[2013] JMCA Civ 44

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 133/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**Y P SEATON & ASSOCIATES COMPANY LIMITED**	**APPELLANT**
AND	**THE NATIONAL HOUSING TRUST**	**RESPONDENT**

Dr Lloyd G Barnett and Miss Anna Maria Gracie instructed by Rattray, Patterson, Rattray for the appellant

W John Vassell QC instructed by DunnCox for the respondent

15, 16, 17 May 2012 and 22 November 2013

HARRIS JA

[1] I have read in draft the judgment of my sister McIntosh JA. I agree with her reasoning and conclusion and have nothing to add.

DUKHARAN JA

[2] I too have read the draft judgment of McIntosh JA and agree with her reasoning and conclusion. There is nothing that I can add.

MCINTOSH JA

Introduction

[3] On 28 August 1995 the appellant and the respondent entered into a Loan Agreement by virtue of which the respondent (also referred to hereafter as the NHT) was to make available to the appellant approximately $187,000,000.00 to partially finance the construction of 259 housing solutions in a housing development project in East Prospect, St Thomas on lands owned by the appellant. The loan was to be repaid by the sale of completed units or lots to the respondent which would then sell them to its contributors.

[4] The project commenced in about November of 1995 and, in accordance with the provisions of the agreement, completion was to be 20 months after the first advance of funds to the appellant by the respondent. For a variety of reasons concerning which no reference need be made in this introduction, the project was never completed and the construction site was closed in October 1997. It is common ground that at that date only some of the housing units had been completed but the respondent did not share the appellant's view that by then the project was near completion.

[5] Approximately six months later, the NHT purported to terminate the agreement by notice to the appellant dated 29 April 1998 setting out provisions of the agreement upon which it relied. Thereafter, a number of meetings were held with a view to resolving disputes which had arisen and the parties eventually arrived at a settlement in

an agreement dated 27 July 1999, referred to as the Settlement (or Compromise) Agreement.

[6] As stated in the Settlement Agreement its purpose was to facilitate the handing over of the project to the NHT, for completion as the NHT saw fit, so as to enable the NHT to be paid all sums due and payable to it by the appellant and to keep its commitment to sell units in the project to its contributors. The agreement also provided for the acceptance of "[T]he Project account" prepared by the NHT as final:-

> "SAVE AND EXCEPT for the following issues:
>
> (a) INTEREST YPS and NHT have agreed to refer to arbitration the interest portion of this statement shown as Twenty-seven Million Two Hundred and Fifty-five Thousand Nine Hundred and Nineteen Dollars and Ninety-two cents ($27,255,919.92) as at the 18th day of January, 1999.
>
> (b) PROFIT YPS and NHT have also agreed to refer to arbitration the issue of the contractor's profit which is provided for in the agreement at a rate of 14.8%
>
> (c) …
>
> (d) … "

These issues were accordingly submitted to arbitration and in a decision handed down on 12 July 2005 the arbitrator refused the respondent's claim for interest and awarded the sum of $24,325,000.00 to the appellant for profit and risk. He gave reasons for his decision.

[7] In December 2005, the respondent paid the sum awarded to the appellant but the appellant, being dissatisfied that interest was not included in the award, filed a claim in the Supreme Court seeking an order that the question of interest upon the sum for profit be remitted to the arbitrator pursuant to section 11 (1) of the Arbitration Act on the ground that the arbitrator fell into error when he determined that no interest was payable because "none was claimed/pleaded".

[8] After due consideration of the claim, Marva McIntosh J remitted the matter to the arbitrator, on 22 January 2007, "to consider and arbitrate on the issue of interest on the profit awarded" and, having complied with that directive, the arbitrator then published a Supplementary Award on 11 May 2007 in which he made an award of $214,512,232.76 to the appellant as compound interest for the period 30 October 1997 to January 2007. This time the dissatisfaction was the respondent's, resulting in its fixed date claim form filed in the Supreme Court on 24 July 2007 seeking orders that the Supplementary Arbitration Award be set aside and that the matter be remitted to the arbitrator "to reconsider and arbitrate on the issue of interest in accordance with the laws of Jamaica".

[9] The claim came up for hearing in chambers on 10 and 11 April 2008 and in a judgment delivered on 11 September 2009 the learned judge held that the arbitrator "acted in excess of his jurisdiction in awarding compound interest on contractor's profit and thereby misconducted himself". The learned judge therefore set aside the award of compound interest and remitted the matter to the arbitrator for him "to reconsider

the rate of simple interest to be applied and the date from which the computation should commence". This is the decision which the appellant now seeks to set aside.

