Neutral Citation Number: [2010] IEHC 393

THE HIGH COURT

COMMERICAL

2010 119 MCA

IN THE MATTER OF THE ARBITRATION ACTS 1954 TO 1998

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

MERO-SCHMIDLIN (UK) PLC

APPLICANT

AND

MICHAEL MCNAMARA AND COMPANY

AND

MICHAEL CUSH

RESPONDENTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 9th day of November, 2010

1. By an originating notice of motion of 30th April, 2010, the applicant seeks three alternative reliefs arising out of an award given by the second named respondent on 19th March, 2010, in an arbitration between the applicant and the first named respondent. The reliefs sought are:

> (i) An order, pursuant to s. 38(1)(a) of the Arbitration Act 1955, setting aside the award of the second named respondent;
>
> (ii) an order, pursuant to s. 36(1) of the Arbitration Act 1954, remitting the award to the second named respondent for this reconsideration;
>
> (iii) an order, pursuant to the jurisdiction of the Court at common law, setting aside the award and/or remitting the award to the second named respondent for his reconsideration on the grounds of fundamental error of law on the face of the award.

2. By order of the High Court (Kelly J.) of 17th May, 2010, the proceedings were admitted to the Commercial List and an order was made for the trial by the Court of the following preliminary issue:

> "Whether the issues of law alleged to have been wrongly decided by the second named respondent were, in effect, referred to him for his determination, with the consequence that the parties are bound by his answer."

The first named respondent was directed to be the moving party on the issue.

3. The second named respondent, as is customary, is not taking any part in the proceedings.

4. The originating notice of motion is grounded on an affidavit of William Aylmer, solicitor for the applicant. The preliminary issue was heard on the evidence in that affidavit, the exhibits referred to, written submissions of the applicant and respondents and oral submissions of counsel on behalf of both parties. This judgment is on the preliminary issue.

Legal context of preliminary issue

5. The preliminary issue relates to the reliefs sought, pursuant to the jurisdiction of the Court at common law. In accordance with the decisions of the Supreme Court in *Keenan v. Shield Insurance* [1988] I.R. 89, and *McStay v. Assicurazioni Generali SPA* [1991] ILRM 237, at common law, the Court has jurisdiction to set aside an award of an arbitrator where an error of law appears on its face. However, excluded from that jurisdiction are errors of law in a decision made by an arbitrator on a specific question of law referred to him. The parties are in dispute as to the precise ambit of this exception and its application to the arbitration and award at issue herein.

Background to arbitration

6. In 2006, the first named respondent was engaged as main contractor on a large commercial development known as MacDonagh Junction in Kilkenny. The employer was Cedar Tree Construction Limited. By a sub-contract made on 5th January, 2007, the applicant agreed with the first named respondent to carry out certain works as nominated sub-contractors.

7. In 2009, the applicant alleged that a sum of €1,862,579.77 (inclusive of VAT) was outstanding and due to it. It issued High Court

proceedings [2009 No. 1939 P] against Cedar Tree Construction Ltd. for failure to certify the said sum and against the first named respondent for recovery of the said sum. The proceedings were entered to the Commercial List and on 11th May, 2009, judgment against Cedar Tree Construction Ltd. was given in default of appearance on the statement of claim and the Court, *inter alia*, ordered Cedar Tree Construction Ltd., its directors and officers to procure the certification for payment of the said amounts. On 15th May, 2009, BSTM Project Management, at the direction of Cedar Tree Construction Ltd., issued a certificate in the sum of €1,862,579.77 (inclusive of VAT).

8. At a further hearing in proceedings [2009 No. 1939 P] before Kelly J. on 26th May, 2009, the applicant herein (the plaintiff therein) sought summary judgment against the first named respondent herein (and defendant therein). At the same hearing, the respondent applied for a stay of the proceedings, pursuant to s. 5 of the Arbitration Act 1980, on the grounds that the applicant and the first named respondent had agreed in writing that any dispute between the parties should be referred to arbitration. In an ex tempore judgment to which I will return, Kelly J. granted a stay, pursuant to s. 5 of the Arbitration Act, and did not grant summary judgment.

