

IN THE MATTER OF THE ARBITRATION ACTS 1954 AND 1980  
AND IN THE MATTER OF AN ARBITRATION

BETWEEN

IRISHENCO LIMITED AND NACAP b.v.  
TRADING AS IRISHENCO NACAP JOINT VENTURE

CLAIMANTS

AND

BORD GAIS EIREANN

RESPONDENTS

AND

MINISTER FOR INDUSTRY AND ENERGY

NOTICE PARTY

Judgment of Miss Justice Carroll delivered the 13<sup>th</sup> day  
of May 1987.

In order to succeed in their application for discovery against a Third Party the Claimants in this Arbitration must satisfy the Court under Order 31 Rule 29 that the Minister is likely to have or to have had documents relevant to an issue arising or likely to arise out of the cause or matter.

The contract is identified as an agreement under seal dated the 5th of February 1982 between the Claimants and the Respondents. Arbitration under the contract under Clause 2.17 arises when the engineer has given his decision in writing to matters referred to him under that Clause.

His decision can be referred to an Arbitrator. The decisions in writing by the engineer referred to in the points of claim are those dated the 27th of July 1984 and the 1st of November 1985 disallowing certain claims for additional expenses and the decision dated the 30th of October 1985 holding the Claimants responsible for certain charges.

The points of claim set out as complaints that the engineer issued instructions for variations and omissions for which the Claimants are entitled to be paid; that the Respondents failed to enable the Claimants to carry out the works; that the Respondents failed to issue instructions in sufficient time; that the Respondents failed to give possession of the site; that the Claimants incurred additional costs for which they are entitled to be paid; that the Respondents failed within a reasonable time of being requested to grant the appropriate extension of time and as a result the Claimants incurred additional expenses to accelerate the work for which they are entitled to be paid.

The grounding Affidavit sets out the history of negotiations. Paragraph 20 exhibits the letter of the 15th of October 1981 from the Respondents stating that the Claimant's tender is accepted subject (inter alia) to Government approval and execution of the deed under seal. Government approval was not forthcoming and paragraph 27 refers to the Minister's determination expressed at a meeting of the 5th of January 1982 to have a fixed price contract. Further telexes and clarifications followed. The Articles of Agreement were entered into on the 5th of February 1982 incorporating (inter alia) correspondence, telexes and minutes of meetings between

the parties.

The issues arising or likely to arise on the Arbitration are

- (1) Was the engineer justified in disallowing certain claims for additional expenses, and
- (2) Was the engineer justified in holding the Claimants responsible for certain charges.

These are decisions which are to be judged by objective standards by the Arbitrator under the terms of the contract. In my opinion the part played by the Department or the Minister in the events leading up to the final contract and any interests shown by the Minister thereafter are nihil ad rem to the issues to be decided. Either the engineer's decisions are objectively justified from a professional point of view under the contract or they are not.

Accordingly, I refuse the application for discovery against the Minister.

*Hella Cudde*  
*21st May 1987*

*Approved*