The appeal

[10] In its amended notice of appeal filed on 23 December 2009 the appellant challenged the learned judge's findings of fact and law and formulated its complaints as follows:

> "(a) The Learned Judge erred on the facts and arrived at conclusions contrary to the evidence in that:-
>
> (i) The learned judge held that the Agreement entered into on 27th July 1999 terminated the 1995 Loan Agreement.
>
> (ii) The Learned Arbitrator, in the Final Award dated 12th July 2005, which is unchallenged, found that the contractor's profit and risk was payable in installments (see paragraphs 3.2.7 page 23 of the Final Award).
>
> (iii) On consideration of the provisions of the Loan Agreement with regard to the Developer, it is plain that the parties envisaged that the applicable rate of interest payable by the Trust to the Developer was the commercial bank rate and not the interest rate prescribed by the Judicature (Supreme Court) Act.
>
> (iv) The applicable interest rate in respect of profit owed to the Developer was interest at the commercial bank rate as this represented the true cost to the Developer of being kept out of his money.

And in holding that:-

(v) In the award referred to by the arbitrator, he was then dealing with interest which might have been due to NHT because of the cessation of work by YPSA and had nothing to do with the award of interest on contractor's profit.

(vi) It is quite clear that the arbitrator accepted the 30th October, 1997 as the date of completion of the project. This I think is clearly wrong as the Compromised Agreement between the parties was to 'facilitate the handover of the East Prospect Phase II housing project (the Project) by YPS to NHT for completion as NHT sees fit.' This in my view marked the termination of the 1995 Loan Agreement.

(vii) I do not believe that August 4, 1998 could also be considered to be an appropriate starting point. Any sums requested in August 1998 could not therefore be applied as stated, as work on the project had ceased in 1997.

(b) The Learned Judge erred in law in:-

(i) Failing to find that the nature of the contractual and business relationship of the parties implied that compound interest was applicable;

(ii) In [sic] finding that the Arbitrator was guilty of misconduct in assuming the jurisdiction to award compound interest in that he did not have that power by the terms of the reference or submission or by general law;

(iii) In [sic] determining that there was an error on the face of the award by having regard to the Loan Agreement of May 1995 as this was not incorporated into the award;

(iv) In [sic] finding that the proviso to section 3 of the Law Reform (Miscellaneous Provisions) Act excluded the Court and by extension an Arbitrator from awarding compound interest, whereas that section was inapplicable to any debt upon which interest is

payable as of right by virtue of any agreement or otherwise.

(v) In [sic] failing to take into account that by virtue of the nature of the relationship between the parties and the subject-matter of the transaction as well as the provisions of the relevant Agreement that the rate of interest should be the same rate 'as the Developer shall pay its bankers on any borrowed [sic] for the Development', compound interest was applicable."

[11] The appellant therefore seeks the following:

1. That the order remitting the matter to the arbitrator to reconsider (a) the rate of simple interest to be applied and (b) the date from which the computation should commence be set aside; and

2. That the costs in the Court of Appeal and in the Supreme Court be paid by the respondent to the appellant and be taxed if not agreed.

The respondent's reaction to the notice of appeal

[12] The respondent filed a counter-notice of appeal on 31 March 2010 supporting the decision of the learned judge and contending that in addition to the reasons advanced in his judgment the judge's decision should also be affirmed on the ground that:

"(a) No interest was payable on the amount determined for profit by the Arbitrator because the position at

> the time of the May 2007 Supplementary Arbitration Award was that the sum of $24,325,000.00 for profit under the July 2005 Arbitration Award had already been paid within a period of six months of the date of the July 2005 Arbitration Award in accordance with the terms of the July 27, 1999 Compromise Agreement and the terms of reference or submission to arbitration. The Respondent's liability for profit had therefore been discharged, and no interest was payable thereon. Alternatively, the Respondent's liability for interest would only be in relation to the period between the date of the July 2005 Arbitration Award and the date of the actual payment thereof."

[13] Although at first reading, the grounds of appeal, in all their component parts, appear to be lengthy, on close examination they reveal one central issue for the court's consideration namely:

Was the learned judge correct in his conclusion that the arbitrator misconducted himself:

> (i) in awarding compound interest to the appellant in his Supplementary Award as he lacked the jurisdiction to do so;
> (ii) in his decision regarding the period for which interest was to be computed and
> (iii) in the rate he used in his computation of that interest?