9. On 30th June, 2009, the applicant served a notice of arbitration in the following terms:

> "30th June 2009
>
> The Secretary
>
> Michael McNamara & Company
>
> Grattan Bridge House
>
> 3 Upper Ormond Quay
>
> DUBLIN 7
>
> Ireland
>
> Dear Sirs
>
> RE: NOTICE OF ARBITRATION - MacDonagh Junction, Kilkenny
>
> In the matter of an Arbitration between MERO-Schmidlin (UK) PLC Claimant
>
> and Michael McNamara and Company Respondent
>
> We hereby serve Notice of Arbitration pursuant to Clause 26 of the Conditions of the Sub-Contract between the Parties dated the 5th January 2007 due to your failure to make payment of the certified amount of €1,641,039.45 plus €221,540.32 (in respect of VAT) as per Main Contract Payment Certificate number 36 dated 15th May 2009 and the related Nominated Sub-Contract Recommendation Form CR2 of the same date.
>
> The aforesaid amounts of €1,641,039.45 plus €221,540.32 (in respect of VAT) are now overdue for payment in accordance with the terms of the Sub-Contract Agreement. We understand your position is that unless and until after receipt of payment from the Employer your company alleges it has no obligation to pay Mero (i.e. you consider the payment terms to be 'pay if paid'). We strongly dispute your view. Indeed the Sub-Contract Agreement does not pass the risk of Employer non-payment to Mero.
>
> We list below the identity of three legally qualified persons who are capable of acting as Arbitrator to resolve this dispute:-
>
> Michael Cush - Senior Counsel, 2 Arran Square, Arran Quay, Dublin 7
>
> Michael Collins - Senior Counsel, 4 Arran Square, Arran Quay, Dublin 7
>
> Paul Sreenan - Senior Counsel, 1 Arran Square, Arran Quay, Dublin 7
>
> We invite you to select one of the above named persons to act as Arbitrator in this reference to Arbitration and provide you with seven days in which to agree upon the name of a person to act as Arbitrator failing which we shall make application to the President of the Construction Industry Federation to appoint an Arbitrator.
>
> In the meantime we reserve all rights to recover interest pursuant to clause 11(e)(iii) of the Conditions of the Sub-Contract between the Parties dated the 5th January 2007 on the overdue amounts identified above and the costs of this reference to Arbitration.
>
> Yours faithfully
>
> David Barrow
>
> Managing Director
>
> MERO-SCHMIDLIN (UK) PLC"

10. The second named respondent was appointed as arbitrator. Pleadings and written legal submissions were exchanged, a hearing took place and the second named respondent made his award on 19th March, 2010.

11. The arbitrator, in his award, describes the respective claims in the arbitration at paragraph 2 in the following terms:

> "2.1 The Claimant's claim is a straightforward one. It contends that it is entitled to a declaration that the Respondent is

liable to pay a sum of €1,862,579.77 (inclusive of VAT) pursuant to the certificate of the Architect dated 15th May 2009 and that this entitlement arises whether or not the Respondent has received payment from the Employer pursuant to the Main Contract. A number of ancillary reliefs as to the date by which the Claimant became entitled to enforce payment are sought.

2.2 The core defence of the Respondent is to the effect that the contractual arrangements between the parties, properly construed, do not impose upon the Respondent a liability to pay the Claimant until such time as the Respondent has received payment from Cedartree. In short, the contract envisaged a 'pay when paid' arrangement between the parties.

2.3 The Respondent advances other defences also. Firstly, it suggests that the Certificate on foot of which payment is sought was not obtained in accordance with the provisions of the contract and does not represent the exercise of discretion on the part of the Architect. Rather, the Respondent says that the Architect was obliged to issue the Certificate on foot of a Court order and that accordingly the Certificate does not have the necessary attributes of a valid Certificate. Secondly, the Respondent suggests that there are defects in the Sub-Contract works and consequent upon this allegation a number of reliefs are sought. However, it is agreed that in respect of this allegation I have no jurisdiction and that the issue will be determined on another occasion. It follows therefore that in addition to the core defence that the contractual arrangements are to be construed as providing for a 'pay when paid' arrangement between the parties, I am concerned only with the suggestion that the Certificate on foot of which payment is sought is not a valid Certificate."

