[2019] IEHC 861

THE HIGH COURT

[2018 No. 76 MCA]

IN THE MATTER OF THE ARBITRATION ACT 2010
AND IN THE MATTER OF AN ARBITRATION

BETWEEN

BOWEN CONSTRUCTION LIMITED (IN RECEIVERSHIP)
AND
SOMAGUE ENGENHARIA SOCIEDADE ANOMINA
TRADING TOGETHER IN JOINT VENTURE AS BOWEN SOMAGUE JV

APPLICANT

AND

KELLY'S OF FANTANE (CONCRETE) LIMITED (IN RECEIVERSHIP)

RESPONDENT

JUDGMENT of Mr. Justice David Barniville delivered on the 6th day of December, 2019

Introduction

1. This is my judgment on an application by a joint venture between Bowen Construction Limited (in receivership) and Somague Engenharia SA, a Portuguese company, which is a party to an arbitration brought by Kelly's of Fantane (Concrete) Limited (in receivership). The joint venture challenges a ruling by the arbitrator pursuant to Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) (the "Model Law"), that she has jurisdiction over certain parts of the claims made in the arbitration. For ease of reference, and to avoid endless confusion, I will refer in this judgment to the applicant to this application as the "respondent" (as it is the respondent in the arbitration) and the respondent to the application as the "claimant" (as it is the claimant in the arbitration).

2. In the course of the arbitration, the respondent contended that the arbitrator did not have jurisdiction over certain parts of the claim sought to be advanced by the claimant as those claims had not been referred to in the notice referring the dispute to arbitration. The issue on jurisdiction arose in the following circumstances. The respondent sought to rely on certain points by way of defence to the claimant's claim. It argued that, on the basis of certain determinations made by it following the termination of the relevant contract between the parties, the claimant could not succeed in certain parts of its claim which were affected by those determinations. When the claimant sought to challenge the determinations in the course of the arbitration proceedings, the respondent contended that the claimant was not entitled to do so as it had not referred those issues to arbitration and that, as a consequence, the arbitrator did not have jurisdiction to deal with the attempted challenges to its determinations.

3. The parties agreed that it was open to the respondent to rely upon its determinations by way of defence to the relevant parts of the claimant's claim. However, the parties did not agree that the claimant could, in response to the defence advanced by the respondent in reliance upon the determinations it had made, seek to challenge those determinations in the arbitration, as no such challenge had been adverted to in the notice referring the dispute to arbitration.

4. The claimant's position was that the dispute referred to arbitration encompassed a challenge to the relevant determinations and that, once it was open to the respondent to rely on the determinations by way of defence, it would in turn be open to the claimant to respond to that defence by challenging the determinations in the arbitration.

5. The arbitrator delivered a ruling on 9th March, 2018, in which she found that she did have jurisdiction in respect of the contested parts of the claimant's claim. The respondent disagreed with that ruling on jurisdiction and brought this application to the court pursuant to Article 16(3) of the Model Law requesting the court to decide the issue of jurisdiction in relation to the relevant parts of the claimant's claim.

6. The application involves a number of interesting points of law which have not previously been considered by the Irish Courts, although they have been considered elsewhere in the common law world. It will, in, due course, be necessary to consider those points, including the principles applicable to the construction of a notice referring a dispute to arbitration and to the ascertainment of the ambit or scope of a particular dispute referred to arbitration.

7. Before considering those issues, it is necessary to set out the relevant factual background contractual relationship between the parties as well as the circumstances in which the dispute between the parties was referred to arbitration and the manner in which it was dealt with in the course of the arbitration. It will be necessary to consider the function of the court and the proper approach to be taken in the context of an application under Article 16(3) of the Model Law. It will then be necessary to consider the respective contentions of the parties on the jurisdiction issue and, in that context, to address the legal principles applicable to the construction of a notice referring a dispute to arbitration and to the question as to how a court should determine whether a particular dispute (or issue within a dispute) has been referred to arbitration. Having done all that, I will set out my conclusions on the various issues.

Outcome of Application

8. I should indicate at this stage that, for the detailed reasons set out in this judgment, I have concluded that the arbitrator does have jurisdiction in relation to the relevant parts of the claimant's claim which is the subject of this application and that the arbitrator was correct in ruling that she had such jurisdiction.

Factual Background

9. There is substantial agreement between the parties as to the relevant facts. The following is a summary of the relevant facts as found by me, which I have taken from the affidavits sworn by the parties in connection with the respondent's application.

The Parties

10. The respondent is an unincorporated joint venture between Bowen Construction Limited ("Bowen") and Somague Engenharia SA ("Somague"), a Portuguese entity, which was formed by way of an agreement between the parties made in February, 2008. Bowen went into receivership in July, 2011. Thereafter, Somague assumed all of the obligations

of the joint venture under the terms of the relevant joint venture agreement. Bowen did not, therefore, participate in the proceedings.

11. The claimant, Kelly's of Fantane (Concrete) Limited, is a specialist building subcontractor providing road paving and associated works. The claimant went into receivership on 21st March, 2011.

The Contracts

12. On 31st January, 2008, the respondent and Laois County Council entered into a contract under which the respondent was to execute and complete various works, including paving works, on the N7 Castletown to Nenagh (Derrinsallagh to Ballintotty) Scheme (the "main contract"). The main contract was in the form of the "Public Works Contract for Civil Engineering Works designed by the Contractor"(19 February 2007). On 19th January, 2009, the respondent entered into a subcontract with the claimant under which the claimant was appointed to carry out and supply road surfacing works and materials to the respondent in connection with the scheme (the "subcontract"). The subcontract expressly incorporated the "Conditions of Sub-contract for use in conjunction with the Forms of Main Contract for Public Works for use with Domestic Sub-contractors". Substantial completion of the works under the main contract was achieved on 22nd December, 2010. The respondent certified that the claimant's subcontract works were substantially complete on that date and the road was opened for public traffic around that time.

13. The parties engaged in discussions in relation to monies which were being claimed by the claimant and which it contended were outstanding from the respondent under the subcontract.

9th March 2011 Claim

14. On 9th March, 2011, the claimant submitted a claim to the respondent under clauses 10(a), 10(b) and 10(c) of the subcontract (the "9th March, 2011 claim"). The 9th March, 2011 claim was expressly stated to incorporate sums unpaid from previous applications and included a claim for extension of time and additional costs allegedly incurred by the claimant as a result of alleged delays to the works under the subcontract which it is alleged were beyond the claimant's control. The 9th March, 2011 claim was made by way of a letter of that date which enclosed four folders of documents (appendices A to D). The total amount claimed was €13,798,995.00.

23rd March 2011 Rejection

15. The 9th March, 2011 claim was rejected by the respondent in a letter dated 23rd March, 2011 (the "23rd March, 2011 rejection"). In the 23rd March, 2011 rejection the respondent pointed out that the claim was being advanced by the claimant just after substantial completion and more than two years after some of the alleged events occurred. It further asserted that clause 10(a)(1) of the subcontract contained a condition precedent which the claimant had to comply with in order successfully to pursue a claim

(the condition relied upon by the respondent was one requiring that notice in certain terms be given within a particular time period where the claimant considered that it was entitled to an adjustment to the subcontract sum or that it had any other entitlement under or in relation to the subcontract). The respondent contended that the claimant had failed to comply with that condition and as a consequence, the respondent had no liability in relation to the 9th March, 2011 claim. For that reason, the claim was "rejected in its totality".

Termination of the Subcontracts and Subsequent Events

16. A receiver was appointed to the claimant on 21st March, 2011. The respondent was unaware of this fact when it sent the 23rd March, 2011 rejection. Having been informed of the appointment of a receiver to the claimant, the respondent terminated the subcontract by letter dated 12th April, 2011, in accordance with clause 12(a) of the subcontract. That clause entitled the respondent to terminate the subcontract in the event of a receiver being appointed to the claimant. Thereafter, the provisions of clause 12(b) of the subcontract provided that the provisions of clause 12.2 of the main contract were to apply. Those provisions deal with the consequences of the termination of the subcontract in the case of a default by the claimant. I will set out in somewhat more detail later in my judgment the relevant provisions of the subcontract and of the main contract in this regard. It should be noted at this point that there is no dispute between the parties as to the respondent's entitlement to terminate the subcontract.

17. Following the termination of the subcontract, the respondent sought to implement the steps provided for in clause 12.2 of the main contract (which applied by virtue of clause 12(b) of the subcontract). First, the respondent wrote to the claimant on 3rd June, 2011, informing it that the respondent had determined that the amount due to the claimant under the subcontract for works completed in accordance with the subcontract and unpaid was "nil". This is what is known in clause 12.2.3 as the "termination value". The respondent was, therefore, informing the claimant that the termination value was nil. Second, the respondent wrote to the claimant by letter dated 21st October, 2011, reminding the claimant that the respondent had informed the claimant that the respondent was obliged to appoint a replacement contractor to complete and remedy certain alleged defects in the subcontract works and that those works were now complete and that all defects had been remedied. In those circumstances, the respondent informed the claimant that it was in a position to determine the "termination amount" in accordance with clause 12.2.9 of the subcontract. The respondent informed the claimant that it had determined the "termination amount" at €768,911.27 and it set out a breakdown of that sum. In the same letter, the respondent demanded that the claimant pay to the respondent the sum of €768,911.27 being the amount by which the termination amount exceeded the termination value. That demand was made pursuant to clause 12.2.11 of the subcontract. The respondent also informed the claimant that if that sum was not paid within ten working days of the date of the letter, the respondent intended to make a claim on foot of the performance bond provided by the claimant.

Under the performance bond, Hiscox Insurance Company Limited was the bondsman (the "bondsman").

18. The claimant did not respond to the respondent's letters of 3rd June, 2011 and 21st October, 2011 in which the claimant was informed of the respondent's determination of the termination value and of the termination amount, respectively.

Respondent's Claim Against the Bondsman

19. The sum demanded by the respondent on 21st October, 2011 was not paid by the claimant. In those circumstances, the respondent sought to recover that sum from the bondsman. It is accepted that the quantity surveyors engaged by the bondsman liaised with Anthony Kelly, the managing director of the claimant, in relation to that claim. Prior to the determination by the respondent of the termination amount but following its determination of the termination value, the bondsman wrote to the respondent's solicitors on 5th October, 2011 informing them that in the event that the respondent ultimately pursued a claim against the bondsman, sums due to the claimant would need to be calculated and offset against any sums incurred in completing the works in order to establish if there were any monies due under the bond. That letter made clear that the bondsman did not accept that the termination value was nil.

20. In due course, the respondent commenced proceedings against the bondsman in 2013 seeking payment on foot of the performance bond (the "bondsman proceedings"). In its statement of claim in those proceedings, the respondent pleaded the fact of the determination of the termination value and of the termination amount. In its defence to those proceedings, the bondsman admitted that the respondent had determined the termination value at nil and the termination amount at €768,911.27. However, the bondsman denied that the determination of the termination value and of the termination amount was correct. The bondsman expressly pleaded that the termination amount claimed by the respondent did not take into account all sums properly due or which might become due to the claimant under the subcontract and contended that that amount had not been properly calculated in accordance with the terms of the subcontract. The bondsman proceedings proceeded up to the point of discovery in 2014.

Correspondence in November – December 2014

21. On 13th November, 2014, Hussey Fraser, the claimant's solicitors wrote to the respondent's solicitors, Maples and Calder. This was the first time that the claimant had written to the respondent since June, 2011 and the first time that the claimant had written in relation to the determinations made by the respondent of the termination value and of the termination amount under the subcontract. There is major disagreement between the parties as to the interpretation and effect of the Hussey Fraser letter of 13th November, 2014. It will, therefore, be necessary to examine the contents of that letter in some detail later in this judgment. At this stage, however, I will note that the letter referred to the fact that the respondent had issued proceedings against the bondsman and that Hussey Fraser were instructed to issue proceedings against the respondent on

behalf of the receiver of the claimant arising out of the subcontract. The letter then referred to the claim against the bondsman before moving on to refer to the valuation of the works carried out by the claimant under the subcontract up to completion in December, 2010. It referred to various discussions and negotiations between the claimant and the respondent in relation to the final account and disputed the deletion of variations that had allegedly been previously agreed and a deduction of alleged unsubstantiated contra charges on behalf of the respondent which the complainant said would be "*vehemently defended*". The letter then referred to the "cost of completion" of €768,911 asserted by the respondent (i.e. the termination amount) and asserted that the claimant's works had been completed by November, 2011 and that there were no works outstanding. The letter then referred to alleged defects in the claimant's works and took issue with the claims being made in respect of the alleged defects. The letter then considered the claimant's claims against the respondent and indicated that, after allowing contra charges which had been agreed and payments on account made to date, the sum of €1,329,670.00 remained due to the claimant and asserted that that sum did not include additional compensation payable to the plaintiff in respect of various matters including additional movements, delay and disruption. The letter then suggested that there may be additional claims and made reference in that context to the 9th March, 2011 claim and stated that the claimant's solicitors had not yet examined that claim in detail. The letter concluded by referring to clause 13(a) of the subcontract providing for arbitration and the service of a notice to refer and asked whether the respondent's solicitors had authority to accept service of the notice to refer.

22. The respondent's solicitors replied to the letter of 13th November, 2014, by letter dated 1st December, 2014 (the "Maples letter of 1st December, 2014"). In that letter, they described the claimant's claim as set out in the Hussey Fraser letter of 13th November, 2014 as having "*no substance*" and being an attempt by the claimant "to leverage nuisance money" from the respondent by attempting to interfere with the bondsman proceedings. The basis for that contention was then set out in a series of numbered paragraphs. Amongst those grounds was the fact that the claimant had not sought to advance its claim for more than three years. It was also asserted that the Hussey Fraser letter of 13th November, 2014 was "*littered with various factual inaccuracies regarding the works performed and not performed by* [the claimant], *the status of* [the claimant's] *account at the time that* [the respondent] *terminated its obligation to complete the works, and the manner in which the subcontract was performed by the parties*.". The claimant attaches some significance to the terms of the Maples letter of 1st December, 2014 in support of its contention that the respondent was aware that the claimant was disputing the determinations in relation to termination value and termination amount. The respondent's solicitors concluded their letter by contending that the claimant's claim was not *"legitimate, meritorious or sustainable*" and that the claimant saw "*its opportunity cheaply to make some nuisance money*…". They stated that the respondent did "*not intend to waste time or legal fees engaging with*" the terms of the Hussey Fraser letter. They concluded by confirming that they had authority to accept service of any dispute resolution proceedings initiated by the claimant pursuant to the subcontract.

23. The claimant's solicitors responded by letter dated 19th December, 2014. In that letter, they stated that the claimant did not intend to interfere with the bondsman proceedings and asserted that, insofar as the respondent was maintaining in those proceedings that the claimant was indebted to it, the letter of 13th November, 2014 commenced with that alleged debt in order to demonstrate that the respondent was indebted to the claimant rather than the other way around. The letter further noted that the respondent had been given substantial material in the claim documents furnished in March, 2011 and concluded by indicating that the claimant would anticipate serving a notice to refer to arbitration in early course.

The Notice to Refer

24. The claimant served a notice to refer to arbitration (the "notice to refer") on 13th March, 2015. I set out below the terms of the notice to refer as significant reliance is placed by both parties on the notice in support of their respective positions as to the disputes and issues which were referred to arbitration by means of that notice.

25. The notice to refer contained four recitals which were in the following terms:-

> "WHEREAS:
>
> *I. The claimant and the respondent entered into a sub-contract agreement dated the 19th January 2009 whereby the claimant was sub-contractor and the respondent was main contractor in respect of works to be executed in respect of the N7, Castletown to Nenagh Road Scheme on the terms and conditions more particularly set out in that agreement.*
>
> *II. The works the subject matter of that sub-contract were completed on or about the 20th November 2010.*
>
> *III. The claimant submitted a claim for payment to the respondent on or about the 9th March 2011 for a total sum of €13,798,955.*
>
> *IV. The respondent disputes the said claim."*

26. Having set out those recitals, the notice to refer continued:-

> *"TAKE NOTICE that the claimant hereby refers the said dispute to arbitration pursuant to clause 13(a) of the terms and conditions of contract. The issues in dispute are as follows:*
>
> *1. The balance due to the claimant on foot of the contract without reference to variations, extras, contra-charges or additional sums.*
>
> *2. The sum due on the variation account.*
>
> *3. The sum due in respect of the tack coat.*

4. *The sum due in respect of prolongation charges between the 9th August 2010 and the 20th November 2010.*

5. *The amount due in respect of changes to the central reserve…*

6. *The amount due in respect of additional moves (remobilisation at different locations) …*

7. *The claimant's entitlement to be compensated for the cost of heating bitumen over a prolonged period.*

8. *Additional sums due in respect of work on side roads and accommodation works not included in the sub-contract sum.*

9. *The sum due in respect of additional cores which were required to be filled by the claimant. These additional works were not included in the sub-contract sum.*

10. *Because the works had to proceed in a piecemeal fashion in circumstances giving rise to legitimate claims on the part of the claimant, more tar joints and cbm joints had to be made than otherwise would have been the case. This gave rise to a claim for additional materials and additional works.*

11. *The sum due in respect of delay and disruption, standing time and inefficiencies identified in appendix D, supporting sheets B, C, D, E, F and G and therein described on the last page of each of those summary sheets as 'standing time'.*

12. *Finance charges and/or interest payable to the claimant.*

13. *The costs of the arbitration proceedings."*

The notice to refer then called upon the respondent to agree to the appointment of an arbitrator and proposed two persons as arbitrator.

Conciliation

27. Having served the notice to refer, the provisions of clause 13(b)(1) of the subcontract applied. Under that clause, no step could be taken in the arbitration after the notice to refer had been served until the disputes had first been referred to conciliation. The parties agreed on a conciliator and referred their disputes to him. He issued a recommendation in December, 2015 which found that the sum of [REDACTED] was due by the respondent to the claimant following termination of the subcontract. The respondent was unhappy with that recommendation and gave notice of its dissatisfaction.