This accords with the learned judge's summary of the respondent's claim before him to be found at page 7 of his judgment. It reads as follows:

> "The pleadings made on behalf of the Claimant disclose three areas of challenge to the award of interest in the Supplementary Arbitration Award, namely:

1. The date from which the interest is to be calculated.
2. The award of compound interest.
3. The rate of interest applied."

The learned judge had arrived at his decision after dealing separately with each of these three areas.

Discussion

[14] For the most part, the appeal was argued in keeping with the issue identified as opposed to separate submissions on each ground and I propose to adopt a similar approach in my review of the arguments.

(i) The award of compound interest

[15] The main thrust of Dr Barnett's submission on this aspect of the appeal was that the respondent's reliance on section 3 of the Law Reform (Miscellaneous Provisions) Act (hereafter 'the Act') to support its contention that the arbitrator had no jurisdiction to award compound interest was misconceived in that although the section does not confer a right to award compound interest, section 3(b) confers a power to award a rate of interest higher than the statutory rate providing that nothing in this section:

> "*shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise;"*

Counsel submitted that the arbitrator's unchallenged finding was that there was a debt for the NHT to pay to the appellant and, counsel continued, by virtue of the contract concluded by the parties, compound interest was payable to the appellant as of right.

In those circumstances, Dr Barnett argued, the arbitrator's power to award compound interest was not restricted by the statute.

[16] Dr Barnett contended that the arbitrator derives his jurisdiction not from statute but from the submission which requires him to deal with the dispute according to the law of the land, be it statute, common law or equity and he referred the court to **Chandris v Isbrandtsen-Moller** [1951] 1 KB 240 in support of this argument. It was his submission that based on the principles enunciated in **Hadley and Anor v Baxendale and Ors** [1843-1860] All ER Rep 461 the arbitrator was entitled in law to award compound interest where it represents the true loss to the party. He contended that the respondent would have had the benefit of funds due to the appellant for a protracted time, thereby being unjustly enriched and it would be unjust to ignore the commercial reality that the appellant would have been unlikely to obtain any advances of funds without having to pay compound interest.

[17] As further support for his submission, counsel referred to decisions of this court and to the Privy Council decision in **Financial Institutions Services Ltd v Negril Negril Holdings Ltd and Another** PC App No 37/2003 (22 July 2004) in which it has been held that commercial banks in Jamaica apply compound interest, as a practice, to moneys advanced by them. He also relied on authorities such as **Tate & Lyle Food and Distribution Ltd v Greater London Council and Anor** [1981] 3 All ER 716 and **British Caribbean Ins Co Ltd v Perrier** SCCA No 14/1994, delivered 26 May 1996 where it has been held that there is jurisdiction in the court and by extension the

arbitrator to award interest on a commercial basis. It was against that background that he brought the attention of the court to the decision of the House of Lords in **Sempra Metals Limited (formerly Metallgesellschaft Limited) v Her Majesty's Commissioners of Inland Revenue and Anor** [2007] UKHL 34 which counsel described as a clear decision on the approach of the courts to awards of compound interest. Therefore, it was the appellant's contention that the arbitrator did not exceed his jurisdiction and was not guilty of misconduct in the Supplemental Award he made.

[18] The force of these arguments was met with learned Queen's Counsel's submission that the issue regarding compound interest as it arises in this case does not strictly require the court to render a decision as to the scope and extent of the power of an arbitrator at common law or in equity or under the statute to award compound interest because the arbitrator did not base his decision on those jurisdictions but rather on the contract between the parties so that the award stands or falls upon the question of whether the terms of the contract justified an award of compound interest. He was fortified in this view, according to his submission, by the reason given in clause 3.5 of the arbitrator's Supplementary Award. It reads as follows:

> "3.5 As far as the right to compound the interest payments are [sic] concerned, I accepted the Respondent's arguments that the parties contemplated this form in their agreements and did not find [sic] Claimant's submissions against my awarding compound interest convincing. Indeed, I am of the view that not to award compound interest would not, as one would aspire, restore the complainant to his position prior to the loss of such monies."

[19] Learned Queen's Counsel contended that this clause could only mean that in the arbitrator's view the parties expressly or impliedly agreed to compound interest in the loan agreement. It is therefore to the terms of the 1995 loan agreement that the court should look in order to determine whether the arbitrator had the jurisdiction to award compound interest and not to the scope of the arbitrator's power as derived from statute, common law or equity, learned Queen's Counsel submitted, since he did not arrive at his conclusions by any of those routes.