12. The arbitrator, in his conclusion at paragraph 7 of the award, sets out the legal principles applicable to "pay when paid" clauses, his analysis of the relevant contractual provisions and, ultimately, at the end of paragraph 7.10, states:

> "Accordingly, I conclude that on a construction of the contract as a whole, the Respondent has no liability to the Claimant until such a time as it has been paid by the Employer and Respondent for the relevant sub-contract works."

In addition, the arbitrator, at paragraph 7.11, whilst indicating that the above conclusion was sufficient to determine the arbitration, determined that the architect's certificate was valid, contrary to the first named respondent's second argument.

Alleged fundamental errors of law

13. The alleged fundamental errors of law appearing on the face of the award are stated to be expressed in paragraph 7.10 of the award and are essentially the construction placed by the arbitrator on the contractual obligation of the first named respondent to the applicant in respect of the certified sum in the absence of the payment to it of the said sum by the Employer. It is contended that the arbitrator erred in law in construing the contractual liability of the first named respondents as set out in paragraph 7.10 of the award.

Applicable law

14. As already indicated, the parties are in dispute as to the precise circumstances in which, in accordance with the case law, the Court's jurisdiction at common law to set aside an award of an arbitrator where an error of law appears on its face is excluded. The kernel of the dispute is that the first named respondent submits, in accordance with existing case law, that this Court must simply consider whether or not there has been a specific reference of the question of law upon which it is alleged the error is made and that, if so, the Court has no jurisdiction to interfere by reason of the alleged error of law made by the arbitrator in determining the specific question referred to him. The first named respondent further submits that it is immaterial to the application of the principle whether any other issues in dispute between the parties have also been referred to the arbitrator.

15. The applicant submits that the Court's jurisdiction is ousted only in circumstances where the only dispute referred to the arbitrator is the specific question of law on which it is alleged the error is made. That submission was made in reliance, in particular, on the speech of Lord Wright in *F.R. Absalom Ltd. v. Great Western (London) Garden Village Society Ltd.* [1933 A.C. 592].

16. I have concluded that the submissions of the respondents on this issue are to be preferred. In *McStay v. Assicurazioni Generali SPA* [1991] ILRM 237, Finlay C.J., at p. 7 stated:

> "6. 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 to him 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.
>
> This fact is not only recognised by the concession made by counsel in this case, which I have already noted, but is also inherent in the submission of counsel on behalf of the insured and appellant in *Keenan v Shield Insurance Company* where he made a similar concession. The matter is most succinctly and, in my view, accurately dealt with by the speech of Lord Russell of Killowen in *Absalom Ltd v Great Western (London) Garden Village Society* [1933] A.C. 592 when he stated at p. 607 as follows:
>
> > *'*My Lords, it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. I am not sure that the Court of Appeal has done so. The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one*'.*

I am therefore satisfied that the first issue which necessarily arises for determination on this appeal is as to whether the clause of the reference to arbitration which I have set out in the course of this judgment constitutes a reference of the specific

question as a matter of law as to whether the arbitrator had jurisdiction to grant interest.

In my view, on a careful consideration of the terms of that reference, and they supersede the original arbitration agreements contained in the policies of insurance to which we were not even referred, it is an inescapable conclusion that one of the matters referred to the arbitrator who, of course, was a distinguished member of the Senior Bar, was this precise question of law . . ."

17. As appears from the above extract, on the facts, the question of law at issue was only "one of the matters referred to the arbitrator". The full reference is not set out in the Supreme Court judgment. However, the High Court judgment of Carroll J. [1989] I.R. 248, records at p. 249:

> "The submission to arbitration provided in paragraph 1 that all differences, disputes and claims in any way arising out of the insurance policies were referred to the final determination and award of the arbitrator. Paragraph 2 provided, inter alia , that the arbitrator should have power "in his award to give directions and make declarations as to the rights of the parties and as to the time and manner of payments including (if he should think fit) the amount of interest (if any) to be payable on such amount and the period in respect of which interest (if any) may be payable."