28. The claimant commenced summary proceedings seeking judgment against the respondent in the amount of the recommendation. The respondent brought an application under Article 8(1) of the Model Law staying the proceedings on the grounds that the dispute between the parties was the subject of an arbitration agreement (contained in clause 13(a) of the subcontract). The High Court (McGovern J.) refused that application in a

judgment delivered on 1st June, 2017 *(Kelly's of Fantane (Concrete) Limited (In Receivership) v. Bowen Construction Ltd (In Receivership) & ors* [2017] IEHC 526). McGovern J. concluded that the dispute between the parties as to whether the conciliator's recommendation had to be paid following notice of dissatisfaction and pending the outcome of the arbitration between the parties was a discrete issue which the parties agreed should be determined by the courts. In a further judgment delivered on 31st July, 2017, McGovern J. granted summary judgment to the claimant on foot of the conciliator's recommendation ([2017] IEHC 526).

29. Subsequent to the hearing before me of the respondent's application in relation to the arbitrator's jurisdiction, the Court of Appeal delivered judgment on the respondent's appeal from the judgment and order of McGovern J. granting summary judgment to the claimant. The judgment of the Court of Appeal was delivered on 20th March, 2019 ([2019] IECA 98). The Court of Appeal dismissed the respondent's appeal. While the judgment of the Court of Appeal is not directly relevant to the issues which I have to decide on this application, it is relevant to observe that, in the course of his judgment for the Court of Appeal, Peart J. noted that following termination of the subcontract, the respondent determined that the termination value was "nil" and that the termination amount was €768,911.00 and that the claimant did not accept those calculations made by the respondent and issued a notice to refer the dispute to arbitration under clause 13(a) of the subcontract. The claimant argued in the course of the summary proceedings that the dispute the subject of the conciliation was the same dispute which was the subject of the notice to refer to arbitration dated 13th March, 2015. The respondent argued that the dispute the subject of the notice to refer, was not the "same dispute" as was the subject of the conciliator's recommendation. That issue was relevant to the summary proceedings in light of the provisions of clause 13.1.11 of the main contract which applied to the subcontract by virtue of clause 13(b) thereof. The High Court (McGovern J.) had held that the dispute before the conciliator and the dispute referred to arbitration was the "same dispute". The Court of Appeal agreed.

30. At para. 30 of his judgment for the Court of Appeal, Peart J. stated:-

> *"The question then arises as to whether the 'same dispute' that was referred to arbitration has been the subject of the conciliator's recommendation. I am completely satisfied that the dispute that went to arbitration is essentially the same as that which became the subject of the conciliator's recommendation. The dispute which arose was referred to arbitration. That arbitration was put on hold until such time as the matter was referred to conciliation as provided for in clause 13(b). What was referred to conciliation was the dispute that was the subject of the notice to refer dated 13th March 2015… I am satisfied that the trial judge was entitled on the evidence before him to conclude that the dispute which was the subject of the notice to refer dated [13th] March 2011 is the same dispute that was referred to the conciliator and became the subject of his recommendation."*

31. The Court of Appeal dismissed the respondent's appeal from the judgment and order of the High Court (McGovern J.) granting summary judgment to the claimant on foot of the conciliator's recommendation. As that judgment was delivered after the hearing before me had concluded, the parties were afforded the opportunity of making further submissions to me arising from the judgment of the Court of Appeal and, while initially indicating that further submissions would be made, it was subsequently agreed between the parties that they were not necessary.

The Arbitration

32. In the meantime, and following the giving of the conciliator's recommendation in December, 2015, the parties agreed to the appointment of an arbitrator on foot of the notice to refer. Ms. Siobhan Fahey, chartered engineer and chartered arbitrator, was appointed arbitrator by agreement between the parties.

33. Following her appointment, the arbitrator held a preliminary meeting on 7th April, 2016 at which a timetable for the arbitration was agreed. The timetable and further directions were confirmed by an order for directions (No. 1) dated 12th April, 2016. The arbitrator gave extensive directions in relation to the conduct of the arbitration and in relation to various applications which the claimant had indicated it intended bringing. The claimant had indicated an intention to bring an application for early disclosure of documents in relation to claims made by the respondent "*against the employer which directly or indirectly related to, or were connected with*" works carried out by the claimant under the subcontract. The claimant also indicated an intention to bring an application for an early interim award in respect of "*the sum due on the agreed valuation of the measured works and variations*". The respondent indicated its intention to bring an application for security for costs in respect of those two intended applications. The arbitrator gave detailed directions in relation to those proposed applications. In addition to doing that, the arbitrator further directed that while clause 13(c)(2) of the subcontract made reference to the Arbitration Procedure, 2000 published by Engineers Ireland (the "2000 Procedure"), the relevant procedural rules that would apply in the arbitration from the date of the preliminary meeting on 7th April, 2016 would be the Arbitration Procedure, 2011 published by Engineers Ireland (the "2011 Procedure"). The parties are in agreement that up to the date of the preliminary meeting on 7th April, 2016, the 2000 Procedure applies with the 2011 Procedure applying after the date of the preliminary meeting.

34. The claimant brought its applications for early disclosure and for an early interim award and they were responded to by the respondent. In response to the claimant's application for an early interim award in respect of the measured works and variations, the respondent made reference to the provisions of clause 12.2 of the main contract as applied by clause 12(b) of the subcontract and to the determinations as to termination value and termination amount made by the respondent under clause 12.2 of the main contract (paras. 62 to 67 of the respondent's response to the claimant's application dated 29th April, 2016). At para. 66 of that response, the respondent stated that the claimant had never disputed the termination value or the termination amount and that the

respondent would, therefore, be entitled to rely upon the provisions of clause 12.2.2 of the main contract even if the claimant obtained an early award in respect of the "measurement account".

35. The arbitrator gave her decision in respect of the claimant's two applications on 25th May, 2016 (the "May, 2016 decision"). In her decision in relation to the request for early disclosure, the arbitrator commented on the scope of the dispute referred to arbitration under the notice to refer and expressed the view (at that stage) that the scope of the dispute referred and the extent of her jurisdiction in the arbitration corresponded with the scope of the 9th March, 2011 claim (para. 3.15 of the May, 2016 decision). The arbitrator expressed the view that the claim was not for all financial entitlements that might be due to the claimant in respect of the subcontract works but was for particular additional payments claimed under four broad headings, namely, prolongation, delay and disruption, additional testing/"quality issues" and revised scope of works (paras. 3.15 and 3.16). The arbitrator was not persuaded (at that stage) by the claimant that item 1 in the notice to refer was sufficient to include all additional payments claimed and received by the respondent from the employer in respect of the subcontract works carried out by the claimant (which was the subject of the claimant's application for early disclosure). The arbitrator concluded, therefore, that the scope of the claimant's request for disclosure extended significantly beyond the scope of the dispute which was referred to arbitration and over which she had jurisdiction (para. 3.17).

36. In ruling on the claimant's application for an early interim award in the May, 2016 decision, the arbitrator returned to the question of jurisdiction. She stated (at para. 4.13) that she had "*come to question*" whether the issue of the disputed sum which was due to be paid to the claimant for measured subcontract works fell within the scope of the dispute referred to arbitration and questioned her jurisdiction to deal with it (para. 4.13). She then stated (at para. 4.14) that, as she saw it, the scope of the dispute referred to arbitration and, therefore, the extent of her jurisdiction in the arbitration, corresponded to the "*scope of the claimant's claim by letter dated 9th March, 2011*". She could find no reference in the 9th March, 2011 claim to the claimant's measurement amount (para. 4.14).

37. The arbitrator refused both of the claimant's applications in the May, 2016 decision. It is accepted by the respondent that the May, 2016 decision does not amount to a final determination by the arbitrator on the question of jurisdiction although it is said that the views she expressed in that decision represented her determination of the objective meaning of the notice to refer and that it is relevant on that basis.

38. The arbitrator gave further directions in her order for directions No. 2 dated 25th May, 2016. She directed the parties to address the question of her jurisdiction to deal with the issue of the disputed sum due to be paid to the claimant for measured subcontract works in circumstances where she had raised a question as regards her jurisdiction to deal with that issue in the May, 2016 decision. She directed the exchange of further written submissions by the parties on that issue. This was done and on 17th June, 2016, the

arbitrator issued a ruling stating that she had jurisdiction in the arbitration to deal with the issue of the disputed sum due to be paid to the claimant for measured subcontract works. The arbitrator had given further directions in her order for directions No. 2, dated 25th May, 2016 for the service by the claimant of its statement of case and also gave directions in relation to the respondent's intended application for security for costs.

39. The claimant served its statement of case on 1st July, 2016. The statement of case did not refer to clause 12(b) of the subcontract or clause 12.2 of the main contract. While the statement of case referred to the termination of the subcontract by the respondent and to the determinations by the respondent of the termination value and of the termination amount, it did not assert that those determinations were incorrect or unlawful in any respect. There is much disagreement between the parties as to the significance of the failure by the claimant expressly to challenge those determinations by the respondent in the statement of case.

40. Following the service of the statement of case, the arbitrator dealt with security for costs issues. In its application for an order for security for costs dated 15th July, 2016, the respondent stated that it intended defending the claimant's claims on various grounds including jurisdictional grounds (paras, 43(i) to (xxx) of the respondent's application for security for costs). Among the grounds set out by the respondent was that, the claimant was not entitled to any further payment from the respondent save under clause 12(b) of the subcontract and clause 12.2 of the main contract having regard to the termination of the subcontract and that the claimant had not pleaded an entitlement to payment on that basis. The respondent further asserted that the scope of the arbitration was co-extensive with the scope of the 9th March, 2011 claim for extensions of time and for associated costs and that no claim was made in the statement of case for an extension of time or for associated costs. The respondent also indicated that it would rely on the notice provisions contained in the subcontract (clause 10). Numerous grounds of intended defence were set out in the respondent's application.

41. The arbitrator gave her decision in principle in respect of the respondent's application for security for costs on 4th November, 2016 (the "November, 2016 decision"). She granted the respondent's application and decided in principle that the claimant should provide security for costs. The arbitrator subsequently made an order for security for costs on 8th February, 2017. The security for costs required to be provided by the claimant was provided in full on 5th May, 2017.

42. Thereafter, the respondent sought particulars arising from the claimant's statement of case. Those particulars were provided. There was a dispute in relation to the adequacy of the particulars provided and the arbitrator ruled on that dispute on 26th July, 2017. The claimant was directed to provide certain further particulars.

43. The respondent served its statement of defence on 7th September, 2017 in accordance with a further order for directions made by the arbitrator on 18th August, 2016. In its statement of defence, the respondent raised a number of preliminary defences including jurisdictional defences. The respondent pleaded that the arbitrator had no jurisdiction to

determine the claimant's claims on two separate bases. The first basis advanced by the respondent was founded on clause 12(b) of the subcontract and clause 12.2 of the main contract. It was pleaded that the respondent had complied with the provisions of clause 12.2 of the main contract (which applied to the subcontract by virtue of clause 12(b)) and had proceeded to determine the termination value and the termination amount in accordance with the provisions of clause 12.2 and that those determinations had not been disputed by the claimant whether in the context of the dispute referred to arbitration or otherwise. In support of that contention, the respondent pleaded that the scope of the claimant's reference to arbitration was co-extensive with the 9th March, 2011 claim and that, therefore, the reference to arbitration could not include a dispute relating to the determinations as to termination value or termination amount since neither of those matters had been determined at the time of the 9th March, 2011 claim. The respondent pleaded, therefore, that those determinations were not within the scope of the reference to arbitration and were, therefore, not within the jurisdiction of the arbitrator. The respondent advanced another preliminary defence based on want of jurisdiction in respect of the prolongation claim which is not relevant to the present application. The respondent attached legal submissions to its statement of defence (at schedule A) concerning the arbitrator's jurisdiction.

44. Particulars were sought by the claimant arising from the statement of defence and were furnished by the respondent. The claimant then served a statement of reply on 8th November, 2017 in which reference was made by the claimant to the "purported determinations" by the respondent of the termination value and termination amount and also addressed the notice to refer. The claimant did not accept that the arbitrator did not have jurisdiction in relation to its claim or in relation to those determinations.

45. The respondent indicated that it wished to serve a statement of rejoinder. However, prior to doing so, the claimant served a draft amended statement of case on 10th November, 2017 and another version of a draft amended statement of case on 21st November, 2017. That was not done by agreement with the respondent or on foot of any direction made by the arbitrator. The claimant's solicitors redelivered the amended statement of case on 29th March, 2018 on foot of further directions given by the arbitrator that day following the delivery of her ruling on jurisdiction of 9th March, 2018. While a timetable for the delivery of further amended pleadings by the respondent appears to have been agreed on 29th March, 2018, the directions made that day were superseded by the respondent's application to the High Court under Article 16(3) of the Model Law in relation to the arbitrator's jurisdiction.

46. The claimant's amended statement of case does now seek expressly to challenge the respondent's determinations as to termination value and termination amount and contends that those determinations were wrongful and unjustified in failing to take account of the legitimate entitlements of the claimant under the subcontract. The amended statement of case further contends that the Hussey Fraser letter of 13th November, 2014 did reject and dispute the respondent's determinations in relation to termination value and termination amount and asserts that the notice to refer to

arbitration, validly referred to arbitration the dispute between the parties concerning the claimant's rejection of those determinations made by the respondent and its entitlement to recover the monies claimed in the 9th March, 2011 claim and in the Hussey Fraser letter of 13th November, 2014. Three new reliefs were included in the amended statement of case including declarations that the purported determinations by the respondent of the termination value and the termination amount should be opened up, reviewed and revised to reflect the findings made by the arbitrator in relation to the merits of the claimant's claims and the respondent's defences in the arbitration and declarations as to the correct amounts arising in respect of the termination value and the termination amount under clause 12(b) of the subcontract and clause 12.2 of the main contract.

47. The respondent relies on the stark contrast between the pleas contained in the statement of case and in the amended statement of case in support of its contention that no issue in relation to the respondent's determinations of termination value and termination amount were referred to arbitration or are within the jurisdiction of the arbitrator.

48. In her order for directions No. 6, dated 18th August, 2017, the arbitrator directed that potential or intended applications by either party in respect of the arbitrator's jurisdiction should be deferred until after the close of pleadings. On 27th November, 2017, the arbitrator informed the parties that she felt that it was appropriate at that stage to proceed to hear an application and to make a ruling on her jurisdiction having regard to the preliminary defences in relation to her alleged want of jurisdiction pleaded by the respondent in its statement of defence. Further directions were agreed and issued by the arbitrator in her order for directions No. 7, dated 4th December, 2017. The arbitrator directed a simultaneous exchange of written submissions and fixed 18th January, 2018 as the date for the hearing of the jurisdictional issue. The hearing proceeded on that date and the arbitrator reserved her decision.

The Arbitrator's Ruling on Jurisdiction

49. With commendable expedition, the arbitrator delivered her ruling in respect of jurisdiction on 9th March, 2018. In a detailed ruling, the arbitrator ruled that she had jurisdiction in respect of the two disputed areas where her jurisdiction was challenged by the respondent, namely, in respect of the issues arising under clause 12 of the subcontract and clause 12.2 of the main contract and in respect of the prolongation claim. The latter aspect of her ruling has not been challenged by the respondent.

50. In rejecting the respondent's contention that she did not have jurisdiction in relation to the claims sought to be made by the claimant having regard to clause 12(b) of the subcontract and clause 12.2 of the main contract, the arbitrator looked at the notice to refer and concluded that there was an ambiguity in the description of the dispute which was referred to arbitration by that notice. She ruled, therefore, that she was entitled to look at documents other than the 9th March, 2011 claim in interpreting the scope of the reference. She decided that, in accordance with the case law relied upon by the claimant, it was necessary to ascertain what dispute had crystallised as of the date of the notice to

refer, as that was the dispute which had been referred to arbitration. In seeking to ascertain what that dispute was, the arbitrator agreed with the claimant that it was appropriate that she should have regard to the factual background to the notice to refer as evidenced in the exchange of communications between the parties pre dating that notice. Having referred to the exchange of communications between the parties between December, 2010 and the date of service of the notice to refer on 13th March, 2015, the arbitrator was satisfied that the Hussey Fraser letter of 13th November, 2014 and the Maples letter of 1st December, 2014 demonstrated that the claimant intended to pursue its claims against the respondent as set out in the 9th March, 2011 claim and that the respondent did not accept those claims and maintained its position in relation to the termination value and the termination amount. The arbitrator did not accept that the first part of the Hussey Fraser letter of 13th November, 2014 was only a "running commentary" on the bondsman proceedings and considered that the claimant was disputing in that letter the termination value and the termination amount as determined by the respondent. On that basis, the arbitrator rejected the respondent's contention that the dispute referred to arbitration did not include a dispute in respect of the termination value and the termination amount. She ruled that such a dispute had been referred to arbitration.

51. The arbitrator further noted that while the notice to refer did not state that the claimant took issue with the termination value and the termination amount, it was common ground between the parties that if a claim was referred to arbitration by the claimant then so were the defences to that claim which were sought to be relied upon by the respondent. The arbitrator stated that it was clear from the statement of defence and from the respondent's written submissions on the question of jurisdiction, that one of the defences advanced by the respondent was based on clause 12 of the subcontract and, in particular, on the respondent's determination as to termination value and termination amount. The arbitrator, therefore, concluded that that defence did form part of the dispute referred to arbitration. The arbitrator did not accept the respondent's argument that the dispute was *"co-extensive"* with the 9th March, 2011 claim. The arbitrator also rejected the contention that she had already determined the scope of the reference in the May, 2016 decision, as that decision concerned the claimant's application for early disclosure and for an interim award and the arbitrator was not at that stage being asked to consider or rule exhaustively upon the extent of her jurisdiction or to define the ambit of the dispute which had been referred to her. For those reasons, the arbitrator concluded that she had jurisdiction in respect of the issues concerning clause 12 of the subcontract and did not accept the preliminary objection raised by the respondent that there was a want of jurisdiction in respect of those issues.

Respondent's Challenge to Jurisdiction

52. The respondent contends in this application that the arbitrator's ruling that she has jurisdiction in respect of the entirety of the claimant's claim, including those parts of the claim which seek to impugn the respondent's determinations as to termination value and termination amount, is wrong. It contends that the arbitrator does not have jurisdiction in

relation to those issues having regard to clause 12(b) of the subcontract and clause 12.2 of the main contract and to the terms of the notice to refer.