[20] This view led Mr Vassell QC to make lengthy submissions on the terms of the agreement between the parties and the principles governing the implication of terms into a contract, concerning which he relied on the text Chitty on Contracts (30th edn) volume 1 at paragraphs 13-004 – 010 and 13-023. It was his submission that, as the learned judge had quite rightly found, there was no provision in the 1995 Loan Agreement or the Compromise Agreement for interest to be compounded (see page 9 of the judgment) which meant that the arbitrator must have implied such a term, but, argued learned Queen's Counsel, a term that compound interest was payable in relation to contractor's profit and risk cannot properly be implied into the arrangement in the instant case. He submitted that when the parties intended payments of compound interest they made explicit provision to that effect in their agreement. There were also clauses which provided for the payment of interest where there had been default in making a payment due under the agreement, but none made provisions for that interest to be compounded. The arbitrator would therefore have erred if he placed any reliance on any implied term for the payment of compound interest, learned Queen's

Counsel submitted. Further, he contended, in concluding that it was necessary to award compound interest to put the appellant in the position that it was in before the loss, the arbitrator misconstrued the express terms of the agreement and/or misapprehended the law as to the implication of terms into a contract and thereby reached the erroneous conclusions in his reasons.

[21] Mr Vassell QC noted that the English case of **Sempra** cited by the appellant, being concerned with the state of the law in England, was not applicable to the instant case which obliged the arbitrator to follow Jamaican law as propounded by Forte P in **Joy Charlton & Others v Air Jamaica & Others** SCCA No 27/1996, in a judgment delivered on 29 July 1997. That case, Mr Vassell QC submitted, made it clear that the court has no jurisdiction to award damages for failure to pay or for late payment, save for a statutory jurisdiction which did not include the payment of compound interest. Additionally, the interest component in **Sempra** was in relation to unjust enrichment and not for a debt as in this case, his submission continued, so that it does not affect the arbitrator's decision, which is based on contract. The arbitrator was applying the terms of the contract as he construed them, assuming them to give him the jurisdiction to award compound interest and that, learned Queen's Counsel contended, was a material error which justified setting aside the award and remitting it for reconsideration.

[22] While Dr Barnett offered no challenge to the respondent's outline of the principles for the implication of a term into a contract it was his contention that the

submission was based on a wrong hypothesis as the arbitrator was not interpreting a term of the contract. He also quite correctly pointed out that the court had before it different considerations in the **Joy Charlton** case, none of which are relevant to the instant case. Ultimately, it was counsel's contention that this challenge to the arbitrator's award is unsustainable.

Analysis and conclusion

[23] I begin with a reference to ***Tehno-Impex v Gebr van Weelde Scheepvaartkantoor BV*** [1981] 2 All ER 669 in which the arbitrator's power to award interest was discussed by the court. Lord Denning MR in his judgment expressed the opinion that "[A]rbitrators have a wide discretion to award interest whenever it is just and equitable to do so" and further, speaking of compound interest, said:

> "In any case where interest can be awarded, then it is in the discretion of the arbitrator to award it with yearly or half yearly rests. That is what banks do on overdrafts."

The learned Master of the Rolls reviewed some earlier cases to include **In Re Badger** (1819) 2 B & Ald 691 which his Lordship said was decided by a strong court involving "some of the best judges ever", giving guidance to arbitrators to award interest; and **Chandris v Isbrandtsen-Moller** (above) relied on by the learned judge in the instant case. It seems to me that these and other authorities brought to the attention of the court are clear on the discretion which resides in the arbitrator to award interest and, where the justice of the case requires it, he may compound that interest.

[24] Although the arbitrator did not specifically state that he had based his conclusions on statutory, common law or equitable considerations, I am not persuaded that his decisions are to be examined without recourse to those jurisdictions. Contrary to the view taken by learned Queen's Counsel, that is clear to me from the reason expressed at clause 3.5 of his Supplementary Award (referred to above). It showed that the arbitrator was rightly concerned with arriving at a just and equitable result between the parties (see **Hadley and Anor v Baxendale and Ors**) and this he was clearly satisfied that he had done, having taken into account the submissions of the parties and the need to "restore the complainant to his position prior to the loss of such monies".