18. Accordingly, in *McStay v. Assicurazioni Generali SPA*, the submission to arbitration was of all disputes between the parties and the Supreme Court, in its application of the legal principles, it would appear, by agreement of the parties, was only concerned to determine whether there was, in addition, a specific reference of the question of law on which the decision was alleged to be erroneous.

19. The logic behind the exception at issue is explained by Clarke J. in *Limerick City Council v. Uniform Construction Limited* [2007] 1 I.R. 30, at p. 47 as being:

> "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."

I respectfully agree with this logic and it also accords and, indeed, flows from the general policy of the Courts in favour of the finality of arbitral awards. That logic and policy is not dependent upon the specific question of law referred being the only dispute referred to the arbitrator. Rather, it is dependent upon the parties having specifically agreed that the relevant dispute which is a question of law be determined by the arbitrator.

20. The applicant's submission that the jurisdiction of the Court at common law to set aside the award by the arbitrator for error of law will only be excluded where the issue referred to the arbitrator is only a specific question of law and not any wider dispute between the parties as has already been stated, is primarily based upon the speech of Lord Wright in *Absalom Ltd v Great Western (London) Garden Village Society* at page 99. In that speech, having reviewed certain authorities in relation to the general rule, that the Court has jurisdiction, at common law, to set aside an award with an error of law on its face, as stated in *Hodgkinson v. Fernie* 3 C.B. (N.S.) 189 Lord Wright continued at page 615:

> ". . . The rule in truth applies to the ordinary case where, in the words of Lord Dunedin [1923] A.C. 488, 489, the submission refers 'to the arbitrator the whole question whether it depends on law or on fact'. To be contrasted with such cases there is the special type of case where a different rule is in force, so that the Court will not interfere even though it is manifest on the face of the award that the arbitrator has gone wrong in law. This is so when what is referred to the arbitrator is not the whole question of law in express terms as the separate question submitted; that is to say, where a point of law is submitted as such, that is, as a point of law, which is all that the arbitrator is required to decide, no fact being, quoad that submission, in dispute. Such a case is illustrated by the *Government of Kelantan v. Duff Development Company* [1923] A.C. 395, where Lord Cave L.C., whose opinion was that of the majority of this House, said *ibid*. 409, 'but where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion'. This House held in that case that the only questions to be determined by the arbitrator, there being no facts in dispute, were questions of law as to the construction of the contract. That decision followed in *In Re King and Duveen* [1913] 2 K.B. 32, 36, in which Channell J. said, in distinguishing the case of the *British Westinghouse Co. v. Underground Electric Rys. Co.* [1912] A.C. 673, 'It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside'. The learned judge shrewdly adds: 'otherwise it would be futile ever to submit a question of law to an arbitrator'.
>
> . .. . .
>
> In my judgment, the submission here falls within the rule of *Hodgkinson v. Fernie*, 3 C.B. (N.S.) 189: 27 L.J. (C.P.) 66. There is here no submission of any specific question of law as such and as a specific question of law; no doubt incidentally, and indeed necessarily, the arbitrator will have to decide some questions on the construction of the building contract, but the two matters submitted are both composite questions of law and fact; there is no express submission of the true effect of the contract on the basis of undisputed facts, as in the *Kelantan* case [1923] A.C. 395, or as a separate and distinct matter on facts to be separately assumed or found, as *In re King and Duvee*n [1913] 2 K.B. 32, 36. There is no reason to think that the parties had any specific questions of law in mind at all. What was wanted was a practical decision on the disputed issues. Even if questions of law were bound to emerge, the parties may never have envisaged them in going to arbitration. The arbitrator was not being asked simply and specifically to decide, upon some agreed or assumed basis of fact, the true interpretation of either clause 26 or clause 30 of the conditions or of both together; he was being required to make an award on the other two matters submitted on whatever questions of fact and law might emerge."