53. Before considering that the basis on which the respondent contends that the court should decide that the arbitrator has no jurisdiction in relation to those issues, I should, first, outline in a little more detail the provisions of the subcontract and of the main contract which are relevant to the jurisdiction issue and, second, consider the approach which the court should take in considering the question of jurisdiction under Article 16(3) of the Model Law.

Relevant Provisions of the Subcontract and of the Main Contract

54. It will be apparent from my outline of the relevant factual background and of the circumstances in which the arbitrator came to give her ruling on jurisdiction in March, 2018, that the most relevant provisions of the subcontract and of the main contract are clause 12(b) of the subcontract and clause 12.2 of the main contract.

55. Before setting out those provisions, I should refer also to the provisions of clause 10 of the subcontract which provides for claims and adjustments. Clause 10(a) was relied upon by the respondent in the 23rd March, 2011 rejection which rejected the 9th March, 2011 claim. Clause 10(a) provides for the procedure whereby a subcontractor who considers that it is entitled to an adjustment of the subcontract sum or that it has any other entitlement under or in relation to the subcontract must follow in order to claim such adjustment or entitlement. Clause 10(a) requires the subcontractor to give notice of its alleged entitlement to the contractor in certain terms and within a particular time limit. Clause 10(a) then provides for the procedure to be followed in relation to such claims. Clause 10(a)(3) provides that if the subcontractor does not give the required notice and details within the stipulated time period, the subcontractor will not be entitled to an increase in the subcontract sum and the contractor will be released from all liability to the subcontractor in relation to the particular claim, save in certain circumstances. As I have indicated, in the 23rd March, 2011 rejection, the respondent rejected the claim made in the 9th March, 2011 claim on the grounds that the claimant failed to comply with the notice requirement contained in clause 10(a)(1), which it asserted amounted to a condition precedent. As a consequence, it was contended that the respondent had no liability in respect of the claimant's claim, and for that reason, its claim was rejected in its totality. The respondent has pleaded the claimant's failure to comply with the notice requirement in clause 10(a)(1) of the subcontract in its statement of defence as a preliminary defence (without prejudice to the other preliminary defences raised by it) and as a substantive defence to the claimant's claims.

56. Clause 12 of the subcontract is concerned with termination. Clause 12(a) provides for the circumstances in which the respondent could terminate the subcontract in the event of a default on the part of the claimant. Under clause 12(a)(x), the respondent was entitled to terminate the subcontract if any of the insolvency events referred to in clause 12.1 of the main contract occurred in relation to the claimant. One of those insolvency events was the appointment of a receiver to the claimant. As outlined earlier, the respondent terminated the subcontract in accordance with clause 12(a)(x) following the appointment

of a receiver to the claimant. There is no dispute between the parties as to the termination of the subcontract.

57. Clause 12(b) is concerned with the consequences of the termination of the subcontract in the case of a default by the subcontractor. It provides that where the subcontractor's obligation to complete the subcontract works is terminated under clause 12(a), the provisions of clause 12.2 of the main contract will apply mutatis mutandis as between the contractor and the subcontractor as if every reference to the contractor in clause 12.2 were a reference to the subcontractor and all references to the employer in clause 12.2 or the employer's representative were to the contractor.

58. Clause 12.2 of the main contract (as adapted and applied to the subcontract by virtue of clause 12(b) of the subcontract) provides as follows:-

"12.2 Consequences of default termination

If the subcontractor's obligation to complete the works is terminated under sub-clause 12.1, the following shall apply:

12.2.1 The subcontractor shall leave the site in an orderly manner.

12.2.2 Payment of all sums of money that may then be due from the contractor to the subcontractor shall be postponed, and the contractor shall not be required to make any further payment to the subcontractor except as provided in this sub-clause.

12.2.3 The contractor shall, as soon as practicable, determine the amount due to the subcontractor under the sub-contract for the works completed in accordance with the subcontract and unpaid (the termination value).

12.2.4 …

12.2.5 The contractor may engage other contractors, use any works, items and subcontractor's things on the site and do anything necessary for the completion of the works.

12.2.6 …

12.2.7 …

12.2.8 …

12.2.9 When the works have been completed and the termination amount as described below has been determined, the contractor shall give a certificate to the subcontractor setting out the total of the following (the termination amount):

(1) the contractor's additional cost of completing the works compared with the cost that would have been incurred if the works had been completed by the subcontractor in accordance with the subcontract.

(2) loss and damage incurred by the contractor as a result of the termination and its cause.

(3) the amounts due to the contractor by the subcontractor under or in connection with the subcontract or in connection with the works.

12.2.10 …

12.2.11 If the termination amount is less than the termination value, the subcontractor shall issue an invoice to the contractor for the difference and the contractor shall pay the amount due on the invoice within 15 working days after receiving the invoice. If the termination amount is more than the termination value, the subcontractor shall pay the contractor the difference within 10 working days of receiving the contractor's demand for payment."

The Parties Respective Positions Following Termination of Subcontract

59. As outlined earlier, following the termination of the subcontract in April, 2011, the respondent sought to implement the provisions of clause 12.2 of the main contract (which applied to the subcontract by virtue of clause 12(b) thereof). It determined the termination value at "nil" (under clause 12.2.3) and the termination amount at €768,911.27 (under clause 12.2.9) and demanded that latter sum from the claimant under clause 12.2.11. The respondent has sought to rely on clause 12.2.2 as providing for the postponement of the payment following the termination of the contract of any sums of money that might then have been due from the respondent to the claimant and the statement that the respondent was not required to make any further payment to the claimant except as provided for in clause 12.2.

60. At the heart of the dispute between the parties in relation to the jurisdiction of the arbitrator is the question as to whether the arbitrator has jurisdiction to deal with the claimant's claims in light of the provisions of clause 12.2 of the main contract as applied to the subcontract by virtue of clause 12(b) of that contract and in light of the determinations made by the respondent as to the termination value and the termination amount. The respondent contends that none of those matters were referred to arbitration although it contends (and the claimant accepts) that the respondent is entitled to rely on the provisions of clause 12.2 and its determinations as to termination value and termination amount by way of a defence to the claim. However, the respondent contends that the claimant is not entitled to respond to those defences by seeking to challenge the determinations as to termination value and termination amount. The claimant contends, for various reasons, that all of those matters were referred to arbitration and that the arbitrator has jurisdiction to deal with them. It maintains that in circumstances where the respondent is entitled to rely on its determinations of termination value and termination amount in defence of the claimant's claims, so too is the claimant entitled to challenge those determinations in response.

The Dispute Resolution Provisions of the Subcontract

61. Clause 13 of the subcontract is concerned with disputes. Clause 13(a) is headed "Notice to Refer" and provides as follows:-

> *"If a dispute arises between the parties in connection with or arising out of the sub-contract, either party may, by notice to the other, refer the dispute for arbitration by serving on the other a notice to refer. The notice to refer shall state the issues in dispute. The service of the notice to refer will deemed to be the commencement of arbitration proceedings."*

62. Central to the dispute between the parties in this application is the proper construction of the notice to refer served by the claimant on the 13th March, 2015. As we shall see, a number of legal principles apply to the construction of a notice to refer and to the ascertainment of the ambit or scope of the dispute or issues referred to arbitration.

63. Clause 13(b) provides for conciliation and, as touched upon earlier, clause 13(b)(1) provides that:-

> *"No step will be taken in the arbitration after the notice to refer has been served until the disputes have first been referred to conciliation."*

64. There is then a provision for the conduct of the conciliation. Certain provisions of the main contract are expressly applied to any conciliation between the contractor and the subcontractor under the subcontract. As noted earlier, a conciliation did take place between the parties following service of the notice to refer. The conciliator made a recommendation in favour of the claimant which was not complied with and led to the commencement of the summary proceedings by the claimant to enforce the conciliator's recommendation and ultimately to the recent judgment of the Court of Appeal. Once the conciliation took place, the parties could proceed with the arbitration on foot of the notice to refer and did so.

65. Clause 13(c) is concerned with the procedure applicable to the arbitration. It provides as follows:-

> *"(1) The parties shall jointly appoint the arbitrator and, if the parties are unable to agree an arbitrator to be appointed under this clause, the arbitrator will be appointed by the President of Engineers Ireland.*
>
> *(2) Any arbitration between the contractor and the subcontractor will be governed by the Arbitration Procedure 2000 published by Engineers Ireland and will be subject to the Arbitration Acts 1954 – 1998."*

66. The parties ultimately agreed on the appointment of Ms. Fahey as arbitrator. Notwithstanding the reference to the Arbitration Acts 1954-1998 in clause 13(c), it is accepted by the parties that the 2010 Act applies (having regard to s.3 of that act). In her first order for directions dated 12th April, 2016, the arbitrator directed (with the agreement of the parties) that the 2000 Procedure would apply up to the date of the

preliminary meeting on 7th April, 2016 but that the 2011 Procedure would apply thereafter. The 2000 Procedure is potentially relevant to the jurisdiction issue between the parties and it is appropriate, therefore, to refer to a number of its provisions at this stage. Although clause 13 of the subcontract does not expressly so state, it seems to me that it must be the case that in the event of any conflict or inconsistency between the provisions of the subcontract and the 2000 Procedure, the provisions of the subcontract must prevail. It remains to be seen as to whether there is any conflict or inconsistency between the subcontract and the 2000 Procedure.

The 2000 Procedure

67. The following seem to the most potentially relevant provisions of the 2000 Procedure for present purposes. Rule 2 is concerned with the commencement of the arbitration. Rule 2.1 provides as follows:-

> *"Unless otherwise provided in the contract, a dispute or difference shall be deemed to arise when a claim or assertion made by one party is rejected by the other party and that rejection is not accepted, or no response is received within the period of 28 days. Subject only to the due observance of any condition precedent in the contract or the arbitration agreement, either party may then invoke arbitration by serving a notice to refer on the other party."*

The parties directed some argument to the construction and application of this rule in the context of the scope of the dispute referred to arbitration and its interaction with clause 13(a) of the subcontract.

68. Rule 2.3 provides as follows:-

> *"The notice to refer shall list the matters which the party serving the notice to refer wishes to be referred to arbitration. Nothing stated in the notice to refer shall restrict that party as to the manner in which it subsequently presents its case."*

Again the parties addressed this provision and its interaction with clause 13(a) of the subcontract.

69. Rule 5.2 provides as follows:-

> *"Once his appointment is completed, the arbitrator shall have jurisdiction over any issue connected with and necessary to the determination of any dispute or difference already referred to him whether or not any condition precedent to referring the matter to arbitration had been complied with."*

This provision is also potentially relevant to the scope of the dispute which was referred to arbitration and the extent of the arbitrator's jurisdiction to deal with issues within the dispute referred.

70. These appear to me to be the relevant provisions of the subcontract, the main contract and the 2000 Procedure for the purposes of the jurisdiction issues which arise on this application.

Article 16(3): The Role of the Court

71. The first issue I have to address is to the approach which the court is required to take in considering a challenge to a ruling by an arbitrator that he or she has jurisdiction in relation to all or part of a claim. The parties made extensive written and oral submissions on this issue. However, it seems to me that ultimately there was not a great deal of difference between them on the issue.

Article 16

72. Under Article 16(1) of the Model Law, an arbitral tribunal may rule on its own jurisdiction. Article 16(2) requires that a challenge to the jurisdiction of the arbitral tribunal must be made in a timely manner. Article 16(3) then provides as follows:-

> *"The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."*

73. In the arbitration between the claimant and the respondent, the respondent did challenge the jurisdiction of the arbitrator to deal with certain parts of the claimant's claims having regard to clause 12(b) of the subcontract and clause 12.2 of the main contract and the terms of the notice to refer. It did so in its statement of defence (having previously adverted to the jurisdiction issue in earlier submissions) as one of a number of preliminary defences advanced by it. The arbitrator received submissions on the issue of jurisdiction and conducted a hearing on the issue before giving her decision on jurisdiction in the March, 2018 ruling. She ruled that she had jurisdiction in relation to the contested issues. The respondent has brought this application under Article 16(3) contending that the arbitrator was incorrect in so ruling and asking the court to "*decide the matter"* under Article 16(3) by concluding that the arbitrator does not have jurisdiction in relation to the contested issues.

Standard of Review

74. There was some debate between the parties as to the standard review the court should adopt in carrying out its function under Article 16(3) of the Model law and, in particular, whether the court should adopt what has been termed a "*full judicial consideration*" of the "*matter*" (i.e. the question of jurisdiction) or whether it should consider that question on a "*prima facie basis*". Ultimately, the claimant accepted the respondent's contention that the court has to decide the jurisdiction question on the basis of a "*full judicial*

consideration" of that question. That is undoubtedly correct. I have no hesitation in concluding that the approach which the court must take when deciding on the question of jurisdiction under Article 16(3) is to engage in a "*full judicial consideration*" of the question. In my view, this follows from the requirement imposed on the court under Article 16(3) to "*decide the matter*". It should be borne in mind that the court is not in fact carrying out a "review" of the decision or ruling of the arbitrator on the issue of jurisdiction or hearing an "appeal" from that decision or ruling.

75. It is now well established that the "*full judicial consideration*" standard is the standard which must be applied by the court in determining whether an arbitration agreement exists between the parties for the purposes of an application for a reference to arbitration under Article 8(1) of the Model Law (see: *Lisheen Mine v. Mullock & Sons (Shipbrokers) Limited* [2015] IEHC 50; *Sterimed Technologies International Limited v. Schivo Precision* [2017] IEHC 35; *Kellys of Fantane Limited v. Bowen Construction Limited & Anor.* [2017] IEHC 357; and *K.& J. Townmore Construction Limited v. Kildare & Wicklow Education and Training Board* [2019] IEHC 666).

76. In his judgment in *Barnmore Demolition and Civil Engineering Limited v. Allendale Logistics Limited & Ors*. [2013] 1 I.R. 690, Feeney J. was dealing with a similar issue, namely, whether an arbitration agreement was in existence between the parties for the purpose of an application to refer the parties to arbitration under Article 8(1) of the Model Law. He was faced with the competing lines of authority as to whether the court should consider that issue on the basis of "*full judicial consideration*" or whether it should do so on a "*prima facie basis*". Feeney J. ultimately did not have to decide as to which approach should be adopted as he was satisfied that on either standard there was no arbitration agreement between the parties. However, among the authorities he considered was the leading textbook in the area of international commercial arbitration, Gary Born "*International Commercial Arbitration* (1st Ed., Kluwer Law International, (2009)) which provided express support for the application of the "*full judicial consideration*" approach in the context of the consideration of an objection to the jurisdiction of an arbitrator. Born stated as follows: -

> *"When a party seeks an interlocutory judicial determination of jurisdictional objections, prior to any arbitral award on the subject, there is uncertainty regarding the standard of judicial review that should be applied by court under the Model Law. As discussed below, the text of the Model Law, and many judicial authorities, strongly suggest that full judicial review of the jurisdictional objection is appropriate, at least in some circumstances. In contrast, as also discussed below, some judicial authority, and some aspects of the Model Law's drafting history, suggest that only prima facie interlocutory judicial consideration is ever appropriate".* (Chapter 6, p. 881, quoted by Feeney J. at 696).

77. Born's preference was clearly for the application of the "*full judicial consideration"* approach in the context of the consideration by a court of a challenge to the jurisdiction of the arbitrator.

78. Laffoy J. in the High Court in *John G. Burns Limited v. Grange Construction and Roofing Company Limited* [2013] 1 I.R. 707 expressed a similar view. Without definitively deciding the point, Laffoy J. was dealing with an application pursuant to Article 16(3) of the Model Law for the court to decide whether or not an arbitrator had jurisdiction to act in a particular arbitration. The assertion by the applicant in that case was that there was no jurisdiction to nominate an arbitrator and that no arbitration agreement existed between the parties as none was agreed. The arbitrator had ruled as a preliminary question that he had jurisdiction to act as arbitrator. The applicant then applied to the court under Article 16(3) for the court to decide that issue. Laffoy J. decided that the arbitrator did not have jurisdiction to act in the arbitration.

79. In the course of her judgment, Laffoy J. had to consider the function of the court under Article 16(3). Having noted that its function was "*to decide the matter*", Laffoy J. assumed that in doing so "*the standard to be applied by the Court is the normal standard in determining matters in civil cases, on the balance of probabilities*" although she did not definitively decide that issue (per Laffoy J. at para. 24, p. 723).

She then stated as follows:-

> *". . . counsel for the respondent pointed to the fact that the Court's jurisdiction is 'to decide the matter', acknowledging that the process is not an appeal from the decision of [the arbitrator]. He acknowledged that the Court may consider such evidence as it sees fit and is not bound by the submissions made to [the arbitrator]. In other words, the Court has untrammelled jurisdiction to consider de novo the issue whether there is an arbitration agreement which binds the parties".*
>
> (Per Laffoy J. at para. 24 at p. 723).

80. That is the approach that Laffoy J. took in *Burns*. She ultimately concluded that there was no arbitration agreement between the parties and, therefore, there was no jurisdiction to appoint the arbitrator.

81. Although Laffoy J. did not definitively decide the issue in *Burns* and although, in the passage quoted above, she was recording the submission of counsel for one of the parties, the description given by Laffoy J. to the function of the court under Article 16(3) of the Model Law in the passage quoted above, was subsequently found to be correct by the High Court (McGovern J.) in *Mayo County Council v. Joe Reilly Plant Hire Limited* [2015] IEHC 544. In that case, McGovern J. recorded Laffoy J. as having held that in an application brought under Article 16(3):-

> *", … the court may consider such evidence as it sees fit and is not bound by the submissions made to the arbitrator. I accept that as being the correct approach."*
>
> (Per McGovern J. at para. 11).