[25] While I agree that the clauses in the agreement which speak to the payment of a commercial rate of interest cannot in and of themselves be treated as provisions for interest to be compounded, they may certainly be regarded as strong indications of the thinking of the parties along that line. That is what I understand Dr Barnett to mean when he submitted that a close perusal of the loan agreement showed the parties' intention that interest on outstanding amounts under their agreement should be truly compensatory to reflect restitution in their contractual arrangement. With this I entirely agree. I must add too that in my view, the arbitrator had to consider both the 1995 Loan Agreement and the Compromise Agreement in arriving at his decision, the latter only replacing some of the terms of the former. It also seems to me that Dr Barnett's submission that the respondent's argument on implied terms was based on a wrong hypothesis that the arbitrator was interpreting a term of their contract is correct. I am

in full agreement with that view and would hold that those arguments and the cases relied on by the respondent are not of assistance in determining the issue in the instant case.

[26] Following the principles laid down in **Hadley and Onor v Baxendale and Ors**, it is clear that where under a contract, money has been kept from the person entitled, the loss of its use or not having it available is a basis upon which compensation may properly be assessed. The material before the arbitrator did give rise to those considerations and it seems to me that it was open to him in the exercise of his discretion to determine that an award of compound interest was appropriate in those circumstances.

[27] Several other authorities were brought to the attention of the court which, in my view, support the submissions on behalf of the appellant that the arbitrator had the jurisdiction to award compound interest and at this juncture I wish to make particular mention of the **Sempra** case. Lord Hope of Craighead in his judgment, traced the jurisdictional routes, in English law, to an award of interest, which he said were to be found in statute, equity and the common law. It seems to me that our law also followed that route but the respondent's argument as I understand it is that we are yet to reach to the point in the journey where **Sempra** has taken the English courts. Nevertheless, it is my view that there is much guidance to be found in the judgments of their Lordships and I rely on the general propositions relating to compound interest contained therein insofar as they are relevant to the issue in the instant case.

[28] The claim in **Sempra**, was a claim for restitution presented as a claim for the time value of money by which the claimant argued that the defendant had been unjustly enriched. The question was whether the award was to be in the form of simple interest or compound interest. The claimant argued that the sum fell to be calculated by compounding interest over that period. Lord Hope was of the opinion that "[S]imple interest is an artificial construct which has no relation to the way money is obtained or turned to account in the real world." He agreed with Lord Nicholls of Birkenhead that there is now ample authority that interest losses which are recoverable as damages should be calculated on a compound basis where the evidence shows that this is appropriate and that the same rule should be applied to the restitutionary remedy at common law. Lord Hope agreed with Lord Nicholls that the loss on the late payment of a debt may well include an element of compound interest and stated that in English law, the fundamental point is that "[C]ompound interest is a necessary and very familiar fact of commercial life" and that the obvious reason for awarding compound interest is that it reflects economic reality.

[29] Lord Nicholls had had this to say:

> "We live in a world where interest payments for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms. This is the daily experience of everyone, whether borrowing money on overdrafts or credit cards or mortgages or shopping around for the best rates when depositing savings with banks or building societies. If the law is to achieve a fair and just outcome when assessing financial loss it must recognize and give effect to this reality."

His Lordship observed that, unhappily, to a significant extent, the law remains out-of-step with everyday life in the 21st century. It was his view that "an award of compound interest is necessary to achieve full restitution and, hence, a just result".

[30] The views expressed are not out-of-step with decisions from our jurisdiction as our courts too have recognized the commercial reality of the day and cases such as **Financial Institutions Services Ltd v Negril Negril Holdings Ltd**; **Tate & Lyle Food and Distribution Ltd v Greater London Council and Anor**; and **British Caribbean Ins Co Ltd v Perrier** (all referred to above) support the jurisdiction of the court (and by extension, the arbitrator) to award interest on a commercial basis. That was the general law which the arbitrator was obliged to follow in coming to his decision.

[31] His powers not being in any way circumscribed by the Act, the arbitrator had the jurisdiction to make an award of compound interest in accordance with the general law applicable to the dispute submitted to him. He was required to utilize his experience and expertise and to exercise his discretion to do what was just and equitable in resolving the dispute between the parties. In the final analysis, the respondent's challenge to the arbitrator's award of compound interest was not well founded and the learned trial judge was clearly wrong in holding that he lacked the jurisdiction to make the award. I would hold that the arbitrator had power to do justice and apply common sense to the appellant's claim, which I am satisfied would empower him to make an award of compound interest in the circumstances of this case.

