, 1999, Uniform provided further information arising out of the meeting on 4th August. In that letter Uniform reserved the option to use micro tunnelling equipment or the drill and blast open phase method "subject to such methods meeting the requirements of the specification and obtaining the Engineers prior approval". The Engineer wrote to Uniform by letter of 6th October, 1999, and confirmed its view that Uniform's only compliant tender was the open face option. It would then appear that later that same month the Engineer recommended to Limerick acceptance of Uniform's tender and by letter of 9th February, 2000, Limerick wrote to Uniform confirming acceptance of its tender.

3.6 It is common case that that acceptance of the tender gave rise to a contract. While it was argued before the arbitrator by Uniform that the contract at that stage gave Uniform the right to undertake the tunnelling works by means of an MTBM at a lower level, the arbitrator rejected that argument and there is no attempt at this stage to invite the court to interfere with that finding. In relation to this issue, at para. 50 of the award, the arbitrator said the following:-

> "I do not accept that argument because the tender as submitted by Uniform did not contain the proposal for the lowering of the tunnel. That was first brought to the attention of the consortium when Uniform submitted its method statement with its letter of 23rd July, 1999, which was some two months after the tender was submitted."

3.7 If the question of establishing the terms of the contractual relations between the parties ended there then there would be unlikely to be any proceedings before the court or indeed any arbitration on many of the issues in dispute between the parties. However, further correspondence and documentation passed between the parties subsequent to the acceptance of the tender on 9th February, 2000 but prior to the execution of a written contract which occurred on 23rd May, 2000. It is clear that the written contract of 23rd May, 2000, purports to incorporate many such documents, written or created between the date of the acceptance of Uniform's tender (9th February) and the execution of the contract (23rd May), into the terms of the contract. It is, therefore, necessary to look at some of the developments which occurred between those dates.

3.8 A further suggestion for using an MTBM was made, by Uniform, by letter of 22nd February, 2000, which differed in some respects from its earlier proposal. On the 10th March, 2000, Uniform submitted a number of method statements which again proposed lowering the tunnel at certain areas and omitting certain shafts. The Engineer sought further details of the March, 2000 proposal by letter of 29th March. There followed further correspondence and discussion about the consequences to be anticipated of lowering the tunnel level in the relevant sections.

3.9 That correspondence would appear to have ended with a letter of 18th May, 2000, from the Engineer to Uniform. A significant difference which arose between the parties at this stage seems to have derived from the risk elements in the contract. As originally contemplated, the contract documents (and the tender documents) placed the risk for any unforeseeable difficulties (that is to say difficulties which a competent contractor could not reasonably have foreseen) upon Limerick. The point being made in letter of 18th May on behalf of Limerick stemmed from a disagreement between the parties as to whether there was any real likelihood of additional risk associated with the alternative tunnelling levels then being proposed by Uniform. Limerick asserted that there was such a greater risk. Uniform asserted that there wasn't. In that context the Engineer, having set out his reason for differing in his view as to the risk, said the following:-

> "As you have made this proposal we conclude that you are prepared to accept these risks."

3.10 There was no reply to that letter but soon thereafter a written contract was, entered into using the standard form published by the Institute of Engineers in Ireland for use in connection with works of civil engineering construction (3rd edition, 1980, as revised October, 1990).

3.11 Following the execution of the contract the Engineer wrote, on 13th June, 2000, to Uniform suggesting that agreement had not yet been reached on the revised proposals put forward by Uniform and adding:-

"Please note that without such agreement you are required to proceed with the works as designed with due expedition and without delay in accordance with the contract."

3.12 Thereafter there was a considerable volume of correspondence on the March, 2000 proposal but same was not ultimately agreed. The work ultimately proceeded with the tunnel installed using an MTBM at the design level although the Engineer agreed to the omission of certain shafts because Uniform were using an MTBM. It would not appear to be disputed that the need for shafts is reduced by the use of an MTBM.

3.13 Thereafter disputes arose between the parties concerning the extent to which Uniform was in compliance with its contractual obligations and also as to whether physical conditions or artificial obstructions were encountered by Uniform in installing the tunnel at the design level which could not reasonably have been foreseen by an experienced contractor so as to entitle Uniform to additional payment or a longer period to comply with its contractual obligations. Save in respect of the disputes which concerned an allegation that Uniform was "persistently in breach of its obligations in relation to safety, inconvenience and nuisance to the general public and compliance with the Engineer's instructions", the other issues, while in some respects relevant to the arbitration generally, do not appear to be relevant to the issues which are now before the court.

3.14 The contract provided for various forms of notices and warnings to be given by the Engineer in the event of an allegation of breach. A notice under Clause 46 of the conditions was sent on 2nd May, 2001, from the Engineer to Uniform, instructing Uniform that it was to take such steps as were necessary to expedite progress so as to complete the works by the date for completion.

3.15 A formal warning under Clause 63 of the conditions was given by letter of 29th May, 2001.

3.16 A letter of 20th June, 2001, was sent by the Engineer to Uniform indicating that, in the view of the Engineer, and despite previous warnings, Uniform was not proceeding with due diligence and was persistently and fundamentally in breach of its obligations. Uniform was given a further period of fourteen days in which to remedy its default. Subsequent to a meeting between the Engineer and Uniform on 12th July, 2001, the Engineer wrote to Uniform by letter of 16th July, 2001, confirming the matters which arose at the 12th of July meeting, and indicating that the Engineer would monitor progress so as to determine whether it would be necessary for the Engineer to issue a certificate to Limerick under Clause 63 of the conditions. By 18th September, 2001, the Engineer, apparently, had formed the view that Uniform had failed to honour the commitments it had given at the meeting of 12th July and issued a certificate under Clause 63 certifying to Limerick that the Engineer's opinion was that Uniform was failing to proceed with the works with due diligence and had repeatedly and persistently been in breach of its obligations in relation to safety and prevention of nuisance to the public and had repeatedly and persistently carried out works without approval and failed to carry out valid instructions of the Engineer.

3.17 As a consequence of the receipt of that certificate, Limerick by letter of 19th September, 2001, sent a notice to Uniform in accordance with further provisions in Clause 63 informing Uniform of the issuing of the certificate and, in substance, terminating the contract.

3.18 The above sequence is a necessarily brief account of the history of dealings between the parties. The fact that the complexity and variety of issues which arose from that course of dealing gave rise to hearings before the arbitrator on liability and on quantum which took place over approximately twelve weeks between July, 2004 and December of the same year makes clear the variety of issues which arose. However the above synopsis appears to be sufficient to address the narrow range of issues which were the subject of those aspects of determination by the arbitrator which are challenged in these proceedings.