82. In that case, the arbitrator had embarked upon a preliminary hearing as to whether or not he had jurisdiction in the arbitration. The arbitrator concluded that he did have

jurisdiction. The applicant applied to the court under Article 16(3) of the Model Law and asked the court to decide that the arbitrator did not have jurisdiction in the arbitration. Although McGovern J. stated that the courts would be "*very slow to interfere with the arbitrator's ruling on his own jurisdiction*" (para. 13), he went on to state that an application under Article 16(3) is a "*challenge to the arbitrator's jurisdiction*" and "*not an appeal against his construction of the agreement"* (para. 14). He continued: -

> *"What this court has to decide is whether he had jurisdiction to hear the preliminary issue, or whether the arbitration clause giving him that power was spent. If he has jurisdiction, then it is a matter for him as to how he construes the agreement. In this case, there is no challenge to the arbitration clause. The court therefore has to decide whether or not the arbitrator was correct in law in holding that he had jurisdiction to commence the hearing and rule on his own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement".*
>
> (Per McGovern J. at para. 14).

83. McGovern J. held that the arbitrator did have jurisdiction and was competent to rule on the preliminary issues before him and that it was: -

> *" . . for the arbitrator and not this Court to determine the issues before him".*
>
> (Per McGovern J. at para. 15).

84. There was some debate between the parties as to the effect and application of these dicta of McGovern J. in the *Mayo County Council* case. The respondent felt that these dicta downplayed the role of the court under Article 16(3). The claimant felt that, if read literally, the dicta might be difficult to reconcile with the obligation of the court under Article 16(3) to "*decide the matter*". The claimant felt the *Mayo County Council* case was concerned with quite specific and distinct facts which may have made those dicta appropriate in that case. I am inclined to agree. In my view, it is clear from Article 16(3) that the role of the court is to "*decide the matter*". When dealing with an application in relation to jurisdiction under Article 16(3), the court is not conducting an appeal from the decision or ruling of the arbitrator, or a review of that decision or ruling. The court is deciding the question of jurisdiction. Further, in performing its function under Article 16(3), the court must carry out a "*full judicial consideration*" of the question of jurisdiction and not consider that question on a mere "*prima facie basis".* I agree with the assumption made by Laffoy J. in Burns that in carrying out that function, the court must apply the normal civil standard, namely, to decide the issue of jurisdiction on the balance of probabilities. I also agree with McGovern J. in *Mayo County Council* and with the submission made in *Burns*, as recorded by Laffoy J., that in carrying out that function, the court may consider such evidence as it sees fit and is not bound by the submissions made to the arbitrator or the evidence before him or her. To be clear, in my view, no matter how eminent or distinguished the arbitrator, the court should not exercise any deference to the arbitrator or to adopt the position that it should be slow to interfere with the arbitrator's decision on jurisdiction. In my view, the court has an untrammelled power to

consider the question of jurisdiction without reference to any question of deference. The absence of any requirement to show deference to the decision of the arbitrator on jurisdiction is, I believe, consistent with the decision of the Supreme Court in *Galway City Council v. Samuel Kingston Construction Limited* [2010] 3 IR 95 (see para. in particular, per O'Donnell J at paras 34-35, pp 110-111).

85. The fact that the application in relation to jurisdiction under Article 16(3) is a full rehearing and not an appeal or a review and without any question of deference, is also, I believe, consistent with the approach taken by the Courts of England and Wales under s. 67 of the Arbitration Act, 1996 (the "English 1996 Act"). That section is the section under which a party to arbitral proceedings may apply to the court to challenge an award of the arbitral tribunal as to its substantive jurisdiction or for an order declaring that an award made by the tribunal on the merits is of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. Under s. 67(3) of the English 1996 Act, the court may by order confirm or vary or set aside the award. While there is no express statement in s. 67 requiring the court to "*decide the matter*", as there is in Article 16(3) of the Model Law, and while there is no express statement as to the nature of the exercise required to be undertaken by the court under that section, it is well established that the section entails a "*complete rehearing rather than a review*". The authors of *Russell on Arbitration* (24th Ed.) (2015) put the position as follows, at para. 8-069:-

> *"Rehearing rather than a review. A s. 67 hearing is a complete rehearing rather than a review:-*
>
> > *'A party who is not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on the evidence of an issue of jurisdiction before the English Court'.*
>
> *There is no halfway house between a limited review akin to that which the court conducts when reviewing the exercise of judicial discretion and a full rehearing. Section 67 entails the latter. The court should not be put in a worse position than the arbitrator in determining the issue of substantive jurisdiction. The court's role is to confirm that the tribunal reached the right answer, not simply to decide that it was entitled to reach the decision it did.*" (para. 8-069, p. 498) (footnotes omitted). The dictum quoted in the extract from *Russell on Arbitration* is from the judgment of Moore-Bick L.J. in the *Dallah* case discussed below.

86. Both parties relied on the approach taken by the UK Supreme Court in *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 to illustrate the approach taken by the Courts of England and Wales to a challenge to the decision of an arbitral tribunal as to its jurisdiction. It should be said, however, that that case did not involve an application under s. 67 of the English 1996 Act but rather an application to enforce under s. 101 of the English 1996 Act an arbitration award which was made under the auspices of the International Chamber of Commerce in Paris under the provisions of the New York Convention. Leave to enforce the award was granted at first instance. The defendant applied successfully to set aside the order granting leave.

The English Court of Appeal upheld the judge's decision and its decision in turn was affirmed by the UK Supreme Court. The arbitral tribunal had concluded that the defendant was bound by the relevant agreement to arbitrate and that it, therefore, had jurisdiction in the arbitration. Of relevance for present purposes is that the English Court of Appeal and the UK Supreme Court considered the approach which the court should adopt when considering whether an arbitral tribunal had jurisdiction and, in particular, the weight that should be afforded to the tribunal's own decision on jurisdiction.

87. In the Court of Appeal, Moore-Bick LJ. addressed the contention made by counsel for the claimants (who were seeking to enforce the award) and stated as follows:-

> "*Moreover, I have to say that I find it difficult to understand exactly what* [counsel] *had in mind when submitting that the court should accord deference to the tribunal's conclusions, particularly in view of the fact that she asserted that the principle was flexible in its application. If it meant no more than that the court should have regard to the tribunal's reasoning in reaching its own conclusion, I should have little difficulty with it, since the tribunal's reasons will almost invariably be before the court and will carry as much persuasive weight as their cogency gives them. That is not, however, what I understood her to mean, since it was essential to her argument that the court should at least accord great weight to the tribunal's conclusions unless they are clearly wrong. However, as became clear in the course of argument, it is impossible to formulate any satisfactory principle that falls somewhere between a limited review akin to that which the court undertakes when reviewing the exercise of a judicial discretion and a full re-hearing, not to mention one that is also capable of flexibility in its application. Moreover, for the court to defer to the tribunal's conclusions in the manner suggested by* [counsel] *when it is required to decide whether a particular state of affairs has been proved would be to give the award a status which the proceedings themselves call into question. It is for similar reasons that our courts have consistently held that proceedings challenging the jurisdiction of an arbitral tribunal under s. 67 of the Arbitration Act, 1996 involve a full rehearing of the issues and not merely a review of the arbitrators' own decision."* (per Moore-Bick LJ. at para. 21, p. 775)

88. In the UK Supreme Court, Lord Mance stated:-

> *"30. …The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so whatever the composition of the tribunal – a comment made in view of Dallah's repeated (but no more attractive for that) submission that weight should be given to the tribunal's 'eminence', 'high standing and great experience' …*
>
> 31. *This is not to say that a court seised of an issue under* [the relevant provisions of the New York Convention and the English 1996 Act] *will not examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal which has*

undertaken a similar examination. Courts welcome useful assistance…" (per. Lord Mance at paras. 30 and 31, p. 813)

89. Lord Mance approved of the summary of the correct position set out in the defendant's written submission in the case, namely, that:-

> "*In making its determination, the Court may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them."* (para. 31, p. 813)

90. In his judgment, Lord Saville also accepted that summary as being correct. Prior to that, he stated:-

> "*In my judgment therefore, the starting point cannot be a review of the decision of the arbitrators that there was an arbitration agreement between the parties. Indeed no question of a review arises at any stage. The starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself."* (per Lord Saville at para. 160, p. 850)

91. I accept that these observations made by the UK Supreme Court, albeit in the context of the enforcement of an arbitral award under the New York Convention, accurately describe the approach which a court should take in "*deciding the matter*" of jurisdiction under Article 16(3) of the Model Law and the weight which should be given to the arbitrator's decision or ruling on jurisdiction. The court can carefully consider the reasoning and conclusions of the arbitrator and may find them to be of useful assistance but is not bound or restricted by those findings. The role of the court under Article 16(3) of the Model Law is to embark on a full and complete rehearing of the question of jurisdiction and is required to decide that question itself.

92. Interestingly, a similar view have been expressed by the courts of Singapore. The High Court of Singapore expressed the view in *Insigma Technology Co. Ltd v. Alstom Technology Ltd* [2008] SGHC 134 that the court's jurisdiction to decide on the jurisdiction of an arbitral tribunal is an "*original jurisdiction and not an appellate one*" on the basis of the wording of Article 16(3) providing for the court to "*decide the matter*" of jurisdiction after the tribunal made a ruling that it had jurisdiction. The court (Judith Prakash J.) stated that *"this is not language implying that the court's powers to act are of an appellate nature*" (at para. 21).

93. The Court of Appeal of Singapore confirmed the position both in relation to Article 16(3) and Article 36(1) (which provides for the grounds for refusing recognition or enforcement

of an arbitral award). In *PT First Media TBK v. Astro Nusantara International BV* [2013] SGCA 57, Sundaresh Menon CJ. (delivering the judgment of the court) cited with approval the decision of the UK Supreme Court in *Dallah* and, in particular, the judgment of Lord Mance and, where he stated that the arbitral tribunal's own view as to its jurisdiction "*has no legal or evidential value*… [and] *this is so however full was the evidence before it and however carefully deliberated was its conclusion*…" (at para. 30) (quoted by the Chief Justice at para. 162), and stated:-

> *"The extracted passage represents the leading statement on the standard of curial review to be applied under the New York Convention, and there is no reason in principle for the position under the Model Law to be any different. Significantly, the jurisprudence of the Singapore courts has also evinced the exercise of de novo judicial review… We affirm these local authorities. In particular, we also agree with Lord Mance JSC that the tribunal's own view of its jurisdiction has no legal or evidential value before a court that has to determine that question."* (at para. 163)

94. In summary, therefore, in deciding on an application in relation to jurisdiction under Article 16(3) of the Model Law, the court is exercising an original and not an appellate jurisdiction. It is not conducting an appeal or a review but a complete de novo rehearing on the question of jurisdiction. While the decision or ruling of the arbitral tribunal on the question of jurisdiction and the reasons for its decision or ruling may be of interest and of assistance and while the court may have regard to the reasoning and findings of the arbitral tribunal, if they are helpful, it is not bound or restricted by them. Further, the court does not afford deference to the arbitrator when exercising its function under Article 16(3) of the Model Law in deciding on the question of jurisdiction. As indicated earlier, the decision of the Supreme Court in Samuel Kingston makes clear that it is not appropriate for the court to show deference to the decision of the arbitrator where the issues before the court were issues of law and that it would "*be taking judicial humility to excessive lengths*" (in the words of O'Donnell J.) to afford such deference. While those observations were made in the context of the pre-2010 Act legislative regime, in my view, they are equally relevant to the approach the court is required to take in deciding jurisdiction under Article 16(3) of the Model Law. While I was urged by the claimant to have regard to the very significant expertise of the arbitrator in the field of dispute resolution in the construction field, and while that experience was not in any way contested by the respondent, and while I have no hesitation whatsoever in accepting the undoubted experience and expertise of the arbitrator, it would not be appropriate for me to afford any deference to the arbitrator's decision on jurisdiction or the reasons for that decision having regard to the function which I am required to exercise under Article 16(3) of the Model Law, as discussed and considered in the authorities to which I have referred. I will, therefore, proceed to consider the question of jurisdiction in accordance with the principles derived from those cases and without exercising any deference to the decision of the arbitrator or to the reasons given by her for her decision.

Consequences of Termination of Subcontract.

Respondent's Position on Consequences

95. The parties made submissions on the consequences of termination of the subcontract and on the respective rights and entitlements of the claimant following such termination. The essential contention of the respondent was that on termination of the subcontract, there was a fundamental alteration of the contractual relationship between the respondent, as contractor, and the claimant, as subcontractor. This fundamental alteration occurred as a consequence of the importation into the subcontract, by virtue of clause 12(b) of the subcontract, of the provisions of clause 12 of that contract and, in particular, the importation of the provisions of clause 12.2 of the main contract which sets out the consequences of a default termination. The respondent drew attention, in particular, to the provisions of clause 12.2.2 of the main contract (as applied and adapted to the subcontract) which provides that the payment of all sums that may be due from the contractor is "*postponed*" on termination of the subcontract and that the contractor "*shall not be required to make any further payment to the subcontractor except as provided in* [clause 2.2]". The respondent then relied on the fact that it determined that the termination value under clause 12. 2.3 was nil and that the termination amount under clause 12.2.9 was €768,911.27 with that sum thereby being payable by the claimant to the respondent under clause 12.2.11. The respondent contended that these provisions of clause 2.2 of the main contract (as adapted and applied to the subcontract) effected a substantive change in the contractual relations between the claimant and the respondent on the termination of the subcontract rather than a mere procedural change. As a consequence, the respondent contended that on termination of the subcontract, the claimant can only make a claim for payment under the subcontract in accordance with clause 12.2 of the main contract (as adapted and applied to the subcontract) and not under clauses 9, 10 or 11 of the subcontract.

Claimant's Position on consequences

96. The claimant's position is that clause 12.2 effects a procedural rather than a substantive change to the contractual relationship between it and the respondent. It contended that the substantive entitlements of the parties (which would inform the determinations made by the respondent in respect of the termination value and the termination amount) were to be primarily determined by reference to the contractual entitlements and obligations of the parties under the provisions of the subcontract. The claimant contended that while its entitlement to payment under the subcontract is postponed upon the termination of the subcontract, clause 12.2 provides for the procedural mechanism by which its entitlement to be paid (or otherwise) is determined albeit that its substantive entitlement to be paid is governed by the other provisions of the subcontract such as clauses 9, 10 and 11, where applicable. Clause 12.2 does not create or confer any right or claim to payment which is a pre-existing right or entitlement under the other relevant provisions of the subcontract, in the claimant's submission. The claimant stressed in that regard the references in clauses 12.2.3 and 12.2.9, with regard to the determination of termination value and termination amount, to the respective entitlement to payment of the subcontractor and the contractor "*in accordance with*" the subcontract, although no express reference is made to the relevant provisions of the subcontract conferring the entitlement to payment. The claimant contended that clause 12.2 is regulating what is to happen on termination and

preserving a right of set off as between the contractor and the subcontractor on the termination of the subcontract. The claimant, therefore, submitted that where a claim for additional remuneration is made by a subcontractor, following the termination of the contract, that claim will necessarily entail a challenge to all determinations whether made during the currency of the subcontract or following termination which are alleged by the contractor to have the effect of denying or defeating the subcontractor's entitlement to such payment.

White Cedar

97. Both the respondent and the claimant made reference in the course of their submissions to the judgment of the High Court (Laffoy J.) in *White Cedar Developments Limited v. Cordil Construction Limited (In Receivership)* [2012] IEHC 525 ("*White Cedar").* That was a judgment on an application by the plaintiff for an interlocutory injunction restraining the presentation and advertising of a petition to wind-up the plaintiff pursuant to s. 213 of the Companies Act, 1963. The plaintiff was the employer and the defendant was the contractor under a building contract which incorporated almost identical provisions of the public works contract as applies to the subcontract at issue in the present case. The contract was terminated by the plaintiff under the provisions of clause 12.1 of the contract. A conciliation process, which was in place prior to the termination, continued after the termination and led to a recommendation that the plaintiff pay a particular sum to the defendant under the contract. Following termination of the defendant's obligation to complete the works, the plaintiff made alternative arrangements for their completion. The receivers of the plaintiff demanded payment from the defendant on foot of the recommendation of the conciliator. The demand was expressly stated to be a notice pursuant to s. 214 of the 1963 Act. In seeking to restrain the presentation and advertising of a winding up petition by the defendant, the plaintiff contended that there was no debt due by the plaintiff to the defendant when the demand was served and, alternatively, that the amount of the demand was less than the amount due to the plaintiff on a crossclaim.

98. In the course of her judgment, Laffoy J. considered the provisions of clauses 11 and 12 of the contract (which are almost identical to those at issue in the present case). As in the present case, there was no issue in that case as to the entitlement of the plaintiff to terminate the contract. The court considered the provisions of clause 12.2 dealing with the consequences of a default termination and referred to the very same provisions that are at issue in the present case (save that clause 12.8 was not incorporated into the subcontract in the present case). The court then discussed the provisions of clause 13 which dealt with disputes and their resolution and made provision in the first instances for conciliation and then for arbitration.

99. Having analysed those provisions, Laffoy J. concluded that the proper application of the provisions in the context of the factual position in that case was clear. She held that as neither party had given notice of dissatisfaction in relation to the recommendation of the conciliator, the recommendation was conclusive and binding on the parties and the

plaintiff was obliged to comply with it. However, she stated that that obligation was "*one obligation only in the overall scheme of mutual rights and obligations of the parties under the* [contract], *all of which continue to apply notwithstanding the fact that one dispute may be resolved in accordance with Clause 13*" (per Laffoy J. at para. 18).

100. Laffoy J. continued (at para. 18):-

> *"Secondly, the rights and obligations to which the plaintiff's termination of the defendant's obligation to complete the Works gave rise under Clause 12 provide that all the defendant is entitled to following termination is the termination value, as determined in accordance with Clause 12.2.3, and the plaintiff is entitled to set off against that sum the termination amount as determined in accordance with Clause 12.2.9. Both determinations are to be carried out by the 'Employer's Representative'. Obviously, in determining the termination value, the Employer's Representative would have to factor in the sum which the Conciliator recommended is to be paid by the plaintiff to the defendant. Thirdly, the termination amount does not fall to be determined by the Employer's Representative until the Works have been completed."*

101. Laffoy J. noted that it was the plaintiff's contention that the termination amount likely to be certified would be well in excess of the termination value so that there would be no sum due to the defendant from the plaintiff, although it was acknowledged by the plaintiff that it was a matter for the employer's representative to determine both termination value and termination amount (as it is a matter for the respondent under the subcontract in the present case). Bearing in mind the test to be applied on an application to restrain the presentation or advertising of a winding up petition, Laffoy J. was satisfied that not only had the plaintiff disputed the debt in good faith and on substantial grounds but had done so in a "*very convincing manner*" (para. 29). Laffoy J. continued:-

> *"Having regard to the provisions of Clause 12.2, of the Building Agreement, until such time as the termination amount has been determined in accordance with Clause 12.2.9 whether there is any amount due to the defendant by the plaintiff cannot be determined. Once the termination amount is determined, if it is less than the termination value, the defendant will be entitled to demand repayment of the difference from the plaintiff by delivering an invoice in accordance with Clause 12.2.11 and the plaintiff will then have 15 working days in which to make payment. In short, the service of the s. 214 demand was premature. It has not been shown that the plaintiff is indebted to the defendant, and, accordingly, the defendant does not have standing to present a petition to wind up the plaintiff."* (para. 29).