21. I accept that Lord Wright appears to be indicating that the exclusion only applies where a specific question of law alone is referred to an arbitrator for determination. However, this speech is not the majority speech in *Absolam.* The majority speech was that of Lord Russell of Killowen to which reference is made by Finlay C.J. in *McStay v. Assicurazioni Generali*. That speech and the speech of Lord Warrington of Clyffe, contain no such limitation. Rather, they follow the distinction between the two types of cases as set out in the extract from the speech of Lord Russell of Killowen cited in *McStay v. Assicurazioni Generali* and set out at paragraph 16 above which is not dependent upon the specific question of law referred being the only issue referred to the Arbitrator. Accordingly, it appears to me that the view expressed by Lord Wright was not the majority view in *Absolam,* and further, does not appear to me

justified by the logic and principle underlying the exclusion that where parties expressly agree to refer a specific question which is a question of law to an arbitrator, they are then bound by the arbitrator's determination of that question of law. As cited by Lord Wright in the extract above and as pointed out by Channell J. in *In Re King and Duveen*, "otherwise it would be futile ever to submit a question of law to an arbitrator". It appears immaterial to the logic and underlying principle that other disputes may also have been referred to the arbitrator.

22. Accordingly, I have concluded that the exclusion applies where what is referred to an arbitrator includes a specific and identified question of law for his determination and the alleged error is in the decision on that question of law, even if the reference also includes other issues of fact or law in dispute between the parties.

23. Accordingly, I now turn to the question as to whether the reference to arbitration herein included the reference of a specific question of law being the proper construction of the contractual liability of the respondents to pay the applicant the certified sum in the absence of payment to it by the Employer.

Reference to arbitration

24. It is common case that the reference to arbitration is the notice of arbitration served by the applicant on 30th June, 2009, and set out above. The written response of the respondent, if any, was not adduced in evidence. There is no evidence to suggest that it sought to refer any different dispute to arbitration. As stated by Clarke J. in *Limerick County Council v. Uniform Construction Limited* [2007] 1 I.R. 30, at p. 47, it is:

> "A question of construction to determine, in any particular incidence, what it is that has been 'referred' to the arbitrator."

I also agree with the view expressed by Clarke J. in that judgment that issues which (only) emerge in the course of the arbitral process, whether by pleadings, submissions or arguments cannot said to be issues specifically referred to the arbitrator.

25. In construing the notice of arbitration, it appears that the Court should take the same approach which it would take to a commercial contract, namely, that it must construe the whole document in accordance with the ordinary meaning of the words used when placed in its relevant factual context. On the facts herein, such facts appear to include clause 26 of the Sub-Contract between the parties dated 5th January, 2007, and the High Court proceedings [2009 No. 1939 P] between the parties and Cedar Tree Construction Ltd., and in particular, the judgment of Kelly J. on the application for a stay on the proceedings, pursuant to s. 5 of the Arbitration Act 1954, to permit the then identified dispute between the parties be referred to arbitration.

26. Clause 26 of the Sub-Contract, insofar as relevant, provides:

> "26. In the event of any dispute or difference between the Contractor and the Sub-Contractor, whether arising during the execution or after the completion or abandonment of the Sub-Contract Works or after the determination of the employment of the Sub-Contractor under this Sub-Contract (whether by breach or in any other manner), in regard to any matter or thing of whatsoever nature arising out of this Sub-Contract or in connection therewith, then either party shall give to the other notice in writing of such arbitration of such person as the parties hereto may agree to appoint as Arbitrator or failing such agreements as may be appointed on the request of either party by the President for the time being of the Construction Industry Federation and in either case the Award of such Arbitrator shall be final and binding on the parties.
>
> . . .
>
> Every or any such reference shall be deemed to be a submission or arbitration within the meaning of the Arbitration Acts, 1954 (Number 26 of 1954) or the Arbitration Act (Northern Ireland), 1957 (as the case may be) or any act amending the same or either of them."