4. The issues

In simple terms Limerick make complaint in respect of a relatively small number of findings made by the arbitrator in the award. They are the following:-

> 4.2 (a) The level of the tunnelling For reasons which I will address in more detail later in the course of this judgment the arbitrator came to the view that Uniform were entitled (under the contract as finally executed) to select the level at which the tunnel was to be constructed provided that same complied with certain requirements specified in clause 7.4.1. of the specification. On the basis of coming to that view the arbitrator took the further view that the instruction by the Engineer of 13th June, 2000, (which was to construct at the design level) constituted an instruction given under Clause 30(1) and was therefore a variation within the terms of clause 51 so that any additional cost would fall to be valued under Clause 52. It is contended by Limerick that in reaching those conclusions the arbitrator was fundamentally wrong.
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> 4.3 (b) The letter of the 18th May As is clear from the brief account of the dealings between the parties set out above a key issue in the debate between the parties leading up to the signing of the contract on the 23rd May was the attempt by the Engineer to place the risk of any varied route upon Uniform. That debate appears to have been left somewhat up in the air with the Engineer's letter of 18th May, 2000. It would appear that the arbitrator accepted that it was common case that the proposal for the acceptance of risk by Uniform contained in that letter was never accepted by Uniform. It is equally common case that the letter of 18th May was bound into the contract documents. In those circumstances the contractual consequences (if any) of the inclusion of that letter in the contract documents was an issue between the parties. It is contended that the arbitrator failed to decide the contractual effect of that letter and in particular its inclusion in the contract documents.
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> 4.4 (c) The certification by the Engineer Under this heading Limerick disputes the test which, it says, the arbitrator applied in determining whether Uniform was in persistent breach and also contend that the arbitrator devised a test of his own making without giving the parties, and in particular Limerick, an opportunity to be heard on it. Further it is contended that the arbitrator failed to decide whether no reasonable Engineer could have issued the Clause 63 certificate on the grounds of persistent breach. 4.5 However, it should be noted that these proceedings are necessarily limited in their scope given that, on any view, the court's entitlement to interfere with an award of an arbitrator is significantly circumscribed. In those circumstances it seems to me that it is appropriate to turn next to the question of the court's jurisdiction to make any of the interventions which Limerick seek.

5. The jurisdiction of the court

As is clear from the above brief recital of the issues, a number of separate contentions put forward on behalf of Limerick concern allegations that the arbitrator made an error of law apparent on the face of his award sufficient, it is contended, to warrant the intervention of the court. It is therefore to the jurisdiction of the court to interfere in such circumstances that I first turn. I will, later

in the course of this judgment, consider the jurisdiction of the court in relation to the contention that the arbitrator failed to decide important issues (viz the effect of the letter of the 18th May and the reasonableness of the engineers certificate) and the legal basis upon which the court should consider the contention that the arbitrator determined the test by reference to which he should assess the question of persistent breach without giving the parties an appropriate opportunity to be heard.

6. Error of Law

6.1 It seems to me that the starting point of a consideration of this question should be the position at common law. In *Keenan v. Shield Insurance Company Limited* [1988] I.R. 89 the Supreme Court acknowledged the jurisdiction of this Court at common law to set aside an award where there was a fundamental error of law on the face of the award.

6.2 It is instructive, in my view, to consider a significant passage from the judgment of McCarthy J. in that case where at p. 95 (and with the agreement of each of the other members of a court of five) the following is said:-

> "Section 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 a case where the arbitrator, himself, seeks to rectify some error and, perhaps, where fresh evidence has become available subject to the standard rules of an appellate court in such cases. No case cited to the court in the course of argument concerns the application of the like section in England and no Irish case has been cited on the point. In my view neither s. 35 nor s. 36 affords any relief to the plaintiff; I express no opinion on the question as to whether or not either section may be so used by this court, which is not the court referred to in the sections, when such an application is made as of first instance on the hearing of an appeal.
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> *Church & General Insurance Company v. Connolly and McLoughlin* (Unreported, High Court, Costello J. 7th May, 1981). In that case the plaintiff did apply under s. 36 alleging that the arbitrator permitted an error of law to appear on the face of the award and that this constituted a misconduct under s. 38, an argument rejected by Costello J. who expressed the view (p. 7 of his judgment) 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", and later "in my view the courts jurisdiction to set the award aside in such circumstances is given by the common law". The precedents cited established, before the passing of the Act of 1954, the jurisdiction to set aside an award because of an error of law that appeared on the face of the award had been established as part of the common law. In addition I would point to *Ex Parte Strabane R.D.C.* (1910) 1 I.R. 135 and the *Honorable The Irish Society v. Minister for Finance* (1958) NI 170. This jurisdiction was abolished in England by the Arbitration Act, 1979 (23) eliz. 2, c. 42). This feature of the common law was described in Russell Arbitration 19th Edition (1979) at p. 437 as a somewhat anomalous extension of the rule that an award which, on its face, fails to comply with the requirements for a valid award, will be remitted or set aside.
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> The concept that a long established common law principle necessarily requires legislation to effect a change in it has little appeal for me since the common law, itself, by definition, reflects the changing demands of society, adapting itself to meet perceived needs. Where, however, the legislature has intervened in a particular branch of the law, and has not expressly negatived an existing common law jurisdiction, such a jurisdiction must have survived, albeit that it must be administered so as to accommodate the legislation.
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> 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 ills becomes the court to show any readiness to interfere in such a process; if policy considerations are appropriate, as I believe they are in a matter of this kind, then every such consideration points to the desirability of making an arbitration award final in every sense of the term".

And later McCarthy J. concludes in the following terms:-

> "There may be instances in which an award which shows on its face an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged".

6.3 It seems to me, therefore, clear that, in the unanimous view of the Supreme Court, the policy considerations which favour conferring finality on the awards of arbitrators were such that the court might well have been persuaded to further refine the common law in a manner so as to further restrict (or indeed remove entirely) the jurisdiction to set aside or remit on the basis of an error of law on the face of the award were it not for the fact that the Oireachtas, having turned its mind to the question of arbitration, had not chosen (unlike Parliament in the United Kingdom) to intervene in relation to that jurisdiction.

6.4 There is nothing, however, in the judgment which would convey any suggestion that, in the view of the Supreme Court, the jurisdiction to set aside or remit on the basis of error of law had been, in anyway, extended or enlarged by the enactment of the Arbitration Act 1954. It is striking that the common law jurisdiction is described as arising only in circumstances where the award shows "on its face an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged".