In those circumstances, the court made an order restraining the defendant from presenting or advertising the petition to wind up the plaintiff.

102. While both parties made reference to the judgment in *White Cedar* and while it may be the only judgment of the Irish Courts dealing with the provisions of clause 12.2 of the relevant public works contract (which applied in that case and in the present case), in my

view, it does not advance the position of either party in this case. All that Laffoy J. was deciding was that until the procedures provided for under clause 12.2 in relation to the determination of the termination value and the termination amount were concluded, it was not possible to determine whether any sum would be due by the plaintiff to the defendant or vice versa. In those circumstances, the service of a statutory demand under the 1963 Act and any attempted presentation or advertisement of a petition would be premature and inappropriate. Therefore, Laffoy J. was in a position to apply the well-established case law that where a debt is disputed in good faith and on substantial grounds, it would be an abuse to proceed with the presentation or advertising of a winding up petition.

103. The judgment in *White Cedar* does not, nor was it intended to, determine the question as to whether the provisions of clause 12.2 of the public works contract effected a fundamental and substantive alteration in the contractual relationship of the parties in terms of the entitlement or otherwise to payment of either party to the contract or whether it merely affected a procedural change in terms of regulating the procedure by which the parties' respective entitlements and obligations under the relevant contract were to be addressed following the termination of the relevant contract.

Wren

104. Another authority referred to by both parties was Thomas Wren "*Public Works in Ireland Procurement and Contracting"* (2014, Clarus Press). Wren provides a commentary on the provisions of clause 12.2 of the public works form of contract. Both parties sought to rely on that commentary in support of their respective positions.

105. At para. 16-85, Wren comments generally on the provisions of clause 12.2. He says as follows:-

"*This provision, when read together with clause 12.8, amounts to an exclusive remedies schema or code as commented by the BLR editors in reporting the decision of the* [English] *Court of Appeal in Stocznia Gdynia v. Gearbulk Holdings* [[2009] EWCA Civ 75, [2009] BLR 196]. *For the greater part, clause 12.2 is prescriptive in nature. The start-point is twofold in that it assumes the contractor was in default and that a valid notice of termination was served by the employer. Where either or both are not contested by the contractor, the procedure acts to cut in and foreclose on other rights and obligations contained in numerous other provisions of the GCCC major forms, clause 11 in particular."* (para. 16-85, p.683)(footnotes omitted)

It should be noted, however, that the subcontract in the present case does not incorporate the provisions of clause 12.8 of the main contract.

106. In commenting on clause 12.2.2 providing for the postponement of payment, Wren observes (at para. 16-87) that provision "*effectively freezes all further payment of monies as would otherwise have been due to the contractor pursuant to clause 11, except as clause 12.2 provides".*

107. Having commented upon the determinations as to termination value and termination amount, Wren then observes in relation to clause 12.2.11 (in relation to the settlement of account under clause 12.2) as follows:-

> *"Under this provision, the two figures represented by the supplementary terms 'termination value' and 'termination amount' as determined by the ER form the basis for a final settlement of account as between the parties. Under the exclusive code which clause 12.2 provides, the employer is entitled to recover the termination amount from the contractor. If the sum so certified by the ER is less than the termination value, then the former is deducted by way of contractual setoff and any remaining balance on the termination value shall be due to the contractor, subject to the contractor raising an invoice for the balance. In this respect, the two-stage payment mechanism in clause 11 is maintained, with the employer having 15 working days to pay the amount of the invoice."* (para. 16-101, pp. 689-690) (footnotes omitted).

108. Again, it seems to me, that these passages from Wren do not conclusively determine the issue as to whether clause 12.2 fundamentally and substantively alters the contractual relationship between the contractor and the subcontractor or whether merely affects a procedural change regulating the entitlement to payment in accordance with the provisions of clause 12.2. However, in my view, it is unnecessary for me to resolve that issue in determining the question of the arbitrator's jurisdiction in this arbitration. It would, I believe, be inappropriate for me to express a concluded view on this issue since I have concluded that the arbitrator does have jurisdiction in relation to the claims and it would, therefore, be wrong for me to express any concluded view as to whether clause 12.2 of the main contract (applied to the subcontract in the present case) constitutes a complete separate code which fundamentally and substantively alters the contractual relationship between a contractor and a subcontractor or whether it merely sets out the procedural mechanism by which the parties' rights and entitlements to additional payments under the contract are to be regulated following the termination of the contract. That is a matter which ultimately may well have to be determined by the arbitrator and I will refrain, therefore, from expressing any concluded view on the issue. However, I should make clear that even if I were to assume that the respondent is correct in its contention that there is such a fundamental and substantive alteration in the contractual relationship between the parties, I would have still reached the same decision which I have reached in terms of the arbitrator's jurisdiction.

Detailed Consideration of Jurisdiction Issue

109. I now move to consider the substance of the dispute between the parties on the question of jurisdiction. This will involve a consideration of the legal principles applicable to the construction of a notice referring a dispute to arbitration and of the principles to be applied by a court in determining whether a particular dispute has been referred to arbitration. In doing so, it will be necessary for me to consider two separate but inextricably related strands or principles of law which have been considered quite extensively by the Courts of England and Wales.

110. It is, I believe, necessary for me to summarise in relatively brief terms the respective contentions of the parties on the question of jurisdiction. I will set out at this point in relatively general, albeit brief, terms, the respective contentions of the parties. I will, where appropriate, consider further and in more detail those respective contentions when addressing the applicable legal principles.

Respondent's Position on Jurisdiction

111. In broad terms, it is the respondent's position that the only dispute referred to arbitration on foot of the notice to refer is the dispute arising from the making by the claimant of the 9th March, 2011 claim and from the rejection of that claim by the respondent in the 23rd March, 2011 rejection. The respondent contended that no dispute has been referred to arbitration concerning the validity or otherwise of the respondent's determinations as to termination value or termination amount or concerning any claim by the claimant for payment under clause 12 of the subcontract. While the respondent accepted that a dispute concerning the validity of the determinations as to termination value or termination amount or as to any claim for additional payment under clause 12 could have been referred to arbitration under the provisions of clause 13(a) of the subcontract, it was the respondent's contention that no such dispute in respect of those issues was in fact referred. The respondent further contended that while any defence which might be open to it to raise by way of defence in response to the claim referred (including the determinations made by it under clause 12.2 as to termination value and termination amount) would be encompassed within the scope of the dispute referred to arbitration as this would be a matter of procedural fairness to the respondent. The respondent did not accept that any response which the claimant might have or wish to advance in respect of any such defence or defences is also within the scope of the reference. The respondent submitted that if it were open to the claimant to rely on any such response or responses to any defence or defences which the respondent may wish to raise to the claimant's claim, it would mean that it would never be possible to raise a jurisdiction objection before an arbitrator and any such objection would always be capable of being overcome.

112. The respondent contended that it was not open to the arbitrator, and is not open to the court, to have regard to correspondence between the parties, such as the Hussey Fraser letters of 13th November, 2014 and 19th December, 2014 or the Maples letter of 1st December, 2014 in construing the notice to refer and, in particular, in determining the scope of the dispute referred to arbitration on foot of that notice. In the alternative, the respondent contended that if it were open to the arbitrator, and is open to the court, to have regard to that correspondence, notwithstanding that it is not expressly referred to in the notice to refer, in construing or interpreting the notice and the scope of the dispute referred to arbitration, that correspondence does not support the contention that the claimant had put in issue the validity of the respondent's determinations as to termination value or termination amount or its entitlement to additional payment under the provisions of clause 12.2 of the subcontract. In addition, the respondent also relied on clause 13(a) of the subcontract itself which requires that the notice to refer *"state the issues in dispute*" and contended that the notice to refer does not state any issue in relation to

clause 12 or in relation to the respondent's determinations as to termination value or termination amount under clause 12.2.

Claimant's Position on Jurisdiction

113. The claimant's position can be briefly explained in general terms. The claimant contended that it is necessary to construe the notice to refer by reference to the state of affairs which existed as of the date of the notice. It maintained that the arbitrator was, and the court is, required to construe the notice in light of the background factual matrix which would include the 9th March, 2011 claim and the 23rd March, 2011 rejection as well as the subsequent correspondence between the parties following the termination of the subcontract including the respondent's determinations as to termination value or termination amount and the Hussey Fraser letters of 13th November, 2014 and 19th December, 2014 and the Maples letter of 1st December, 2014 as well as the correspondence in connection with the bondsman proceedings. While asserting that the notice must be construed in light of this factual background matrix, the claimant contended that, although its claim is as set out in the 9th March, 2011 claim, nonetheless the correspondence demonstrates that as of the date of the notice to refer in March, 2015, the claimant had taken issue with the respondent's determinations as to termination value and termination amount and that, therefore, the validity of those determinations and the entitlement of the claimant to additional payment, whether under clause 12 of the subcontract or otherwise, was within the scope of the dispute referred to arbitration by the notice to refer. The claimant made the further point that since it is accepted that the respondent is entitled to rely on clause 12 and on its determinations as to termination value and termination amount in defence of the claimant's claim, the dispute referred must, therefore, include those defences and any response which the claimant may have to them. While accepting that the notice to refer makes no express reference to clause 12 of the subcontract or to any challenge to the validity of the determinations made by the respondent as to termination value and termination amount, the claimant contended that it was not necessary to refer expressly to those issues in the notice to refer as it was clear from the factual background matrix, including the correspondence between the parties, that as of the date of the notice to refer, a dispute had arisen between the parties in relation to these various issues.

114. Although it was accepted by the claimant that it was necessary for it to seek to amend its statement of case, in order to deal with the points raised by the respondent in its statement of defence, including the defences and jurisdiction objections raised by the respondent in reliance on clause 12.2 and on the determinations which the respondent had made thereunder, it maintained that that gave rise to a pleading point rather than a jurisdictional point and that it was open to the arbitrator to permit the claimant to amend its statement of case to include a challenge to those determinations and otherwise to deal with the points sought to be raised by the way of defence in reliance on clause 12.2. Finally, and by way of a fallback position, the claimant sought to rely, in particular, on the provisions of clause 5.2 of the 2000 Procedure which was expressly incorporated into the subcontract by clause 13(c)(2). The claimant contended that the arbitrator had

jurisdiction over issues in relation to clause 12.2 and the validity of the determinations as to termination value and termination amount in that those issues were "*connected with and necessary to the determination of any dispute or difference already referred to* [the arbitrator] *whether or not any condition precedent to referring the matter to arbitration had been complied with*". The claimant also sought to rely on certain other provisions of the 2000 Procedure (including clause 2.1 and clause 2.3). In response, the respondent did not accept that the 2000 Procedure was of any assistance to the claimant in light of what it regarded as the clear terms of the notice to refer and that while all defences to the claim actually made and referred would travel with the referred claim and be within the jurisdiction of the arbitrator, additional claims intended to overcome or defeat those defences would not.

115. Broadly speaking, those are the respective contentions of the parties on the jurisdiction question. To resolve this issue, it is necessary to refer to some statements of the relevant legal principles applicable to the construction of notices to refer and to the ascertainment of the scope or ambit of a dispute referred to arbitration.

Construction of Notice to Refer: Legal Principles

116. The proper approach to be taken to the construction of a notice to refer a dispute or disputes to arbitration has been the subject of much discussion and consideration in leading academic texts and in judgments of the Courts of England and Wales. I will consider in this part of my judgment some of those texts and cases. While I have not referred to all of the cases open to me, as to do so would be unnecessary, I have considered all of the relevant cases in forming the views expressed in this judgment.

117. *In Russell on Arbitration* (24th Ed.) (2015), the authors consider the requirements of a notice to refer to arbitration and the approach to be taken in determining the scope of the reference. They state as follows:-

> "*5-027 Identifying matters in dispute. Whilst it is not a requirement of the statute, the notice of arbitration should identify the matters in dispute and indeed there may be a contractual requirement to do so. Care should be taken to identify all the matters in dispute which are to be determined in the arbitration. This is because the tribunal will have jurisdiction to decide only those matters actually referred, and if there is doubt about whether a particular matter has been included, a tribunal's jurisdiction to deal with it will be open to challenge. Consequently, it is advisable to include in the notice of arbitration some general wording which embraces all the outstanding matters in dispute between the parties, as well as specific wording identifying clear and discreet issues to be decided which can be described in the notice.*
>
> 5-028 *Scope of the reference. Whether a particular matter is within the reference will be determined as a matter of construction of the notice of arbitration, giving the words used their natural meaning in the context in which they were used and applying an objective test. The scope of matters that can be referred will normally be constrained by the scope of the agreement to arbitrate, although the parties may agree that the reference should be broader and can agree an ad hoc*

submission of issues enlarging the scope of the tribunal's jurisdiction beyond their original agreement to arbitrate. The scope of the reference may include both claims by a claimant and counterclaims brought by a respondent, which again must be within the agreement to arbitrate. The factual background to the giving of the notice and any previous communications between the parties concerning the issues between them will also be relevant in construing the scope of the reference to arbitration. If, by the time the notice of arbitration is given, the parties' previous communications indicate that it would be natural to expect the reference to include all the outstanding disputes, that fact may be taken into consideration. The reference may also include claims arising subsequent to the commencement of the arbitration if the notice of arbitration demonstrates the parties' intention to do so. Provided they are within the scope of the reference, the tribunal has a discretion whether to permit new claims to be introduced in the course of the arbitration, but if they are outside the scope of the reference, new claims cannot be entertained without agreement of the parties." (pp. 205-206)

118. In one of the leading Irish texts, Hutchinson "*Arbitration and ADR in Construction Disputes*" (2010), the author addresses the question of the adequacy of the notice to refer to arbitration as follows:-

"6-11 In every case, the notice must provide sufficient details so as to identify the dispute or disputes to which it relates with sufficient particularity. The leading cases Interbulk Limited v. Ponte DEI SOSPIRI Shipping Co (The "Standard Ardour") [1988] 2 Lloyd's Rep 159, where Saville J. held that the notice must not only 'require' the recipient to appoint or concur in the appointment of an arbitrator, but, further said (emphasis added):-

> *'In my view, when the question arises whether an arbitral tribunal constituted as in the present has jurisdiction to determine a particular dispute or claim it is necessary to look objectively at what passed between the parties to the reference, and on that basis to determine whether or not any particular matter is included in the reference… It is not sufficient for a party privately to seek to invest his arbitrator with power to determine a particular claim unless this is also made clear to the other party'*

6-12 Thus, it is not possible to defeat the time limits by issuing a 'general' notice to refer in respect of an unknown dispute so as to constitute a valid reference for a dispute not yet arisen…

6-13 Once sufficient detail has been provided in the notice, however, it is not essential that it be an exhaustive catalogue of all the issues in dispute in issue between the parties – further issues can be introduced at a later stage provided they are founded in the same fact pattern and contractual claim (Panchaud Freres S.A. v. Etablissements General Grain Co [1970] 1 Lloyd's Rep 159)."

119. Both parties referred to and relied upon these passages from Russell and Hutchinson. I agree that the statements of principle set out in the passages from both texts quoted above represent the law in this jurisdiction. I should observe, however, that the respondent submitted that the statement in Hutchinson that further issues could be introduced in an arbitration after the notice to refer, provided those further issues are "*founded in the same fact pattern and contractual claim*", is incorrect and is not consistent with the decision of the Court of Appeal of England and Wales in *Kenya Railways v. Antares Pte Limited* [1987] 1 Lloyd's Rep 424. The respondent relied in support of that contention on the emphasis placed in the decision in that case on the consensual basis of arbitration which undermined the contention by the appellant in that case, that the court had the power to add or substitute a new party to an existing arbitration. Having so found (on an issue which arose in the case before it), the Court of Appeal went on to state (in the judgment of Lloyd L.J.) as follows:-

> "*I have equal difficulty in seeing how the court could order the addition or substitution of a new cause of action, for the arbitrator's jurisdiction is confined to the dispute or disputes which have been referred to him. He has no jurisdiction to decide disputes which have not been referred to him even though they may arise out of the same facts or substantially the same facts…. If the new cause of action falls outside the reference, then, unless the parties agree to refer the new cause of action, the arbitrator would have no jurisdiction to deal with it*." (per Llyod L.J. at p.432)

120. That statement is fine as far as it goes. It does, however, beg the question as to whether the particular dispute or disputes at issue fell within the scope of the reference made. I do not myself see how these *obiter dicta* of Lloyd L.J.in *Kenya Railways* are inconsistent with what Hutchinson said in the impugned passage of para. 6-13 of his text. He made clear that further issues could be introduced after the notice to refer provided they are founded not only on the same fact pattern but also on the same "*contractual claim*". Thus, Hutchinson was not talking about the introduction of a new cause of action as such but rather an additional issue or aspect as part of the same contractual claim which has been referred to arbitration. The case cited by Hutchinson in support of the principle referred to by him in the passage, criticized by the respondent in the present case is the decision of the Court of Appeal of England and Wales in *Panchaud Fréres S.A. v. Établissements General Grain Company* [1970] 1 Lloyd's Rep 159. In that case the court held that original claim made within time was that there was entitlement on the part of the buyers to reject a shipment of goods on the basis that the goods did not conform to the contractual description. That claim was made within the contractual time for the arbitration. However, the buyers sought to make an additional claim (outside the relevant contractual time limit) to the effect that they were entitled to reject the goods for late shipment. The Court of Appeal held (*obiter*) that the claim to reject for late shipment was a different claim to the claim to reject the goods as not being within the contractual description. They were, therefore, different contractual claims. I do not, therefore, agree that the statement of principle in Hutchinson is incorrect. However, it should be said that

not a great deal turns on that point for the purposes of my ultimate conclusion on the issues in this case.