27. As appears from the above, what may be referred is a "dispute or difference" and the notice in writing which must be given is of "such dispute or difference".

28. The notice given herein and set out at paragraph 9 above, recites, in its first paragraph, the fact that the notice is being given, pursuant to clause 26 and the reason for which it is being given, namely, the failure of the respondent to make payment of the certified amount. It is the second paragraph in the notice of arbitration which identifies the "dispute or difference" between the parties which the applicant is seeking to have referred to arbitration. This provides:

> "The aforesaid amounts of €1,641,039.45 plus €221,540.32 (in respect of VAT) are now overdue for payment in accordance with the terms of the Sub-Contract Agreement. We understand your position is that unless and until after receipt of payment from the Employer your company alleges it has no obligation to pay Mero (i.e. you consider the payment terms to be 'pay if paid'). We strongly dispute your view. Indeed the Sub-Contract Agreement does not pass the risk of Employer non-payment to Mero."

29. It appears to me that the applicant, in this paragraph in accordance with the plain meaning of the words used, has identified the proper meaning of the terms of the Sub-Contract Agreement in the absence of payment by the Employer as the then dispute or difference between the parties. The dispute being identified is that the first named respondent contends, in accordance with the contract terms, that it has no obligation to pay until after receipt of payment from the Employer. The applicant makes clear it disputes "this view" which can only mean the first named respondent's view of the proper meaning of the contractual terms.

30. I have concluded, accordingly, that, in accordance with the ordinary meaning of the words used in the notice of arbitration, the dispute or difference between the parties identified by the applicant, was whether or not, on a true construction of the Sub-Contract between the parties, the first named respondent had a contractual liability to pay to the applicant the certified sum in the absence of payment to it by the Employer of the said sum.

31. I am reinforced in the conclusion I have reached by two other relevant facts. Firstly, the applicant, in the notice of arbitration itself, identifies "three legally qualified persons" capable of acting as arbitrator to resolve "this dispute". There is no requirement in clause 26 that the arbitrator be a legally qualified person. On the contrary, in the absence of agreement as to the arbitrator, such a person is to be appointed by the President, for the time being, of the Construction Industry Federation. This appears to me to confirm the identification by the applicant of the dispute between the parties as a legal dispute which required a legally qualified person to act as arbitrator.

32. Secondly, this construction is consistent with the dispute identified by the parties before Kelly J. in the contemporaneous applications for summary judgment and a stay, pursuant to the Arbitration Act, of the decision which gave rise to the reference to arbitration. In his *ex tempore judgment*, Kelly J. stated, in relation to the application for a stay:

> "The second defendant has brought an application to stay the proceedings against it on the basis of it having a valid arbitration clause to which it wishes to have recourse because of a dispute between it and the Plaintiff as to the Plaintiff's entitlement to payment.
>
> In the shell of a nut the point which is raised by the Defendant is that on the true and proper construction of the contract entered into between it and the Plaintiff there is no obligation on the part of the second-named defendant to pay unless and until such time as it is paid by the first-named defendant, the employer under the proceedings - when I say under the proceedings the employer under the terms of the contractual arrangements."

And further:

> "Now, what Mr. McCullough [counsel for the Defendant] contends is that the effect of these contractual terms mean that there is no obligation upon his client to pay until such time as it in turn is paid by the employer. If it is not paid by the employer then not only does it not get paid but neither does Mr. McDowell's [counsel for the Plaintiff] client because the obligation on the part of McNamaras is to pay only when Cedartree in turn pays it.
>
> Mr. McDowell argues to the contrary and he relies upon authorities touching upon the construction from various different jurisdictions."

33. Having considered certain authorities referred to, Kelly J. concluded:

> "I am unable to say at this juncture that the position is so clear as to disentitle the second-named defendant to have the issue thrashed out before the tribunal of choice, the tribunal chosen by the parties which is not this Court but rather the arbitrator who will be appointed under the terms of the contract. I of course accept that common sense would suggest that a subcontractor ought not to enter into an arrangement where the ability to be paid is going to be determined by reference to an employer's ability to pay or arguably McNamaras ability to pay, but it is argued that that is the very contract that was entered into."