The Supreme Court again had occasion to consider this area in *McStay v. Assicurazione Generali SPA and Another* [1991] ILRM 237 where, at p. 243, Finlay CJ had the following to say:-

> "I am satisfied that at common law where an arbitrator decides a question of law in the course of an arbitration where a general issue in dispute is submitted to him, but where that precise question of law has not been submitted for his decision, 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. This was the situation presented to this court in *Keenan v. Shield* Insurance Company and in the judgment of McCarthy J. was accepted, subject to what I am satisfied were appropriate warnings as to the limited number of instances in which it is appropriate for the court, even in that situation to intervene. A decision made by an arbitrator upon the reference to him of a specific question of law which appears on its face to be erroneous is not covered by any of these qualifications".

6.5 Those two authorities suggest that the jurisdiction at common law is limited and arises only where the error is "so fundamental" that it cannot be allowed to stand (*Keenan*) or "clearly wrong" (*McStay*). It is noteworthy that the position in the United Kingdom prior to the abolition of the error jurisdiction was equally restrictive (see for example the comments of Lord Denning referred to at para. 9.2 hereafter). Having considered the position at Common law it is now necessary to turn to the Arbitration Act, 1954.

6.6 In *Tobin & Toomey Services v. Kerry Foods Limited* [1996] 2 ILRM 1 the judgment of the Supreme Court was delivered by Blayney J. where he adopted the statement of O'Hanlon J. in *Portsmouth Arms Hotel Limited v. Enniscorthy UDC* (Unreported, High Court,

O'Hanlon J., 14th October, 1994) to the effect that amongst the grounds for the exercise by the court of its undoubted jurisdiction to remit for re-consideration under s. 36 was a case where it had been established "that there is some defect or error patent on the face of the award".

6.7 While it may be that *Tobin & Toomey* is, therefore, authority for the proposition that the statutory power to remit under s. 36 includes a power to remit in circumstances where there is an error on the face of the award, I can find nothing in that judgment, or in the judgment of O'Hanlon J. in *Portsmouth Arms Hotel*, which implies a departure from the test for the exercise of any such jurisdiction as set out in both *Keenan and McStay*. It may well be, therefore, that it is a rather academic point as to whether a power to remit for reconsideration as a result of an error on the face of the award exists under s. 36 as well as at common law unless there is authority which tends to suggest that any such jurisdiction as may exist under s. 36 would be greater than the jurisdiction to remit at common law.

6.8 It seems to me to be the obvious inference from the comments as to the desirability of treating arbitration awards as final made by McCarthy J. in *Keenan* that the courts should and will be slow to imply into any statutory provision any increased entitlement to interfere with arbitration awards in the absence of clear wording in the statute concerned indicating such an intent. There is manifestly no such clear wording in s. 36 and, for those reasons, I do not believe that any statutory jurisdiction to remit under s. 36 which may exist, extends the jurisdiction beyond that which formerly existed at common law and which is as set out in *Keenan and McStay*.

6.9 The Supreme Court returned to the question of the jurisdiction to interfere with arbitration awards in *McCarthy v. Keane and Others* [2004] 3 I.R. 617. It is noteworthy that Fennelly J. (who delivered the unanimous judgment of the court) quoted part of the same passage from the judgment of McCarthy J. in Keenan to which I have referred earlier and commented that "though he was not dealing with an allegation of misconduct, McCarthy J. set the tone for the correct judicial approach to arbitrator awards" in that passage.

Further in the course of his judgment in that case Fennelly J. considered the extent of the courts jurisdiction under s. 36 in particular in the light of the decision of Herbert J. in this Court in McCarrick v. The Gaiety (Sligo) Limited [2001] 2 I.R. 266. In respect of that judgment Fennelly J. noted, at p. 629, as follows:-

> "The conclusion of Herbert J., arrived at after very careful consideration goes some way to open up the possibilities of employing s. 36 to cover more than the traditional four grounds, error on the face of the award; a mistake which the arbitrator wishes to have corrected; new material evidence; misconduct. He considered that the courts should exercise restraint in exercising the "unlimited discretion" conferred by the section. It is true that s. 36 does not in turn 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 arbitration awards, once they have been made. Furthermore the courts will not interfere without very good reason in the arbitration process".

6.10 While that case is, therefore, authority for the proposition that there may well be further categories of case (beyond those already identified) where the statutory jurisdiction to remit under s. 36 arises it does not, it seems to me, provide any assistance to a party, such as the plaintiff, who may argue for an enlarged jurisdiction to remit for error. On the contrary the case is a reiteration of the strong policy of the courts in favour of upholding arbitration awards. Indeed in relation to the courts jurisdiction to set aside an award on the grounds of misconduct under s. 38 Fennelly J., (at p. 627) indicated the test in the following terms:-

> "It seems to me that the standard or test of misconduct of such a nature would be something substantial, something that smacks of injustice or unfairness".
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> While Fennelly J. was speaking of misconduct in relation to the process, the passage is, nonetheless, a further reiteration of the very high standard that needs to be met by a party who wishes to invoke the courts jurisdiction to interfere with an arbitration award.

6.11 In commenting on the analogous statutory scheme applicable to the review of decisions taken in relation to the assessment of the value of land for the purposes of compulsory acquisition under the Acquisition of Land (Assessment of Compensation) Act 1919, Keane J. in *Sheehan v. FBD Insurance plc* (Unreported, Supreme Court, Keane J., 20th July, 1999) said, at p. 21, the following:-

> "The statutory scheme, which entitled the High Court to remit any of the matters referred to arbitration to the reconsideration of the arbitrator and to set aside the award where the arbitrator has misconducted himself or the award has been improperly procured, did not affect the jurisdiction of the court at common law to set aside an award where there was an error of law on its face".

6.12 *Doyle v. Kildare County Council* [1996] 1 ILRM 242 is, if it is needed, further authority which confirms the above policies and suggests that the jurisdiction under s. 38 to set aside on the grounds of misconduct does not apply in cases where the only allegation is of error. Even if an error of law on the face of the award could be regarded as misconduct in principle I can find nothing in any of the authorities cited which would imply that the jurisdiction to set aside under s. 38 for misconduct on the basis of error of law is any greater than the common law jurisdiction to set aside on the same grounds.