121. Both parties relied on the judgment of Saville J. in *Interbulk Limited v. Ponte dei sospri Shipping Co (The "Standard Ardour"*) [1988] 2 Lloyd's Rep 159. In that case, the court held that the particular reference to arbitration at issue in the case referred a claim to arbitration but did not refer a counterclaim. The judgment is important for present purposes in that Saville J. identified the test to be applied in determining whether a particular dispute or claim has been referred to arbitration. He said as follows:-

> *"In my view, when the question arises whether an arbitral tribunal constituted as in the present case has jurisdiction to determine a particular dispute or claim it is necessary to look objectively at what passed between the parties to the reference, and on that basis to determine whether or not any particular matter is included in the reference. This seems to me to be the approach of Mr. Justice Neill in The World Ares [1984] 2 Lloyd's Rep 481 and one which I adopt. It is not sufficient for a party privately to seek to invest his arbitrator with power to determine a particular claim unless this is also made clear to the other party. That was not done in the present case."* (p.162)

122. I agree that this is the approach to be taken in interpreting the notice to refer in the present case. It will be necessary for me to look objectively at what passed between the claimant and the respondent and, on that basis, to determine whether issues in relation to clause 12 of the main contract as applied to the subcontract and issue concerning the validity of the determinations made by the respondent in relation to termination value and termination amount were included in the reference.

123. The claimant contended that adopting this approach entitles the court to look at the background to or factual matrix in relation to the reference to arbitration. The respondent did not accept that the court should look at the factual background or matrix unless the description of the dispute being referred in the notice to refer is ambiguous. In any event, it contended that even if the court can look at the factual background or matrix, it does not support the construction of the notice to refer urged on the court by the claimant. In my view, it is appropriate for the court to look at the factual background or matrix leading up to the notice to refer and it is not necessary to establish an ambiguity in the language used in the notice to refer before regard can be had to that background or matrix.

124. That conclusion is, I believe, supported by another judgment to which both parties referred, *Lesser Design & Build Limited v. University of Surrey* (1991) 56 BLR 57. In that case, Hirst J. had to construe a reference to arbitration in circumstances where the respondent to the arbitration challenged the jurisdiction of the arbitrator to determine certain matters which it claimed had not been referred to arbitration. The court, therefore, had to construe the reference to arbitration. Hirst J. noted that:-

> "It is common ground that the matter must be decided on the normal rules of construction, i.e. giving the words their natural meaning in their context, and applying an objective test." (at p. 67)

125. This is similar to what Saville J. had said in The "*Standard Ardour".* In approaching the exercise of construction, Hirst J. looked at the background or matrix and, in particular, the correspondence passing between the parties prior to the reference to arbitration. Hirst J. observed that in reaching his conclusions on the scope of the reference, it was "*convenient first to consider the probabilities in the light of the background or matrix*" (p. 71). He concluded that "*the background or matrix strongly supports* [the claimant's] *submission on the inherent probabilities"* (p. 72). The court then analysed the terms of the reference letter and concluded that the arbitrator had jurisdiction in respect of the disputed issues.

126. In a commentary on the judgment by the editors of the Building Law Reports, a number of useful observations can be identified. In commenting on the judgment, the editors observed:-

> "…It is clear from the approach adopted by Hirst J. that a court will not approach the construction of a letter referring certain matters to arbitration as if it were a statute. It is to be considered in the light of the claims which the parties have made during the course of the contract and the differences which existed between them. Hirst J. attached considerable importance to the factual matrix within which the [reference letter] had been written…" (p. 59)

It should be noted, however, that the editors felt that the judge may have placed a little too much emphasis on the desires of the contractor to include all outstanding issues within the scope of the arbitration.

127. I agree with the two important points made by the editors in their commentary. First, I agree that the court should not construe the notice to refer as if it were a statute and should not approach the construction of the notice in an excessively legalistic fashion. This point was also strongly made in *Cantillon Limited v. Urvasco Limited* [2008] EWHC 282 (TCC) to which I will refer later. Second, it is open to a court in construing a reference to arbitration to consider the factual matrix in respect of the reference. The outcome of *Lesser Design* indicates that recourse to the factual matrix can be of considerable assistance in determining the scope of the dispute referred.

128. A similar point was made by Judge Lloyd QC in *KNS Industrial Services (Birmingham) Limited v. S Limited* [2000] All ER (D) 1153 (an adjudication case). Judge Lloyd QC commented as follows:-

> "When the jurisdiction of a person appointed to make a decision under a contract (such as an adjudicator) is called into question, it is always necessary to ascertain with precision what the decision-maker was authorised to do. The events leading up

to [the notice to refer] have to be examined in order to understand what dispute the adjudicator was appointed to resolve." (para. 14).

The court adopted the approach taken by Judge Thornton QC in *Fastrack Contractors Limited v Morrison Construction Limited* [2000] 75 Con LR 33 where (again in the context of an adjudication) the judge stated that it is generally a question of fact as to what is in dispute between the parties and the dispute is "*whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference."*. Judge Thornton QC then stated:-

> "A vital and necessary question to be answered, when a jurisdictional challenge is mounted, is: what was actually referred? That requires a careful characterisation of the dispute referred to be made. This exercise will not necessarily be determined solely by the wording of the notice of adjudication since this document, like any commercial document having contractual force, must be construed against the background from which it springs and which will be known to both parties." (para. 20)

129. While *KNS* and *Fastrack* were both adjudication cases, and while there are undoubtedly differences between arbitration and adjudication (which takes place in a particular statutory context in England and Wales), in my view, the observations made by both judges have equal force in the case of a reference to arbitration. The reference must, in my view, be construed against the background from which it emerges which is of course known by both parties.

Scope of Dispute: Legal Principle

130. I was referred to several further decisions of the Courts of England and Wales on the approach which should be taken by a court to ascertain the ambit or scope of a dispute referred to arbitration. There is a vast number of cases on this issue and it is unnecessary to refer to them all. However, two further points clearly emerge from these cases.

131. First, the point in time on which the court must focus in determining the ambit or scope of a dispute referred to arbitration is the date of the commencement of the arbitration process which will generally be the date of the reference to arbitration. That is clear from several of the cases to which I have referred including *Fastrack* and *Allied P&L Limited v. Paradigm Housing Group Limited* [2009] EWHC 2890. As noted earlier, in Fastrack Judge Thornton QC observed that:-

> *"…The 'dispute' is whatever claims, head of claim, issues, contentions or cause of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference"* (para. 20)

132. In Allied P&L (an adjudication case), Akenhead J. noted that it was necessary for the court to "analyse what if any dispute has been referred at the time that the procedure to refer, laid down in the contract or by statute, is initiated" (para. 29(c)).

133. I agree with these statements of principle. The scope or ambit of the dispute referred by the claimant to arbitration must be determined by reference to the state of affairs between the parties at the date of the notice to refer, 15th March, 2015.

134. The second important point which emerges from the English cases is that it is generally unnecessary to specify in the document referring the dispute to arbitration the particular defences or responses which the other party has advanced or wishes to advance in opposition to the claim being made. As observed by Judge Lloyd QC in *KNS*:-

> "A party to a dispute who identifies the dispute in simple or general terms has to accept that any ground that exists which might justify the action complained of is comprehended within the dispute for which adjudication is sought." (para. 21)

135. In *Cantillon* (an adjudication case), Akenhead J. said:-

> "It is, I believe, accepted by both parties, correctly in my view, that whatever dispute is referred to the Adjudicator, it includes and allows for any ground open to the responding party which would amount in law or in fact to a defence of the claim with which it is dealing. Authority for that proposition includes KNS…" (para. 54)

136. Akenhead J. continued:-

"There has been substantial authority, both in arbitration and adjudication, about what the meaning of the expression 'dispute' is and what disputes or differences may arise on the facts of any given case. Cases such as Amec Civil Engineering Limited v. Secretary of State for Transport [2005] EWCA Civ 291, [2005] 1 WLR 2339… and Collins (Contractors) Ltd v. Baltic Quay Management (1994) Limited [2004] EWCA Civ 1757, 99 Con LR 1… address how and when a dispute can arise. I draw from such cases as those the following propositions:

(a) Courts (and indeed adjudicators and arbitrators) should not adopt an over legalistic analysis of what the dispute between the parties is.

(b) One does need to determine in broad terms what the disputed claim or assertion (being referred to adjudication or arbitration as the case may be) is.

(c) One cannot say that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication or arbitration.

(d) *The ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration*." (para. 55)

137. Akenhead J. continued:-

> "In my view, one should look at the essential claim which has been made and the fact that it has been challenged as opposed to the precise grounds upon which that it has been rejected or not accepted. Thus, it is open to any defendant to raise any defence to the claim when it is referred to adjudication or arbitration. Similarly, the claiming party is not limited to the arguments, contentions and evidence put forward by it before the dispute crystallised. The adjudicator or arbitrator must then resolve the referred dispute, which is essentially the challenged claim or assertion but can consider any argument, evidence or other material for or against the disputed claim or assertion in resolving that dispute." (para. 55)

138. In my view, these are significant observations by Akenhead J. as they are expressly stated to refer not just to adjudication cases but also to cases involving arbitrations. The judge was careful to expressly apply the statements of principle to arbitrations. The judge also made clear that it would not be appropriate for a court to analyse the ambit or scope of a dispute referred to arbitration in an overly legalistic manner. He also made the point that not only was it open to a respondent to raise any defence to the claim which has been referred to arbitration but also that the claimant was not limited to arguments, contentions and evidence put forward by it before the dispute crystallised by the reference to arbitration and that the arbitrator was entitled to consider "*any argument, evidence or other material for or against the disputed claim or assertion in resolving that dispute*". I accept and agree with those statements of principle. In my view, they also reflect the position in this jurisdiction.

139. Furthermore, as the respondent in the present case correctly maintained, procedural fairness requires that a respondent should be entitled to raise any point or argument by way of defence or response to the claim. This is particularly so, but not exclusively the case, where the respondent has not had any input into the preparation of the reference. However, it seems to me that procedural fairness requires more than that. It also requires that a claimant who is faced with a point or argument raised by a respondent in response to the claim should be entitled to deal with that point or argument and should not be precluded from doing so or hamstrung in its response, provided that such response directly arises from the defence advanced by the respondent and concerns an issue which falls within the scope of the arbitration agreement and could have been referred to arbitration at the outset. In my view, this is a fundamental requirement of procedural fairness for a claimant.

140. Akenhead J. returned to this theme in *Allied P&L* (an adjudication case), where having set out some further statements of principle, he reiterated what he had said earlier that the court should not adopt an "*overly legalistic analysis*" of what the dispute between the parties is and should instead "*determine in broad terms what the disputed claim, assertion or position is"* (para. 30(c)). He continued:-

> "It follows from the above that if a basic claim, assertion or position has been put forward by one party and the other disputes it, the dispute referred to adjudication

will or may include claims for relief which are consequential upon and incidental to it and which enable the dispute effectively to be resolved…" (para. 30(d))

141. It seems to me that these observations apply equally in an arbitration context and I do not accept the argument advanced on behalf of the respondent that they must be confined to adjudication in the context of the particular statutory scheme applicable to that procedure in England and Wales. As I pointed out earlier, Akenhead J. made clear that the statements of principle which he was setting out applied equally to arbitration.

142. The main reason why the respondent contended that the principles set out in these English cases had to be seen in their proper context, being cases involving adjudication under a particular statutory regime is that the governing statute precluded a multiplicity of disputes being referred to adjudication. It is possible under that regime only to refer a single dispute to adjudication. The respondent contended that, bearing that context in mind, the court should be cautious about directly applying the propositions contained in the adjudication cases to arbitration. The respondent is undoubtedly correct that the statutory adjudication procedure in England and Wales differs in a number of respects from arbitration. However, as I observed earlier, many of the propositions seen in the cases are expressly stated to refer both to adjudication and arbitration. That is why I am satisfied that the principles and propositions seen in those cases are applicable to arbitration and correctly represent the position under Irish law.

143. In that regard Akenhead J. returned to the issue of the scope of a dispute referred to adjudication and the adjudicator's jurisdiction in *Whitney Town Council v. Beam Construction (Cheltenham) Limited* [2011] EWHC 2332 (TCC). In comments expressly applicable to adjudication and arbitration, Akenhead J. observed that:-

> "It is almost impossible to give a definition which will work in every case as to what a dispute is. It will usually involve a claim or assertion which is expressly or by implication challenged or not accepted. It may be broad or narrow. It may be a one or a multiple issue dispute." (para. 32)

144. Having discussed the particular issue which arises in adjudication (namely, that a single dispute only may be referred to adjudication), the judge went on to discuss how a dispute can generate issues and sub issues as it proceeds. He said:-

> "A particular dispute, somewhat like a snowball rolling downhill gathering snow as it goes, may attract more issues and nuances as time goes on; the typical example in a construction contract is the ever increasing dispute about what is due to the contractor as each monthly valuation and certificate is issued; a later certificate may accept amounts in issue previously not certified but then reject some more items of work. One may in the alternative have a dispute, like the proverbial rolling stone gathering no moss, which remains the same and unaffected by later events…" (para. 33)

145. The rolling snowball is a useful metaphor for present purposes as it vividly demonstrates that many issues or sub issues may arise in the context of a particular dispute which may arise or develop as time goes on.

146. Akenhead J. referred to many of the cases which I have just mentioned including *Cantillon* and Fastrack and then sought to draw together the various threads of principle arising in those cases. Having done so, he drew the following conclusions:-

> *"(i) A dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.*
>
> *(ii) A dispute in existence at one time can in time metamorphose into something different to that which it was originally.*
>
> *(iii) A dispute can comprise a single issue or any number of issues within it. However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication; put another way, everything in issue at that time does not necessarily comprise one dispute, although it may do so.*
>
> *(iv) What a dispute in any given case is will be a question of fact albeit that the facts may require to be interpreted. Courts should not adopt an overly legalistic analysis of what the dispute between the parties is, bearing in mind that almost every construction contract is a commercial transaction and parties cannot broadly have contemplated that every issue between the parties would necessarily have to attract a separate reference to adjudication.*
>
> *(v) The Notice of Adjudication and the Referral Notice are not necessarily determinative of what the true dispute is or as to whether there is more than one dispute. One looks at them but also at the background facts.*
>
> *(vi) …*
>
> (vii) …" (para. 38)

147. Leaving aside the issue arising in adjudication under the statutory scheme in England and Wales and the prohibition on referring more than one dispute to an adjudicator, it seems to me that the conclusions expressed by Akenhead J. in *Whitney* are applicable to arbitration and should be applied in the assessment of whether the respondent is correct in its contention that issues in relation to clause 12 of the main contract as applied to the subcontract, including issues concerning the validity of the determinations made by the respondent as to termination value and termination amount are within the scope of the reference to arbitration in the present case. I intend to apply those principles and propositions as well as the others I have identified from the case law.

Summary of Guiding Principles

148. The following seem to me to be the guiding principles in the construction of a reference to arbitration and in the ascertainment of the scope or ambit of the dispute referred to arbitration:-

(1) The words of the notice to refer should not be construed as if they were contained in a statute. The words used should not be analysed in an over legalistic manner.

(2) The relevant point in time for the purpose of ascertaining the scope of the dispute referred to is the time of the reference to arbitration itself.

(3) In determining whether a particular dispute or claim has been referred, it is necessary to look objectively at what has passed between the parties to the reference up to the date of the reference. The words used must be given their natural meaning in their context applying an objective test. The court can and should have regard to the factual background or matrix of fact leading up to the reference to arbitration.

(4) The focus should be on the essential claim which has been made and the fact that it has been challenged as opposed to the precise grounds on which the claim has been rejected or not accepted.

(5) The disputed claim or assertion is not necessarily defined or limited by the evidence or arguments submitted by either side to each other before the reference to arbitration.

(6) It is not necessary to set out in a reference to arbitration all of the grounds or points of defence or response which the respondent may wish to rely upon in resisting the claim. It is open to a respondent to raise any point or argument by way of defence to the claim being made in the arbitration notwithstanding that the point is not referred to in the reference to arbitration. This is a matter of procedural fairness for a respondent.

(7) Procedural fairness works both ways. If it is open to a respondent to raise any defence to the claim notwithstanding that it is not referred to in the reference to arbitration as a matter of procedural fairness, so too should it be open to the claimant to respond to any such defence sought to be relied upon by the respondent. That too is a matter of procedural fairness for the claimant. Provided such response directly arises from the defence raised and concerns an issue which falls within the scope of the arbitration agreement.

(8) A particular dispute may comprise one issue or several issues. Or there may be several disputes between the parties. A dispute or disputes may attract more issues and may become more nuanced as time goes on. In order to identify the dispute or disputes and the issue or issues arising, it is appropriate to consider the exchanges between the parties prior to and up to the point of the notice to refer. It is not

necessary for the words used in the notice to refer to be ambiguous before the arbitrator or a court can consider these exceptions.

(9) The court will also have to consider whether the terms of the contract between the parties on its proper construction disapplies any principles or propositions.

149. I will now proceed to apply these principles to the particular facts and circumstances of this case.

Application of Principles
Findings on Construction of Notice to Refer and Scope of Dispute Referred

150. There is no dispute between the parties on the relevant facts. I set out earlier the relevant factual background on the basis of the facts set out in the affidavits sworn by the parties for the purposes of the respondent's application.

151. As the relevant legal principles require, it is necessary to look not only at the notice to refer itself but also to the factual background or matrix of fact leading up to the date of the notice to refer, including the correspondence and other interactions between the parties up to that point in time. While I referred to these exchanges earlier in the judgment, it is necessary to return to them now in order to ascertain what was referred to the arbitrator in the notice to refer.