34. As appears, the dispute between the parties identified by both sides before Kelly J. was whether or not, on a proper construction, the Sub-Contract between the parties imposed a liability on the second named respondent to pay the certified sum in the absence of payment to it by the Employer. The notice of arbitration was served following the judgment of Kelly J. and order staying the proceedings on 26th May, 2009, and, as might be expected, identifies the same dispute.

35. Accordingly, I have concluded that a specific question as to the proper construction of the contractual liability of the respondent to make the certified payment to the applicant in the absence of payment of that sum to it by the Employer was referred to arbitration. Such question of contractual construction is a question of law.

36. Having regard to my conclusion as to the circumstances in which the Court will not interfere with an award by reason of an alleged error on its face, i.e. where the alleged error is made in the determination of a question of law which has been specifically referred to the arbitrator, it is unnecessary for me, on the facts herein, to consider whether the notice of arbitration referred any wider or other dispute to the arbitrator for his determination. Undoubtedly, the arbitrator considered he had jurisdiction to determine a dispute as to the validity of the Certificate.

Conclusion

37. It appears to me that the preliminary issue should be answered as follows. The issue of law alleged to have been wrongly decided *i.e.* the construction of the contractual liability of the first named respondent to make the certified payment to the applicant in the absence of payment of the said sum to it by the Employer was specifically referred to the arbitrator for his determination, with the consequence that the parties are bound by his determination of such question of law.

Further Issue

38. I would like to add the following having regard to one of the submissions made on behalf of the applicant. In my view, the applicant correctly identified a further subtlety in the principle applied by the Court herein, arising from the decision of the House of Lords in *Government of Kelantan v. Duff Development Company* [1923] A.C. 395, and, in particular, the speech of Viscount Cave L.C. and implicitly repeated by Lord Russell in *Absolam.* It appears that even where a specific question of law is referred to an arbitrator for his determination, whilst his conclusion on that question of law may not be interfered with by the Courts, if the award discloses an error of law on some other question of law which was not specifically referred but which emerged in the course of the arbitration, then the Courts may still interfere. In the *Government of Kelantan v. Duff*, Viscount Cave L.C. at p. 409, stated:

> ". . . the reference, therefore, was a reference as to construction.
>
> If this be so, I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law . But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally - for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is an error in law which may be ground for setting aside the award; but the mere dissent of the Court from the arbitrator's conclusion on construction is not enough for that purpose . . ."

39. The above appears consistent with the general principle, as already explained. If a question of law (A) is specifically referred to an arbitrator, then the parties are bound by the arbitrator's determination of the legal question (A). If, however, in the course of that determination, there emerge additional legal questions (B) and (C), which are not questions of law which have been specifically referred, and the award, on its face, contains fundamental errors of law in the determination of such legal questions (B) and (C), the court retains jurisdiction to set aside an award by reason of such errors. This approach appears consistent with the distinction as

explained by the Supreme Court in *McStay v. Assicurazioni Generali* by reference to the speech of Lord Russell of Killowen in *Absolam Ltd. v. Great Western (London) Garden Village Society*.

40. Whilst I agree with the submission of the applicant on this further qualification of the relevant legal principles, I am not satisfied that, on the grounding affidavit of Mr. Aylmer, sworn on behalf of the applicant, or the submissions made by Counsel on its behalf that the applicant has identified, in the award herein, any fundamental errors of law alleged to have been made by the arbitrator on any distinct question of law which emerged in the course of the arbitration and determination. The fundamental errors alleged are stated to be expressed in paragraph 7.10 of the award and are in the construction placed by the arbitrator on the Sub-contract. Whilst Mr. Aylmer makes reference to other alleged "findings of law" by the arbitrator with which issue is taken, I am satisfied that they form part of the construction of the contract i.e. the legal question referred, and are not the determination of any separate and distinct question of law which emerged in the course of the arbitration, as envisaged by Viscount Cave.