7. Conclusion on Error Jurisdiction

7.1 While a considerable amount of argument was addressed at the hearing as to whether this Court has a jurisdiction, under either or both of ss. 36 and 38, to remit or set aside respectively an award of an arbitrator on the basis of an error of law, for the reasons set out above it seems to me that this argument is wholly academic. There seems to be authority which suggests that the jurisdiction to remit under s. 36 for error of law does exist (*Tobin & Toomey*). An entitlement to set aside on the same basis for alleged misconduct is less clear. However even if either or both of the above statutory jurisdictions exist I can find nothing in any of the authorities which suggest that the court has, under either or both of those sections, a larger entitlement to interfere with an arbitration award than the court had, prior to the enactment of the 1954 Act, at common law. Whether the court has, or has not, a statutory jurisdiction as well, is, it seems to me, therefore, irrelevant.

7.2 I therefore propose approaching the alleged errors of law on the face of the award applying the test identified by McCarthy J. in *Keenan* and Finlay C.J. in *McStay*.

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; *Carrickdale Hotel v. Controller of Patents* [2004] 3 I.R. 410.

7.4 Finally in relation to the law on this aspect of the case it is clear from the authorities referred to above (especially *McStay*) that there is a limitation on the jurisdiction of the court to set aside or remit an award for error on the face of the award where the specific question of law in respect of which the error is alleged to have been made has been referred to the arbitrator for his determination. The logic behind this exception is that if the parties have contracted to refer a decision as to what a particular point of law is, to an arbitrator, they are bound by the view of that arbitrator even if he turns out to be wrong. However it is equally clear from the passage from *McStay* as cited above that a distinction needs to be made between a specific issue actually referred to the arbitrator on the one hand and the variety of legal issues which will necessarily arise in a great number of arbitrations on the other hand. Even the simplest of arbitrations will, in all likelihood, involve some questions of law. Even where the relevant legal principles are not, in themselves, the subject of any controversy between the parties, their application to the facts of the case which the arbitrator has to decide frequently are. In those circumstances the arbitrator will, necessarily, be called upon to decide what are, at a minimum, mixed questions of law and fact. The exclusion of the jurisdiction of the court, it appears to me, arises only where "a specific question of law" has been referred to the arbitrator. It does not arise where it is necessary for the arbitrator to decide a question of law in the course of an arbitration where a general issue in dispute is submitted to him. See *McStay*.

7.5 It is, of course, a question of construction to determine, in any particular instance, what it is that has been "referred" to the arbitrator. It does not appear to me that issues which emerge in the course of the arbitral process (whether by pleadings, submissions, or argument) can be said to be issues specifically referred to the arbitrator. To take a practical example of the distinction, parties in dispute over their entitlements to property might have agreed all relevant factual matters but differ over whether, say, an estoppel arose on those facts as a matter of law. If that question was referred to an arbitrator then it could not be doubted that the specific question of law as to whether an estoppel arose on those facts would have been referred to the arbitrator and no jurisdiction to set aside or remit would arise even if the court took the view that the arbitrators determination, as appearing on the face of his award, was in error.

On the other hand a more general question as to the entitlements of competing parties in relation to rights to property could be referred to an arbitrator in which, as part of its case, one of the parties might plead an estoppel. In those circumstances the estoppel question would, in my view, be a legal question arising in the course of a referral of a general issue, rather than a specific issue referred to the arbitrator and, in those circumstances, the limited jurisdiction of the court to remit or set aside in circumstances where there was a patent or fundamental error on the face of the award would arise. I will address the remaining legal issue that arises under this heading (that is the test by reference to which it may be said that an error is an error of law "on its face of the award") later in this judgment (see para. 9 hereafter.)

8. Application to this Case (the first alleged error)
8.1 Having identified the basis upon which it is proper for this court to interfere with an award of an arbitrator on the basis of an alleged error on the face of the award it is necessary to consider in more detail the errors alleged to be present in this case. As appears from the list of specific issues relied upon by Limerick which I have set out at paragraph 2.2 above three matters (the two questions referred to in sub-paragraph (a) and the question referred to at sub-paragraph (c)) are alleged to constitute errors of law on the face of the award sufficient to warrant the courts intervention. It is necessary to deal with each in turn.

8.2 The alleged section 7 errors
The first two errors contended for, concern is the manner in which the Arbitrator construed s. 7.4 of the Specification. As indicated above one of the documents which was supplied to each potential tenderer was such a specification. Section 7.4 of that document provided the following:-

> "7.4 TRENCHLESS ROUTE
>
> 7.4.1 The contractor may propose an alternative route for the interceptor to suit his proposed tunnelling method and construction techniques, provided that:-· all connections are fully provided for
>
> · foundations, structures and services are not put at risk
>
> · future maintenance requirements are facilitated, particularly in the context of the Safety Health and Welfare at Work Regulations
>
> · the revised route does not impinge on private property."

The specification formed part of the documents which were incorporated into the contract as signed in May. The arbitrator construed section 7.4 as giving the contractor the right to put forward proposals for an alternative route at any time even after the contractor's tender had been accepted and an initial contract or even a final contract entered into. As he found that Uniform's proposal to lower the tunnel did comply with the above requirements, the arbitrator concluded that the lower tunnel proposal conformed with the contract. Limerick suggests that the arbitrator was fundamentally wrong in coming to that view.

8.3 It is, of course, correct to state that section 7.4.1 does not, in its terms, specify when the contractor (i.e. Uniform) was entitled to propose alternative routes. However Limerick argues that by reference to certain other aspects of the contractual documents it is clear that the entitlement to put forward alternative routes only existed at the stage of consideration as tenders and not after the acceptance of the successful tender.

Firstly it is contended that a reading of section 7 of the specification as a whole makes it clear that it is intended to apply only to the tender stage and not to a period after the contractor's tender has been accepted. It is also suggested that the arbitrator, in construing section 7.4, appears to have overlooked certain other contractual provisions which, it is said, make it clear that section 7 only applies at that tender stage and not after a contract has been entered into. In that regard reference is made to a further portion of the same section (section 7.8.1) which refers to the provision, if requested, of a detailed Method Statement in support of his (the contractor's) proposals during the detailed consideration of his tender". It is therefore suggested that the entirety of s. 7 pre-supposes that a tenderer who wishes to put forward an alternative proposal would put forward an alternative tender together with a compliant tender (a compliant tender being one which is in strict conformity with the specified design).