152. The claimant submitted the 9th March, 2011 claim seeking payment of €13,798,995.00. That claim sought to recover sums allegedly unpaid from previous applications and also claimed for an extension of time and additional costs which the claimant alleged had been incurred as a result of delays to the works under the subcontract which were beyond its control. Four folders of documents were enclosed with that claim. The 9th March, 2011 claim was rejected by the respondent by means of the 23rd March, 2011 rejection. As explained earlier, in its rejection letter, the respondent noted that the claim was being advanced by the claimant more than two years after some of the alleged events occurred. It was further asserted by the respondent that clause 10(a)(1) of the subcontract contained a condition precedent which required that notice be given by the claimant within a particular period of time in circumstances where the claimant considered that it was entitled to an adjustment to the subcontract sum or that it had any other entitlement under or in relation to the subcontract. The respondent maintained that the claimant had not complied with that condition precedent. In those circumstances, the respondent rejected the 9th March, 2011 claim in its totality.

153. Thereafter, following the appointment of a receiver to the claimant, the respondent terminated the subcontract in accordance with clause 12(a) by letter dated 12th April, 2011. As pointed out earlier, the provisions of clause 12.2 of the main contract as applied to the subcontract then came into effect. The respondent wrote to the claimant on 3rd June, 2011 informing it that the respondent had determined that the termination value was nil. The claimant did not respond to that letter and did not, at that stage, expressly dispute the respondent's determination as to termination value.

154. The respondent wrote to the claimant on 21st October, 2011 informing it that the respondent had determined the termination amount at €768,911.27 and provided a breakdown of that sum. The respondent demanded the payment of that sum and informed it that a claim would be made on foot of the performance bond provided by the claimant. The claimant did not respond to that letter either and did not, at that stage, expressly dispute the respondent's determination as to the termination amount.

155. The respondent then made a claim under the performance bond. The bondsman was Hiscox. Prior to the determination by the respondent of the termination amount, the bondsman informed the respondent's solicitors on 5th October, 2011 that the bondsman did not accept that the termination value was nil and further stated that the bondsman would not be bound by any agreement which might be reached with the receiver to the claimant in that regard. That letter made express reference to a letter from the respondent's solicitors to the receiver dated 16th September, 2011 which referred back to the respondent's letter of 3rd June, 2011 informing the claimant of the determination of the termination value and indicated that the respondent was in the process of determining the termination amount. While the bondsman responded to that letter (which was copied to it), the receiver to the claimant did not. The respondent proceeded to determine the termination amount and so informed the claimant in the letter of 21st October, 2011 (which was copied to the bondsman).

156. The respondent called on the bondsman to pay the sum of €768,911.27 (being the termination amount) and advised that additional defects in the subcontract works had been discovered which had not been taken into account in the determination of the termination amount. Thereafter, the bondsman appointed Andrew P. Nugent & Associates, Chartered Quantity Surveyors, to liaise with Anthony Kelly, the claimant's managing director, in order to obtain information in relation to the claim and for the purpose of liaising directly with the respondent and subsequently with the quantity surveyors appointed by the respondent. The bondsman's quantity surveyors worked closely with Mr. Kelly. The respondent had put forward a statement of account which purported to confirm an overpayment to the claimant of €9,426.94. That claim was challenged by the bondsman's quantity surveyors. In a final claim submission dated 3rd October, 2012, the respondent purported to disallow entirely the sum previously allowed for variations in the amount of €849,891.20 (including €742,528.79 for variations which were paid by the respondent on foot of issued payment certificates). The respondent advanced a claim in that submission for overpayment in the sum of €653,037.29.

157. There followed further engagement between the respective quantity surveyors for the bondsman and for the respondent. No agreement was reached in relation to the value of the claim or as to the amount allegedly due to the respondent by way of set off. Thereafter, the respondent commenced proceedings against the bondsman in 2013. I was provided with a set of the pleadings in the bondsman proceedings where, as noted earlier, the respondent in its statement of claim pleaded the fact of the determination of the termination value and the termination amount. In its defence to the bondsman proceedings, the bondsman disputed the determination of the termination value and of

the termination amount. The bondsman expressly pleaded in its defence that the termination amount determined by the respondent did not take into account all sums properly due, or which might become due, to the claimant under the subcontract and contended that the termination amount had not been properly calculated in accordance with the terms of the agreement. It is clear from my review of the pleadings in the bondsman proceedings that the bondsman (working with Mr. Kelly of the claimant company) was disputing that any monies were owing by the claimant to the respondent and was disputing the determinations made by the respondent under clause 12. In my view, this is relevant as part of the background or matrix of fact. I accept of course that these points were being agitated by the bondsman in the proceedings brought against it rather than, at that point, at least, by the claimant.

158. That brings me to the correspondence between the claimant's solicitors and the respondent's solicitors in November and December, 2014. This correspondence forms an important part of the relevant factual matrix. I am satisfied that I am required to have regard to this correspondence, notwithstanding the respondent's contention to the contrary. It is precisely the sort of material which the authorities indicate must be considered when seeking to determine what was the scope of the dispute between the parties in order to ascertain what was referred to arbitration.

159. The respondent's fallback position was that the correspondence discloses that the claimant was not maintaining any claim under clause 12 or disputing the validity of the determinations made by the respondent under that provision. I do not agree with that contention. In my view, it is based on an unduly narrow and legalistic reading of the letter which runs counter to the approach which a court is required to take in considering exchanges of this sort with a view to ascertaining what was in dispute between the parties and what was referred to arbitration.

160. While it has to be acknowledged that the Hussey Fraser letter of 13th November, 2014 could have been clearer, it seems to me that the respondent could have been in no doubt from that letter that the claimant was disputing the determinations made by the respondent under clause 12 in relation to the termination value and the termination amount. It must, of course, also be acknowledged that the letter was sent some three and a half years ago after the respondent determined the termination value at nil and, more than three after it determined the termination amount at €768,911.27. That delay, while most unfortunate, does not detract from the fact that, notwithstanding the failure expressly to challenge those determinations when they were made, the Hussey Fraser letter of 13th November, 2014 was conveying to the respondent that the claimant did not accept those determinations and was maintaining claims for additional monies from the respondent under the subcontract.

161. While the respondent is correct in stating that the Hussy Fraser letter of 13th November, 2014 records the claim being made by the respondent against the bondsman based on certain contentions, including contentions which relied upon the determinations as to the termination value and the termination amount. However, it is, in my view, a misreading

of the letter to suggest that what follows in the first three and a half pages of the letter relates exclusively to the claim being made by the respondent against the bondsman. That contention by the respondent was based on the following statement at p. 4 of the letter under the heading "KOF's Claims Against BSJV", namely:-

> "The above comments relate to the claim being made against Hiscox. We do not act for that company. Our remarks are made on behalf of KOF and not on behalf of Hiscox. We now turn to the claims against your client."

162. It would, in my view, be an incorrect and excessively narrow reading of the letter to ignore what was said by the claimant's solicitors in the previous three pages of the letter, albeit that those comments were stated to relate to the claim being made by the respondent against Hiscox. What is, however, relevant is the information contained in those pages rather the heading under which that information appears. It is clear on my reading of the letter, that the information contained under the heading "*Valuation of the Works to Completion*" on pages 1 and 2 of the letter is directed to the contention that the claimant was not accepting that the termination value was nil or that the claimant had been overpaid by any amount. The letter further makes clear that the claimant did not accept the respondent's attempt to reverse variations that had allegedly previously been agreed (and for the most part paid) or the deductions of "*unsubstantiated contra-charges"* by the respondent. The letter contained an explanation on behalf of the claimant as to why the purported deduction of the variations which had been agreed was not accepted and an assertion was made that the respondent had waived the notice of requirements in clause 10 of the subcontract by reason of the manner in which the subcontract had been operated from the outset. The letter went on to observe that the contra-charges put forward by the respondent would be considered in more detail "*in due course"*. However, some explanation was given as to why it was said on behalf of the claimant that those contra-charges were not correctly applied by the respondent and were wrongly based on the supposition that the claimant was contractually liable for them. The letter made clear that the claimant did not accept that it had any such contractual liability for those contra-charges stating:-

> *"Suffice it to say, for the purpose of this letter, that the [contra-charges] will be vehemently defended".*

163. Those comments were made in a part of the letter which was said by the respondent only to concern the respondent's claim and proceedings against the bondsman.

164. The letter then went on to comment, under the heading "*The Cost of Completion (€768,911*)", on the claim by the respondent that the claimant was liable for such cost. This, of course, is the amount which the respondent determined as the termination amount. The letter contains the claimant's response to the contention that the claimant is liable for that sum. The claimant made the point that the works carried out by it were completed by November, 2010, that it understood that the amount claimed by the respondent was referable to works carried out by Roadstone (although further details were awaited by the claimant), that the claimant's understanding was that there were no

works outstanding on its part and that Roadstone may have been employed to carry out additional works which were never part of the claimant's duties under the subcontract. My reading of this part of the letter is that the claimant was clearly indicating that it did not agree with the termination amount as determined by the respondent. The claimant had, earlier in the letter, signaled its disagreement with the termination value determined by the respondent.

165. The letter then commented on the alleged defects in the claimant's works. In that part of the letter, there was a clear denial on behalf of the claimant that works which it carried out were in any way defective or that there was breach of contract on the part of the claimant. It was asserted that the works were carried out in accordance with the required specification and that while the works were damaged by the respondent and its subcontractors, both prior to and subsequent to completion by the claimant, that was not the responsibility of the claimant. Some further detail was set out in support of the claimant's position on that point.

166. The letter then addressed the claimant's claims against the respondent and contained the words which I quoted above and on which the respondent relies in support of its assertion that the comments contained in the first three pages or so of the letter were purely by way of commentary on the respondent's claim against the bondsman. However, much too much emphasis, and excessive weight, has been placed by the respondent on those words. In doing so, the respondent has sought effectively to airbrush out of the letter the comments contained in the first three pages. From those comments, it is quite clear, in my view, that the claimant was disputing the determinations made by the respondent under clause 12 and was setting out some reasons why it did not accept that those determinations were correct.

167. Having made those comments in the letter, the claimant's solicitors then turned to consider the claims being made by the claimant against the respondent. The comments on that claim commenced with an assertion that a sum allegedly agreed as being due to the claimant (€1,329,670.00), remained due for payment and an assertion that that sum did not include additional compensation payable to the claimant in respect of certain other matters which were then set out. Those other matters included sums in respect of tack coat, accommodation works, additional movements, delay, and disruption. Under a heading "*Further Claims*", the claimant's solicitors noted that the items just mentioned appeared to be the main headings of the claim but that there might be additional claims. The letter then stated:-

> *"You will be aware that our client submitted a claim on 9th March, 2011 in the sum of €13,798,995. We have yet to examine that claim in detail but to the extent that elements of that claim may not be covered by the above, we reserve the right to include such elements in the process hereinafter discussed. The client also reserves the right to claim for VAT, interest and costs."*

168. The letter concluded by referring to the dispute resolution provisions contained in clause 13(a) of the subcontract and requested confirmation as to whether the respondent's

solicitors had authority to accept service of a notice to refer to arbitration and mentioned the conciliation process under the subcontract.

169. In my view, an objective reading of that letter demonstrates that not only did the claimant not accept the determinations made by the respondent under clause 12 as to the termination value and the termination amount, but that the claimant was advancing additional claims under various headings including, potentially, the claims made in the 9th March, 2011 claim which the claimant's solicitors had not by that time examined in detail.

170. Another important part of the background or matrix of fact is the Maples 1st December, 2014 letter in response. I quoted extensively from that letter earlier in the judgment and it is unnecessary to do so again here. On any reading, the letter was somewhat intemperate in its terms and accused the claimant's solicitors of attempting to "*leverage nuisance money out of our client by attempting to interfere with and/or stall High Court litigation in which our client is engaged*". This was a reference to the bondsman proceedings. Notwithstanding its intemperate tone, the letter does rightly complain about the delay on the part of the claimant in seeking to advance its claim and about the apparent failure by the claimant's advisers fully to examine the 9th March, 2011 claim by that stage. It is clear, however, from the letter that the respondent's solicitors were aware that the claimant did not accept the respondent's position in relation to the claimant's account and did not accept the respondent's determinations in relation to that account. At point 6 of the letter, the respondent contended that the lack of merit of the claimant's claim was evidenced by:-

> *"The fact that your letter is littered with various factual inaccuracies regarding the works performed and not performed by your client, the status of your client's account at the time that our client terminated its obligation to complete the works, and the manner in which the subcontract was performed by the parties. These inaccuracies further evidence the abject lack of bona fide inquiry by your client to date in the matters that it purports to justify an entitlement on its behalf to be paid nearly €16m by our client."*

171. For reasons mentioned earlier in the judgment, the respondent's solicitors declined to comment further on the matters set out in the Hussey Fraser letter of 13th November, 2011. They did, however, confirm that they had authority to accept service of a notice of any dispute resolution proceedings commenced by the claimant under the subcontract.

172. I regard the Maples letter of 1st December, 2014 as another significant part of the matrix of fact to which the court is required to have regard in considering the state of affairs between the parties as of the date of the notice to refer. Leaving aside the indignant and somewhat intemperate tone of the letter and the decision by the respondent not to engage in the detail as set out in the Hussey Fraser letter of 13th November, 2014, it is clear from the terms of their letter that the respondent's solicitors had read and considered the letter to which they were replying. The respondent and their solicitors were, therefore, aware of the fact that the claimant was not accepting the position taken by the respondent and was not accepting the respondent's determinations as to the

termination value and the termination amount. The respondent's position, as is evident from point 6 of the letter, was that the Hussey Fraser letter contained factual inaccuracies about various matters including the status of the claimant's account when the respondent terminated the subcontract. The respondent, therefore, could not but have been aware of the fact that the claimant did not accept that it was precluded from maintaining its claim by reason of the steps taken or determinations made by the respondent under clause 12.

173. The position is made even more clear in the Hussey Fraser letter of 19th December, 2014 in response to the Maples letter of 1st December, 2014. At the very outset of that letter, the claimant's solicitors stated:-

> *"Our client does not intend to interfere with the High Court proceedings as suggested by you. Insofar as your client maintains in those proceedings that our client is indebted to it, we thought it appropriate to start with that alleged debt by demonstrating that far from our client being indebted to yours, substantial monies are due by your client to ours."*

174. This could not be clearer. The claimant was disputing the assertion that monies were due by the claimant to the respondent. Since the respondent's contention that such monies were due by the claimant to the respondent was based, in part at least, on clause 12 and on the steps taken by the respondent under that provision, it must have been clear to the respondent that the claimant was not accepting the respondent's contention and, on the contrary, was continuing to assert that substantial monies were due by the respondent to the claimant. The respondent must have understood, therefore, that the steps which it had taken under clause 12, including the determinations made by it, were being put in issue, at least in the correspondence emanating from the claimant's side at that stage. Again, it seems to me that this is a significant part of the matrix of fact to which the court must have regard in assessing the state of affairs between the parties as of the date of the notice to refer.

175. The correspondence between the parties ended with the Hussey Fraser letter of 19th December, 2014. The notice to refer dated 13th March, 2015 then followed.

176. I have referred earlier to the notice to refer which contains four recitals. For present purposes, the two critical recitals are:-

> *"III. The claimant submitted a claim for payment to the respondent on or about the 9th March, 2011 for a total sum of €13,798,955.*
>
> *IV. The respondent disputes said claim."*

177. Having set out the four recitals, the notice to refer then stated that the claimant was referring the "*said dispute*" to arbitration pursuant to clause 13(a) of the subcontract. The notice then set out the "*issues in dispute*". A series of ten issues were then identified. The first issue referred to was:-

"The balance due to the claimant on foot of the contract without reference to variations, extras, contra-charges or additional sums."

Several further issues were identified including the sum due on the variation account, the amount due in respect of additional moves, sums in respect of delay and disruption, standing time and inefficiencies identified in a particular annex and so on.

178. The respondent claimed that recitals III and IV identify the dispute between the parties which arose by the submission by the claimant of the 9th March, 2011 claim and by the rejection by the respondent of that claim by means of the 23rd March, 2011 rejection. That, the respondent said, is the dispute between the parties and that is the dispute (i.e. the "*said dispute*" referred to in the notice to refer) which the claimant referred to arbitration under clause 13(a) of the subcontract by means of the notice to refer. The respondent understandably pointed out that the notice to refer does not make any reference to clause 12 of the main contract as applied and adapted to the subcontract or to the determinations made by the respondent as to the termination value and the termination amount under that clause. The respondent did, however, maintain that all defences which the respondent could rely on in order to resist the claimant's claim also travel with the reference so that the arbitrator would have jurisdiction to entertain all such defences. The claimant accepted that that is the case and it is certainly supported by the authorities discussed earlier. Among the defences which the respondent has sought to rely upon before the arbitrator, as appears from the respondent's statement of defence, is the preliminary defence based on want of jurisdiction in reliance on clause 12 and the non-disputation by the claimant of the termination value and the termination amount. In addition, the respondent has sought to rely on another preliminary defence based on the "*undisputed, and unreviewable herein, determinations of the termination value and termination amounts*" which it contended amounts to a full and complete defence to all of the claimant's claims, in the event that it were to fail on the preliminary defence based on a want of jurisdiction having regard to clause 12 (paras. 82 to 85 of, and schedule C to, the respondent's statement of defence). Schedule C contains the legal submissions advanced by the respondent as part of its statement of defence on the "*undisputed and unreviewable determinations of the termination value and termination amount as a complete defence to the claimant's claims"*. The respondent, therefore, has sought to rely, as a fallback position, on this defence and it is accepted by the claimant that it is entitled to do so before the arbitrator (the merits of that defence being a matter for the arbitrator). The basis upon which the respondent contended (and the claimant accepted) that it is entitled to rely upon these defences even though they are not expressly referred in the notice to refer is that procedural fairness requires that it be so entitled. Where the parties differ, however, is as to what the claimant can then do in response to such defences which the parties have agreed are before the arbitrator.