8.4 Reliance is also placed on the provisions of paragraph 30 of the Instructions to Tenderers which provides as follows:-

> "Where a tenderer wishes to submit alternative proposals to those specified in the tender documents, this should be done by way of an alternative tender. No alternative will be considered unless a tender based strictly in accordance with the tender documents without qualification is also submitted. Any alternative tender must also be free of qualifications and must show clearly where costs would differ from the compliant tender. The engineer and employer reserve the right to

reject any alternative tender considered inappropriate and to insist on design criteria and requirements that suit their general requirements in terms of maintenance, materials methods of construction etc. An alternative tender that does not meet these requirements may be summarily rejected by the employer, whose decision in the matter shall be final".

8.5 Reliance is also placed on a further contract document, the Bill of Quantities, which, at paragraph 23, gives details as to how any such alternative tender was to be submitted.

8.6 Finally it is suggested that the construction which the arbitrator placed upon the contract as a whole was such as would make the contract as entered into, in breach of public procurement rules because the contract so entered into would differ, in a significant and material manner, from the proposal which went out to tender in the first place.

8.7 In response Uniform draws attention to the fact that the tender documents did not require tenderers to include a statement indicating which of the specified methods of construction the tenderer proposed to use. Uniform also places reliance on instruction 23 which noted that such information might be requested from tenderers when tenders were being considered. In that context Uniform draws attention to the request by the engineer by letter of 30th June, 1999 to provide such additional information in response to which the information was provided including a detailed method statement for construction of the tunnel by two alternative methods being "drill and blast" at the design level or alternatively at a lower level by MBTM.

Furthermore attention is drawn to the fact that each of the sub-clauses in section 7 of the Specification refers to alternative construction "methods" as opposed to alternative tenders. It is, therefore, suggested that the proposal for use of MBTM was one for an alternative method rather than an alternative tender and was, therefore, a permissible response to the engineers request of the 30th June, 1999, provided it complied with the provisos to clause 7.4.1

8.8 In the context of assessing these competing arguments it is important to start with the basic contractual document which is the agreement signed on 30th May, 2000. That document lists a very significant number of other documents which are described as being deemed "to form and be read and construed as part of this agreement". The documents are:-

(a) the instructions to tenderers

(b) the said tender

(c) the drawings and schedules

(d) the conditions of contract and amendments to conditions of contract

(e) the specification

(f) the price to bill of quantities

(g) the performance bond

(h) site investigation report

(i) any queries dealt with during the tender period

(j) any notice issued under instruction 23 of instructions to tenderers

(k) the schedule of day works

(l) the schedule of basic prices

(m) post tender correspondence

8.9 The contract then simply states that in consideration of the payments to be made, Uniform are to construct and complete the works in conformity "with the provisions of the contract". It might well be said that where parties choose to enter into a formal written contract which will necessarily post date and supersede a tender process it would be preferable if the contract documents which constitute the final agreement were put together in such a way as made clear which aspects of the documents were to form part of the continuing contractual obligations between the parties. The problem with the inclusion of a vast array of documentation without specifying its current status is shown by the difficulty that arises in this case.

8.10 If Limerick are correct as to the proper construction of the entirety of the contract documentation taken as a whole then it would seem that Clause 7.4.1 of the specification (and indeed the balance of Clause 7 as well) has no relevance to any continuing contractual obligations of the parties as of the date of signing the agreement. If Clause 7 was only to have an effect at the tender stage then that effect was spent long before the parties came to sign the agreement in May. If that is the proper construction to be placed upon the contract as a whole then one might well ask as to why the relevant provisions of the specification, which were only concerned with the tender process (rather than specifying or at least influencing the continuing contractual obligations of the parties) were included in the contract documents at all.

8.11 Obviously in the ordinary way, specifications or other documents which form part of the tender process may be necessary to understand and interpret those documents which are to govern the continuing obligations of the contractor. Where pre-tender documentation is concerned only with the tender process itself and is unnecessary for the interpretation of the continuing contractual obligations of the parties it would be preferable if such documentation was not incorporated into the contract as its inclusion has the potential to lead to ambiguity. If it is not possible to exclude such documentation (because, for example, same forms part of a larger document some of which remains relevant) then it would avoid confusion if the primary contract document specified expressly which portions are intended to effect the parties continuing obligations. Failure to do so will lead to undoubted debate as to the effect, if any, of including as part of the contract documents clauses which might be said on one view to be spent prior to the execution of the agreement.

In expressing those views I have not overlooked the fact that the Clause 5 of the general conditions specifies that the several documents forming the contract are to be taken as mutually explanatory of one another and that discrepancies and ambiguities are to be the dealt with by the engineer. It is by no means clear that such a clause could be used to resolve the difficulties of construction

to which I have referred in the preceding paragraphs.

8.12 It is, of course, well settled that in construing a contract which the parties have agreed to reduce to writing the court should have regard only to the terms of the contract itself together with, where appropriate, the factual matrix within which the contract came to be entered into.

The very fact that, in order to make its argument, Limerick is required to refer to a range of separate contractual documents and to their interaction by reference to the facts which explain the sequence in which those documents came about shows that the range of materials relevant to the proper construction of this contract are potentially quite extensive and, may arguably, go beyond Clause 7 itself and indeed might, on one view, trespass into factual matters beyond the raw text of the documents themselves. In that context it is necessary to address a separate legal issue as to just what is meant by an error "on the face of the award". I now turn to that issue.

9 What is "on the face of the award"
9.1 In *DS Blaiber & Company Limited v. Leopold Newborne (London) Limited* (1953) 2 Lloyds Rep. 427 Lord Denning expressed the test in the following way:-

> "The question whether a contract, or a clause in a contract, is incorporated into an award is a very difficult one. As I read the cases, if the arbitrator says:-
>
> "On the wording of this clause I hold" so-and-so, then that clause is impliedly incorporated into the award because he invites the reading of it; but if an arbitrator simply says: "I hold that there was a breach of contract", then there is no incorporation.

9.2 Before leaving that case it is also worthy of note that Lord Denning went on to make the following general comment:-

> "It seems to me that, when traders go to lay arbitrators to decide a dispute between them, then the matter ought in the ordinary way to be left to those lay arbitrators without their decision being queried thereafter in point of law. The lay arbitrators have decided according to the justice of the case as they see it. If people want to raise points of law then they ought to ask at the time for a case to be stated on a point of law. If no such request is made, they should leave the law to the arbitrators. Applications should not be encouraged which seek to set aside the award on the ground of error on the face of it in point of law".

9.3 Counsel for Limerick helpfully procured the final edition of Halsbury Laws of England which pre-dated the removal of the jurisdiction to remit or set aside for error of law in the United Kingdom (Halsbury Laws of England 4th Edition Volume 2 (1973)). In paragraph 623 the jurisdiction is described in the following way:-

> "In order to be a ground for setting aside the award an error in law on the face of the award must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous".

In the relevant footnote to that passage there is reference to *FR Absalom Ltd. v. Great Western (London) Garden Village Society* (1933) AC 259 where it was considered permissible to look at the terms of a clause in a contract where the award referred to the clause but did not set out its text in full. Further reference is made to *Nils Heime Akt v. G Merel & Company Limited* (1959) 2 Lloyds Rep. 292 where reference was made to the whole of a contract where the award referred in terms only some part of the contract.

9.4 It seems to me that this latter point necessarily follows. But it does show the difficulty of the court exercising its limited power of review in cases where the construction of the contract concerned is complex. It would, of course, be wholly wrong if it could be the case that a court would conclude that a construction placed on a contract, or a term of it, was in error without the court having regard to all of the materials which could properly have been considered by the arbitrator in reaching his conclusions. It, therefore, necessarily follows that a court cannot conclude that an arbitrator has been in error in his construction of a contract unless it is open to the court to look at all the materials which would have been properly taken into account.

10. Conclusion on First Error
10.1 In this Court in *McStay v. Assicurazione Generali SPA* [1989] I.R. 251 Carroll J. having considered the competing arguments as to the construction of the contract under review in that case said the following:-

> "However I should say that the matter is not clear-cut. There is an arguable case on both sides. That being so, I do not see how it fits into the category of case in which the Supreme Court indicated that it would be appropriate to interfere. In my opinion, any error, if there be an error, could not be described as being so fundamental that the courts could not stand aside and allow it to remain unchallenged".

10.2 I have come to a similar view in respect of the first contended for error. In order to reach a conclusion as to whether there was an error it is necessary to have regard to the interaction of the whole series of contractual documents, to construe them by reference to each other and by reference to the evidence as to the sequence in which the documents came into existence. In those circumstances I am satisfied that, in the words of Carroll J. in *McStay*, any error, if there be an error, cannot be said to be of the obvious and fundamental variety which is necessary for the court to intervene.

10.3 Before passing from this aspect of the case I should say that I am mindful of the argument put forward on behalf of Limerick to the effect that the conclusion reached by the arbitrator as to the proper construction of the contract entered into in May is surprising in the light of the original project for which the parties tendered. That may well be so. However that fact needs to be seen in the context of the fact that there were, on any view, significant developments between the termination of the tender process and the entering into of the formal contract. Furthermore for the reasons set out above any ambiguity that arises stems at least in significant part from the manner in which all contractual documents were simply included without any sufficient express provision as to how they were to be collectively interpreted. In that context what might otherwise be perceived to be a surprising result is not, necessarily, quite so obviously so. It is certainly not, in my view, so obviously and fundamentally wrong as to invoke the courts jurisdiction. It should also be noted that the correspondence between the Engineer and Uniform concerning the position in relation to Uniform's March proposal had not come to any conclusion as of the date of signing the agreement. Furthermore both parties had, if would appear, agreed to differ on the issue as to Uniform's entitlement to propose alternatives which emerged at the meeting of the 4th August, 1999. It is surprising that the documents which gave rise to that difference of opinion were incorporated into the contract signed some 9 months later without specifying or clarifying which interpretation was to prevail.

10.4 Before leaving this topic I should also note that I have given consideration to the submissions, which I invited from the parties, as to whether I should express a view, (in the event that I found that there was not an error of sufficient seriousness to warrant the intervention of the court by reference to whatever threshold I had determined was appropriate) as to whether there was in fact an error at all even though it might fall short of that threshold. I have come to the view that it would be inappropriate so to do. Firstly it seems to me that in order to reach a safe conclusion as to whether the interpretation of the arbitrator was in error at all (as opposed to being in fundamental error) it would be necessary for me to consider in much greater detail the submissions made by the parties at the hearing before the arbitrator and all of the materials relied upon. Given that I have taken the view that there is no error which would warrant the intervention of the court I have also become satisfied that, having regard to the fact that the matter must now go back before the arbitrator, it would be inappropriate if he were to be asked to continue with the arbitration in circumstances where he had made a ruling which was not to be disturbed by the court, but where the court had indicated that that ruling was wrong. For those reasons I feel that I should express no view as to whether there was, in fact, an error at all. I confine myself to indicating that any error that might be present is not such as would justify remittal or setting aside.

11. The Second Error
The second error relied upon also concerns the interpretation of section 7.4.1. It is said, that the arbitrator in construing the section in the way he did overlooked section 7.2.2 which states:-

> "For any alternatives put forward the proposals are required to comply fully with Specification".

Reliance is placed upon the fact that the Specification required the construction of all the shafts (including the omitted shafts). Therefore it is said that the alternative put forward in March did not comply fully with the Specification and thus contravened section 7.2.2.

11.2 In support of this argument reliance is placed on instruction 14(iii) of the Instructions to Tenderers which states that "each rate or price shall properly cover the fully inclusive value of the works covered by the item description and shall reflect the quantity set against that item". On that basis it is suggested that the March proposal which, in effect, it may be said, transferred some of the cost from shafts to what was the apparently more expensive micro tunnelling, failed to comply with the requirement that there be a rate or price which covered the value of the work covered by the relevant item description.

11.3 Again under this heading it seems to me that the questions of construction that arise are complex involving the interaction of different aspects of the contractual documentation. In particular it is necessary to reconcile the apparent entitlement under section 7.4.1 to put forward alternatives subject to compliance with the provisos contained in that clause and the fact that it was, apparently, eventually agreed that the work could go ahead without some of the shafts, with the terms of section 7.2.2. In those circumstances I am not satisfied that the view which the arbitrator took was so obviously and fundamentally wrong that it is appropriate for the court to intervene.

12. "Persistent Breach"
12.1 Under this heading complaint is made as to the manner in which the arbitrator made findings as to whether Uniform were in persistent breach of contract. Clause 63 (1) of the conditions of contract permit the engineer to certify in writing to the employer that, in his opinion, the contractor, despite previous warning by the engineer in writing is, "persistently or fundamentally" in breach of his obligations under the contract. As indicated above this the engineer did.

12.2 Under this heading two complaints are made. It is suggested that the test applied by the arbitrator in considering whether Uniform were in persistent breach was incorrect. Secondly it is said that the process was unfair to a sufficient degree to warrant the intervention of the court, because the arbitrator invented the test himself without giving the parties an opportunity to be heard. I turn first to the issue as to whether there can be said to be an error on the face of the award sufficient to justify the intervention of the court applying the principles already identified.