179. It seems to me that the respondent's suggested interpretation of the notice to refer in terms of the scope of the dispute referred by that notice to arbitration is far too narrow. It ignores, or at least gives insufficient weight to, the guiding principles on the construction of a reference to arbitration and on the ascertainment of the scope or ambit of the dispute

referred to arbitration, which I considered and summarised earlier in my judgment. In my view, the respondent's suggested interpretation seeks to apply a construction of the notice to refer as if it were a statute and to construe the words used in the notice in an overly legalistic manner. It ignores the requirement that the relevant point in time to ascertain the scope of the dispute referred to arbitration is the time of the reference to arbitration itself and that, in determining whether a particular dispute or claim has been referred, it is necessary to look objectively at what has passed between the parties to the reference up to that point. I have referred earlier to the exchanges between the parties up to the point of the notice to refer and have set out my conclusions as to what ought to have been understood by the respondent from what passed between the parties. While, as just observed, it is open to the respondent to raise any point or argument by way of defence to the claim being made notwithstanding that that point or argument is not referred to in the notice to refer, as a matter of procedural fairness for the respondent, however, the respondent's proposed interpretation overlooks the requirement for procedural fairness for the claimant also. It seems to me that if the respondent is entitled to raise clause 12 and the determinations as to termination value and termination amount under that provision by way of defence to the claim, then, having regard to the guiding principles discussed and summarized earlier, so to as a matter of procedural fairness should the claimant be entitled to seek to address those defences in whatever way it considers appropriate. That must include an entitlement to challenge the validity of the determinations made by the respondent under clause 12. To permit the respondent to rely upon these defences by way of defence but to preclude the claimant from dealing with them in response would itself, in my judgment, be contrary to procedural fairness.

180. It seems to me that the notice to refer should be construed, and the scope of the dispute referred by that notice ascertained, by reference to these guiding principles, the most relevant of which, for present purposes, are, first, the requirement to construe the notice to refer by reference to the state of the dispute as of the date of the reference and taking into account the exchanges between the parties up to that point and, second, the principle that the reference to arbitration carries with it all defences which the respondent wishes to raise and, in my view, any responses which the claimant may wish to raise in response, subject to the limitations referred to earlier.

181. I have concluded by reference to the exchanges between the parties culminating in the exchange of correspondence in November and December, 2014 (which represent the state of the parties' respective positions up to the date of the notice to refer on 13th March, 2015), that it was clear that the claimant was not accepting the position taken by the respondent and was not accepting its determinations as to the termination value and the termination amount. The respondent could not but have been aware that the claimant was not accepting that it was precluded from maintaining its claim by reason of clause 12 or by reason of any of the determinations made by the respondent under that provision. It must also have been clear to the respondent that the claimant was disputing that any monies were due by it to the respondent and that steps which the respondent had taken under clause 12 (including the two relevant determinations) were being put it issue by the

claimant. All of that represented the position, and the state of affairs between the parties, at the time the notice to refer was sent by the claimant's solicitors on 13th March, 2015.

182. In my view, applying the guiding principles discussed and summarised earlier, it would be an excessively narrow interpretation of the notice to refer, and would ignore the position adopted by the parties in correspondence up to the date of that notice, to confine the claimant to the claims expressly set out in the 9th March, 2011 claim and to preclude the claimant from attempting to deal with the points of defence raised by the respondent in its statement of defence in reliance on clause 12 and on the determinations made by it under that provision.

183. While the claimant confirmed in the course of the submissions at the hearing that the dispute referred to arbitration was the claim set out in the 9th March, 2011 claim, I did not understand the claimant to make the case that it was not open to the arbitrator, or to a court, to examine the exchanges between the parties in order to determine what was in issue between the parties as of the date of the reference to arbitration. Indeed, the claimant strongly urged the arbitrator, and the court, to consider the exchanges between the parties including the Hussey Fraser letters of 13th November, 2014 and 19th December, 2014 and the Maples letter of 1st December, 2014. It made submissions on its suggested interpretation of that correspondence in response to those advanced by the respondent. I have, for the most part, accepted the submissions advanced by the claimant as to the interpretation of that correspondence. I do not believe, therefore, that the claimant's submission that the claim sought to be made by the claimant was as set out in the 9th March, 2011 claim undermines the case which it was making as to the entitlement of the court to look at the exchanges between the parties in order to determine the scope of the dispute actually referred to arbitration.

184. The respondent also argued that if the arbitrator had jurisdiction to consider the claimant's responses to the defences raised by the respondent in reliance on clause 12 and on the determinations made by it under that provision, whether by challenging those determinations or otherwise, it would never be possible to challenge jurisdiction before an arbitrator. I do not accept that that is so. I am, of course, dealing with the particular jurisdiction challenge made by the respondent on the facts of this case. In my view, the arbitrator does have jurisdiction to deal with the points which the claimant seeks to make in response to the preliminary defences on jurisdiction and otherwise advanced by the respondent in reliance on clause 12 and on its determinations under that provision. Those responses fall squarely within the wide provisions of clause 13(a) of the subcontract in terms of the disputes which may be referred to arbitration under that provision (namely disputes "*in connection with or arising out of the subcontract*"). Furthermore, the case which the claimant seeks to make is in response to the defences asserted by the respondent (which points of defence, it is agreed, do not expressly have to be referred to in the notice to refer). If a claimant sought to advance a case which fell outside the scope of the arbitration clause or agreement and was not in response to a point or argument relied upon by a respondent by way of defence to a claim, then an arbitrator, and a court,

may well find that the arbitrator has no jurisdiction in relation to the points sought to be raised by the claimant. However, that is not the position in the present case.

185. While it is perhaps surprising that the claimant did not make express reference to clause 12 and to the determinations made by the respondent under that provision in the notice to refer, I have concluded that on a proper construction of that notice in accordance with the guiding principles derived from the authorities, those issues do fall within the scope of the arbitration initiated by the notice to refer. It is also surprising that the claimant did not make reference to those issues in its statement of case. It sought to do so for the first time in its statement of reply on 8th November, 2017 in response to the respondent's statement of defence of 7th September, 2017 which sought to rely, both by way of a preliminary defence on jurisdiction and by way of a substantive preliminary defence on clause 12 and on the determinations. However, as those issues were properly before the arbitrator (for the reasons just outlined), it was a matter for the arbitrator to decide whether she would permit the claimant to amend its statement of case expressly to impugn the validity of the respondent's determinations under clause 12. The arbitrator permitted the respondent to deliver an amended statement of claim on 29th March, 2018 in directions given by her following her ruling on jurisdiction of 9th March, 2018. In my judgment it was entirely a matter for the arbitrator as to whether she could permit those amendments and it was within her jurisdiction to do so.

186. I should make clear that in holding that the arbitrator has jurisdiction in relation to the issues concerning clause 12 which have now been expressly raised by the applicant in the amended statement of case, I am not commenting in any way on the substantive merits of the respective contentions of the claimant and of the respondent on those issues. That is exclusively a matter for the arbitrator.

Clause 13(a)

187. Having set out my conclusions on the question of jurisdiction by applying the guiding principles to the construction of a reference to arbitration, I should now consider whether there is anything in clause 13(a) of the subcontract which would require me to alter those conclusions. In this context, I must consider the express provisions of clause 13(a) and the provisions of clause 13(c) and the 2000 Procedure which the parties agreed would apply to any arbitration under clause 13 of the subcontract.

188. The respondent contended that the notice to refer did not comply with the provisions of clause 13(a) of the subcontract in that it did not set out any issues between the parties concerning clause 12 or the determinations made by the respondent and did not, therefore, "*state the issues in dispute*" as required by clause 13(a). The respondent contended that the requirement to "*state the issues in dispute*" is a jurisdictional requirement which, if not complied with, means that the arbitrator does not have jurisdiction in relation to any issues not stated in the notice. The claimant's position was that the notice did adequately refer to the dispute and state the issues between the parties. It relied on the 13 issues set out in the notice as amounting to the various different bases on which the claimant was asserting a right to be paid the amounts

claimed. The claimant maintained that the construction of clause 13(a) urged by the respondent is too strict and goes too far.

189. In my view, the notice to refer does comply with the provisions of clause 13(a) of the subcontract. It specifies the dispute (and must be interpreted by reference to the guiding principles discussed earlier). It then refers to several issues in dispute including a claim for the balance due by the respondent to the claimant. Since it was agreed between the parties that notice does not have to specify the points of defence on which the respondent will seek to rely in resisting the claimant's claim and the failure to specify those points of defence in the notice does not amount to a breach of clause 13(a) or render the notice ineffective in respect of those issues raised by way of defence, it would indeed be a very harsh interpretation and application of the requirement in clause 13(a) to "*state the issues in dispute*" to find that the failure to specify the points which the claimant wishes to rely upon in response to those points of defence renders the notice ineffective and derives the arbitrator of jurisdiction in relation to those issues. That would not, in my view, be a reasonable or sensible interpretation of clause 13(a). I do not accept that the notice to refer fails to comply with the requirement to "*state the issues in dispute*" under clause 13(a) of the subcontract. However, even if it did, I am not at all convinced that a failure to comply with that provision would go to the jurisdiction of the arbitrator to deal with issues not expressly stated in the notice, provided they arose by way of a response to a point or argument raised by way of defence by a respondent which itself was not stated in the notice. A failure to state an issue sought to be raised by a claimant in response to a point or argument raised by way of defence would not, in my view, amount to a breach of clause 13(a) and would not deprive the arbitrator of jurisdiction to deal with that issue. Even if it did amount to a breach of clause 13 (a), I am not satisfied that such a breach would go to the jurisdiction of the arbitrator or preclude her from dealing with the particular issue or issues.

190. In my view, there is nothing in clause 13(a) of the subcontract which would affect or undermine the conclusion which I have reached that the arbitrator does have jurisdiction to deal with the points which the claimant wishes to advance in response to the points of defence raised by the respondent in reliance upon clause 12.

Clause 13 (c) and 2000 Procedure

191. I now turn to clause 13(c) which provided that the 2000 Procedure was to govern the arbitration. As I have already explained, the arbitrator directed (with the agreement of the parties) that the 2000 Procedure would apply up to the date of the preliminary meeting held by the arbitrator on 7th April, 2016 but that, thereafter, the 2011 Procedure would apply. Since the notice to refer was dated 13th March, 2015, the relevant provisions of the 2000 Procedure applied to the notice to refer. As a fallback argument, the claimant sought to rely on certain provisions of the 2000 Procedure in order to defeat the respondent's jurisdictional challenge. The claimant relied in particular on Rules 2.1, 2.3 and 5.2. I have set out those provisions earlier in this judgment.

192. Having considered the rules relied upon and the respective arguments of the parties in relation to the interpretation and application of those rules, I have reached the conclusion that there is nothing in the 2000 Procedure which undermines the conclusions I have already reached in relation to the jurisdiction of the arbitrator to deal with the issues which the claimant wishes to raise in relation to clause 12 and the determinations made by the respondent under that provision.

193. It might be argued that Rule 2.1 assists the claimant in that that provision deems a dispute or difference to arise between the parties where a claim is made by one party and not responded to by the other within a period of 28 days thereby entitling either party to proceed to arbitration by serving a notice to refer on the other party, subject to the observance of any condition precedent in the relevant contract. However, I do not see how this provision in any way affects the conclusions I have already reached in relation to the state of the dispute or the issues in dispute between the parties as of the date of the notice to refer. While it could be argued that the failure by the claimant to respond to the determinations as to termination value and termination amount when those determinations were made meant that a dispute or difference was deemed to arise within 28 days of those determinations being provided to the claimant, I have in any event concluded that those determinations were in dispute between the parties at the time of the reference in light of the correspondence exchanged between their respective solicitors in 2014 and in light of the involvement of the claimant's personnel in assisting the bondsman in defence of the bondsman proceedings. Furthermore, there is no issue between the parties as to the entitlement of the claimant to serve a notice to refer on the respondent. It did so as it was entitled to do under clause 13(a). The issue between the parties concerns the ambit of the dispute and the issues or sub-issues within that dispute which were referred to arbitration. In my view, Rule 2.1 does not advance matters at all.

194. Nor, in my view, does Rule 2.3, which provides that the notice to refer must list the matters which the referring party wishes to be referred to arbitration and that nothing in the notice to refer restricts the referring party as to the manner in which it presents its case. It seems to me that the first part of Rule 2.3 mirrors the provisions of clause 13(a) in terms of the requirement to state the issues in the notice to refer. The second part of Rule 2.3 adds nothing, in the context of the issues between the parties on this application. It has not been suggested that the notice to refer restricts the claimant "*as to the manner in which it subsequently presents its case*". The dispute between the parties which has led to this application does not concern the "*manner*" in which the claimant presents its case. It concerns the scope or ambit of the dispute referred and the issues (and sub-issues) which the arbitrator has jurisdiction to consider. I have addressed those already without reference to Rule 2.3 of the 2000 Procedure. In my view, Rule 2.3 does not advance matters at all.

195. It might be argued that Rule 5.2 confers an arbitrator with jurisdiction over an issue not expressly set out in the notice to refer as it provides that the arbitrator has jurisdiction "*over any issue connected with and necessary to the determination of any dispute or difference already referred*" to him or her "*whether or not any condition precedent to*

referring the matter to arbitration had been complied with". While this might be of assistance to the claimant in conferring jurisdiction on the arbitrator to deal with issues which are "*connected with and necessary to*" a dispute or difference already referred to the arbitrator even though those issues may not have been expressly set out in the notice to refer (assuming the requirement to do so is a condition precedent), it is unnecessary to reach a concluded view on that question in light of the conclusions which I have already reached without reference to clause 5.2. The important point is that clause 5.2 is an enabling rather than a restricting provision and does not, therefore, assist the respondent in its contention that the arbitrator does not have jurisdiction over the disputed issues.

196. In summary, therefore, I do not believe that the provisions of the 2000 Procedure relied upon by the claimant advance matters at all. They do not in any way undermine or detract from the conclusions I have already reached in relation to the jurisdiction of the arbitrator to deal with the disputed issues.

Other Observations

197. While not determinative in any way of this application, I cannot conclude this judgment without observing that it would be surprising if I had reached a different conclusion on the scope of the arbitrator's jurisdiction in light of the approach which the Irish courts have taken to the interpretation and enforcement of arbitration agreements. The Irish courts have consistently applied the principles derived from the decision of the House of Lords in *Fiona Trust & Holding Corporation & ors v. Privalov & ors* [2007] 4 All ER 951. The Irish decisions which applied those principles and the principles themselves were discussed by me in a number of judgment including *K & J Townmore Construction Limited v. Kildare and Wicklow Education and Training Board* [2018] IEHC 770 (*'Townmore (No. 1)'), K & J Townmore Construction Limited v. Kildare and Wicklow Education and Training Board* [2019] IEHC [insert] (*'Townmore (No. 2)'*) and *XPL Engineering Limited v. K & J Townmore Construction Limited* [2019] IEHC [665].

198. One of the principles discussed in those cases is that, when construing an arbitration agreement, the court should start from an assumption or presumption that the parties are likely to have intended any dispute arising out of the relationship between them to be decided by the same body or tribunal. In other words, there is an assumption or presumption that the parties intended a "one-stop shop" for adjudicating their disputes. While not directly relevant to the matters in dispute on this application, as the respondent accepted that the disputed issues could have been referred to arbitration but were not, the principles discussed and applied in these cases are instructive. It would be a surprising (but not impossible) outcome if the respondent were permitted to rely on points or arguments by way of defence but that the claimant was not permitted to respond to those points of defence by raising issues which both parties accept fall within the scope of the arbitration agreement. As it happens, I have concluded that, properly construed, the notice to refer did refer all of the issues which the respondent has sought to raise by way of defence and also those points which the claimant has sought to raise by way of response to those defences.

Arbitrator's Ruling

199. I have reached these conclusions without reference to the arbitrator's ruling on jurisdiction. The arbitrator and I have reached the same conclusion, namely, that the arbitrator does have jurisdiction in relation to the issues concerning clause 12 of the subcontract and the determinations made by the respondent under that provision. We have done so for similar but not identical reasons. The main point of departure, I think, is the route adopted by the arbitrator in examining the exchanges between the parties after the 9th March, 2011 claim. The arbitrator came to the view that the description of the "*said dispute*" in the notice to refer was ambiguous and that she was entitled, therefore, to look at the subsequent exchanges between the parties. I have concluded that it is not necessary to find an ambiguity in order to consider the exchanges between the parties as to the reference to arbitration and that such exchanges form part of the background or matrix of fact to which regard may be had in the construction of the reference, irrespective of any ambiguity. This is a minor point of difference between the approach taken by the arbitrator and the approach taken by me. We have reached the same conclusion but by a slightly different route. There is no doubt that the route taken by me took considerably longer than the route taken by the arbitrator, with commendable expedition and efficiency on her part.

Summary of Conclusions

200. In summary, I have reached the following conclusions:-

201. In deciding an application in relation to jurisdiction under Article 16(3) of the Model Law, the court is exercising an original and not an appellate jurisdiction. It is not conducting an appeal or a review but a complete de novo rehearing on the question of jurisdiction. The court's function under Article 16(3) is "*to decide the matter*". In doing so, the court applies the "*full judicial consideration*" approach. The standard to be applied by the court in deciding the question of jurisdiction is the normal standard applied in civil cases, namely, the court must decide the question of jurisdiction on the balance of probabilities. The court may consider such evidence as it sees fit and is not bound by the submissions made to the arbitrator or the evidence before him or her. The court does not exercise any deference to the decision of the arbitrator. The court may have regard to the reasoning and findings of the arbitrator, if they are helpful, but the court is neither bound nor restricted by them.

202. In deciding the question of jurisdiction, I have considered a large number of authorities and have set out in this judgment what appeared to me to be the guiding legal principles applicable to the construction of a notice referring a dispute to arbitration and to the ascertainment of the scope or ambit of the dispute referred.

203. I have applied these guiding principles to the facts of this case. Having done so, I have concluded that, on the correct construction of the notice to refer, the contested issues were referred to arbitration by the claimant and that the arbitrator does have jurisdiction to consider the issues which are now set out in the amended statement of case delivered

on 29th March, 2018 on foot of the further directions given by the arbitrator that day following her ruling on jurisdiction.

204. I have concluded that the arbitrator was correct in ruling that she had jurisdiction in relation to those contested issues and that the arbitrator has jurisdiction in relation to those issues, albeit on slightly different grounds to those relied upon by the arbitrator.

205. For these reasons, I reject the respondent's application for an order deciding that the arbitrator does not have jurisdiction over the contested issues.

206. Finally, I wish to thank counsel and solicitors for the parties for the excellent written and oral submissions which I received in this case for which I am very grateful.