12.3 It is clear that there is a difference between a fundamental breach and a persistent breach. A fundamental breach is clearly a breach which is so significant that it can, of itself, be regarded as going to the root of the contractual obligations of the party in breach to a sufficient extent as would justify the termination of the contract.

12.4 There are clearly breaches which have varying degrees of seriousness but which fall short of a fundamental breach. Such breaches can only justify certification by the engineer if they are "persistent".

Reference was made to the leading English construction text book Keating on Building Contracts which indicates in respect of similar wording in the ICE contract at page 1193 that a persistent breach:

> "must involve either repeated or continuing occurrences e.g. repeated execution of bad work or continuing failure to rectify."

12.5 The arbitrator considered this issue in paragraph 301 of his award where he noted that he had considered a schedule setting out 129 alleged incidents of breach which Limerick had contended ought to give rise to a finding of persistent breach. In sub-paragraph 4 the arbitrator correctly noted that in order for a breach to be persistent it should "continue firmly or obstinately."

At sub-paragraph 12 the arbitrator concluded in the following terms:

> "I do not consider that any of the incidents either individually or collectively were of such seriousness as to warrant termination of the contract."
>
> The arbitrator then went on at subparagraph 20 to indicate that he did not: "consider that any of these incidents individually qualifies as proving that Uniform was either persistently or fundamentally in breach of its obligations under the contract."

12.6 The contention of Limerick is that the above passages from the award of the arbitrator make it clear that he considered that Uniform were not in persistent breach by looking separately at each individual instance. It is therefore submitted that he manifestly applied the wrong test and it is further submitted that the test adopted was not one which was canvassed in any way at the hearing and that its adoption was, therefore, unfair.

12.7 Clearly any assessment of whether a party was in persistent breach requires looking at the overall picture in relation to breaches. As is pointed out in the passage from *Keating* referred to above breaches can either be one off incidents or can arise from

permitting a state of affairs to continue. It is, therefore, possible that an individual instance may amount to a persistent breach where that instance is a continuing failure to deal with some important aspect of the contract. There is nothing, therefore, illogical about looking at individual instances as, potentially, providing a separate justification for a finding of persistence.

12.8 Applying the principles of construction to which I will refer later in this judgment (see para. 13.5), it seems to me that it is appropriate to construe the award in a manner which gives effect to each of the paragraphs to which I have referred so as to consider from an overall point of view whether the arbitrator has dealt properly with the issues before him. In those circumstances it seems to me that the arbitrator did have regard to the possibility that individual breaches which would not of themselves give rise to a finding of persistence might nonetheless collectively lead to such a finding (see para. 301.12 of the award referred to above). I am not satisfied, therefore, that the construction which Limerick seeks to place on the arbitrators award is, in fact, correct. In saying that I should indicate that if I were wrong in that conclusion and if, on a proper construction of the award, it could be said that the arbitrator had not had regard to the possibility that breaches which while individually insufficient to establish persistence might collectively meet that test, then I would view the award as containing on its face a fundamental error sufficient to potentially invoke the jurisdiction of the court.

12.9 Finally under this heading I have also had regard to the contention on behalf of Limerick that the arbitrator was incorrect in having regard to the seriousness of the breaches as part of the test for persistence. I am not satisfied that the arbitrator was incorrect in having regard to seriousness. Breaches which fall short of being fundamental can lie at any point on a spectrum of seriousness from the highly trivial or technical to those which fall only just short of being fundamental. The length of time for which a breach might be set to persist (in the case of a continuous breach) or the frequency of its occurrence (in the case of one-off breaches) are of course important factors in determining persistence. However it does seem to me that seriousness is also a factor. A less frequent occurrence of a quite serious breach could well justify a finding of persistence while a more frequent occurrence of a relatively trivial breach might not, in my view, justify such a finding. I am not, therefore, satisfied that the arbitrator was in error in having regard to seriousness as part of the test.

12.10 Finally it is necessary to refer to the procedural complaint made under this heading. On the basis of what I have considered to be the appropriate construction of the arbitrator's award on this topic taken as a whole I have therefore come to the view that he applied the appropriate test, that there was therefore no error, and that he did not, therefore, apply a test upon which the parties, and in particular Limerick, did not have an opportunity to be heard.

13. Issues other than error
13.1 In relation to those issues, other than error on the face of the award, upon which reliance is placed I have come to the following views:-

13.2 (i) *the letter of the 18th May*

I now turn to the contention that the Arbitrator failed to resolve the issue of the effect (if any) of the letter of the 18th May on the contract. Such a failure can, of course, amount to misconduct of the proceedings *Samuel v. Cooper* (1835) 2 Ad & EI 752. For reasons which I advert to later (see para. 14.3) I have come to the view that the arbitrator does not, necessarily, have to answer each issue raised at the hearing (whether by pleading, written submissions, oral argument, or on an "issue paper" prepared by the parties) unless that issue is necessary to resolve the case which he is hearing.

13.3 Under this heading attention is drawn to the fact that the arbitrator, in paragraph 91, of the award asked himself the question as to whether that letter of 18th May, 2000 made the exercise by Uniform of the entitlement which the arbitrator found arose under s. 7.4 (i.e. to propose a different tunnel provided it complied with the various conditions set out in that clause) subject to Uniform accepting the risk set out in the letter.

13.4 It seems to me that this question raises in an even starker way the difficulty that has, in my view, given rise to much of the ambiguity in the contract in this case. That is the practice of binding in of documents to the contract and deeming them to be part of the contract without specifying the role which they are to play in the overall contractual picture. The arbitrator found, as a fact, that prior to the execution of the contract it had been made clear to the engineer that Uniform did not accept that which was set out in the letter of the 18th May. I am, I have to say, somewhat at a loss to understand the purpose of binding in to the contractual documents a proposal which, it was common case, had been rejected.

13.5 It is true to say that the arbitrator does not appear to have specifically answered this question in express terms. The approach to construing an award of an arbitrator by the courts is illustrated by *Stillorgan Orchard Limited v. McLoughlin and Harvey* [1978] I.L.R.M. 128 where Hamilton J. came to the conclusion that an award of an arbitrator will be sustained although the arbitrator may have omitted in his award to notice some claim put forward by a party if according to a fair interpretation of the award it is to be presumed that the arbitrator is taking the claim into consideration in making the award. The overall principle is that it is not appropriate to parse and analyse an arbitrators award but rather to consider from an overall point of view whether it may be said that the arbitrator has dealt properly with each of the matters referred to him. In the light of the arbitrators findings of fact in relation to the rejection of the letter of 18th May and of the remainder of the award on this aspect of the case, it seems to me that the appropriate inference to draw is that the arbitrator did not consider that the inclusion of the letter of 18th May in the contractual documents had any affect on the relevant terms of the contract. Given the history, as found by the arbitrator, of its inclusion in those documents and given the absence of any express guidance in the contract documents as to how the inclusion of inconclusive letter was to affect the overall interpretation of the contract, this is a hardly surprising conclusion.

13.6 Applying the test identified at 13.2 above and taking, as I feel I should, the overall approach to the construction of an arbitral award illustrated by *Stillorgan Orchard*, I do not believe that the Arbitrator has failed to decide a matter referred to him. Unless required by the arbitration agreement, an award will not be set aside because the arbitrator has not found separately on each matter referred to him *Whitworth v. Hulse* (1866) LR 1 Exch 251. The Arbitrator, having found on the overall issue, was not required to make a specific finding on the effect of the letter of 18th May unless it was necessary to his conclusions. I am satisfied that a fair reading as the award as a whole leads to the view that the arbitrator did not consider that the letter effected the contractual obligations of the parties in a relevant manner. On that basis I am not satisfied that the Arbitrator failed to decide an issue necessary to resolve the case.

13.7 (ii*) Clause 63 and the "reasonable engineer"*

The next contention made on behalf of Limerick, concerns the question of whether a reasonable engineer could have formed the opinion that a Clause 63 certificate was justified on the grounds of lack of diligence and persistent breach of contract as of 18th September, 2001. Again the contention is that the Arbitrator failed to decide a matter referred to him. The same test applies. The

arbitrator concluded that the engineer was wrong in his interpretation of the contract in respect of the cost of ground treatment, the ground conditions encountered in respect of certain specified aspects, the necessity for further ground investigation, and the competence of Uniform's tunnelling operations. It is clear therefore that the arbitrator formed the view that the engineer had, by virtue of a misconstruction of the contract, taken into account wrong matters informing his view to issue a section 63 certificate. Having taken that view it was, in my view, open to the arbitrator to form the view that the answer to the question posed was no. If the section 63 certificate was to fall then it was unnecessary to consider whether there was more than one ground upon which it could fall. I can therefore find nothing wrong with the way in which the arbitrator determined this aspect of the case before him.

13.8 (iii) did the Arbitrator "invent" a test

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'Armenment-Tunis v. Government of Ceylon* [1959] 3 All E.R. 25. However given the construction which I have placed on the award (see para. 12.10) I am not satisfied that the arbitrator in fact applied a test which had not been canvassed.

14. Specific Issues
14.1 Finally before indicating my final conclusions I should indicate that I have given consideration to the argument addressed by Uniform that many of the questions in respect of which it is alleged that the arbitrator fell into error are, in any event, specific questions referred to the arbitrator and thus outside the scope of the error jurisdiction of the court. As indicated above it is a matter of construction to determine the matters specifically referred to the arbitrator. In this case, unusually, there was no formal reference to arbitration. The arbitrator was nominated in accordance with the terms of the arbitration agreement and the issues between the parties became refined by pleading. Furthermore in the course of the hearing both parties suggested specific lists of questions which they invited the arbitrator to answer.

14.2 It does not seem to me that the fact that an issue becomes apparent on the pleadings always contained in one or other of what might loosely be termed an issue paper means that the issue concerned was specifically referred to the arbitrator in that sense. The overall issue which was referred to the arbitrator concerned the monies to which Uniform may be entitled on foot of the contract. There are, of course, many building blocks which have to be put in place before reaching a conclusion on that question. Most critically the validity or otherwise of the forfeiture of the contract will necessarily have a profound effect on the calculation of Uniform's entitlements. But even that issue is simply a means to an end rather than the end itself. I am not, therefore, satisfied that any of the matters in contention in these proceedings could be said to have been specifically referred to the arbitrator in the sense in which that term is used in the jurisprudence. The fact that they specifically arose in pleadings or were contained within specific questions put to the arbitrator is not, in my view, sufficient. If, therefore, I was wrong in coming to the view that there were no errors on the face of the award of a sufficiently fundamental character to warrant the intervention of the court I would not take the view that Uniform was entitled to escape from the consequences of any fundamental error on the grounds of the exception that arises where there has been a specific reference of the question concerned to the arbitrator.

14.3 However I should not leave this aspect of the case without commenting that it seems to me that analysis cuts both ways. It is equally true that the fact that specific questions appeared on the relevant issue papers does not, of itself, necessarily oblige the arbitrator to answer them. The arbitrator is obliged to answer all questions necessary to come to a final conclusion of the matters referred to him. The fact that he may take the view that in the light of his answers to some questions others need not be answered at all or need not be answered in the way in which the parties might have put them, does not, it seems to me, mean that the arbitrator could not be said to have dealt properly with the issues before him.

15. Discretion
15.1 As a fallback position at the hearing Uniform argued that even if I were to reject their principal arguments I should, in my discretion, not to intervene to set aside the award. Uniform placed reliance on *Lamprell v. Billeircay Union* (1849) 18 L.J. Ex 283 in which it was held that the court, in its discretion, might decline to set aside an aspect of an award of an arbitrator (even though there was a proper basis for so doing) if it should be the case that the aspect to be set aside would not affect the overall result of the arbitration.

15.2 On that basis Uniform contends that even if any of the arguments which challenge the Arbitrator's finding as to the validity of the Clause 63 certificate on the basis of the finding of their being no "persistent breach" were correct, the certificate would in any event have fallen for other reasons such as the finding in para. 304.4 of the award that one of the members of the "engineer" as specified in the contract did not participate in the decision to issue the Clause 63 certificate. However I am not persuaded that the findings of the arbitrator in relation to persistent breach could not have affected the overall result.

15.3 Having regard to the views which I have expressed above in relation to the arbitrator's findings concerning "persistent breach" the question of the exercise of a discretion does not arise. However lest this case should go further it seems to me appropriate that I should indicate that in the event that I am wrong in relation to those views, it would not have been my view that I should have exercised any discretion in favour of Uniform on the basis that I am not persuaded that the determination of the arbitrator in respect of persistent breach could have made no difference to the overall outcome of the arbitration.

16. Conclusions
For all of the above reasons I have come to the view that none of the issues raised are sufficient to warrant the exercise by the court of its jurisdiction to interfere with the arbitrator's award.