(ii) The date from which interest was to be awarded

[32] Dr Barnett contended that the issue of the date from which interest was to accrue was for the determination of the arbitrator and that no error of law has been identified by the respondent with respect to the date selected by him. Counsel submitted that the arbitrator had determined on the material available to him that contractor's profit and risk was payable in installments on the completion of each unit and when the developer ceased working on the project the sums due to it should be computed as at that date.

[33] It was also Dr Barnett's submission that the scheme of payment provided for in the agreement between the parties was for payment to be made within a reasonable time of the completion of each phase, so that when the parties agreed that the appellant should hand over the project on 30 October 1997 the settling of a final account between them should have taken place promptly and the appropriate certificate issued. Dr Barnett submitted that when certificate number 19 was provided on 28 July 1998 and the arbitrator's award made on 12 July 2005 the liability to the appellant had already existed from 1997.

[34] On the other hand, learned Queen's Counsel contended that in accepting 30 October 1997 as the starting point for the computation of interest which the learned trial judge found that he did, the arbitrator clearly showed that he had not properly adjudicated on the question as at that date, the project had yet to be completed. In any event, Mr Vassell QC submitted, the arbitrator would have erred in linking the

entitlement to interest on profits to the date the appellant ceased working on the project and closed the site. The learned judge was therefore well within his right, taking guidance from the judgment of Lord Donaldson MR in **King and Another v Thomas McKenna Ltd and Another** [1991] 1 All ER 653 at page 660 (referred to below) to remit the matter to the arbitrator for reconsideration, Mr Vassell QC submitted.

[35] Learned Queen's Counsel pointed out that the learned trial judge did not pronounce upon the date but left it to the arbitrator to arrive at a date other than 30 October 1997 and the alternative date of 4 August 1998 that were canvassed before him by the appellant. Mr Vassell further submitted that factors would need to be taken into account for this determination which were not before the learned trial judge but the court could take the view that the date the arbitrator used was definitely wrong and that that issue should be returned to him.

[36] Additionally, Mr Vassell QC submitted, the contemplation of the parties was that there would be a taking of accounts on each side and the liability of one to the other would depend on the taking of the accounts and interest would not take effect until six months after the striking of a balance. Mr Vassell QC argued that the arbitrator in his Supplemental Award clearly failed to appreciate these matters and there is every indication that there was inadequate adjudication upon them to justify the learned trial judge's decision to remit the matter to the arbitrator for further consideration and determination as to when the interest should start.

Analysis and conclusion

[37] The learned judge had rejected the arbitrator's reasoning as to the date from which interest was to be computed. At page 8 of his judgment he had this to say:

> "In accepting October 30, 1997 as the date from which interest should be calculated [sic] gave the following as his reason:
>
> > '3.3 In terms of the date(s) from which interest should have been payable, I agreed with the Respondent's arguments over those of the Respondent [sic] mainly because the Respondent reflected the opinions and reasons expressed by me in my award.' "

He thereafter concluded that "[I]t is quite clear that the arbitrator accepted the 30th October, 1997 as the date of completion of the project." To my mind, there is no basis for that conclusion. The submission to the arbitrator would have made that clear to him. The developer had completed involvement with the project but it was beyond dispute that the project was not complete, even though the parties did not agree on the stage it had then reached. That was one of the purposes of the Compromise Agreement – to facilitate the completion of the project by the NHT. The learned judge also seemed to have found it significant that the arbitrator did not indicate his views on the alternative date of 4 August 1998 but simply opted to accept the October date. He did not find that date to be feasible and clearly felt that it had not been addressed by the arbitrator, but, in my view, it was for the arbitrator to determine the appropriate date and it was clear that he rejected that August date. It seems to me that the arbitrator's selection of the October date was based on the developer's completion of its part in the

construction on the site at which point the basis for its entitlement to profit would have ceased. What was owed to the developer for profit and risk was to be determined then as well as the interest due on that sum.

[38] In dealing with this area the learned trial judge expressed the view that the award to which the arbitrator referred in his reasoning at clause 3.3 (above) was his main award where he was dealing with interest which might have been due to the NHT and had nothing to do with interest on contractor's profit (see page 8 of his judgment). This, it seems to me, was to show that the opinions and reasons to which the arbitrator referred could have had no bearing on the date for the computation of the interest on the contractor's profit and risk. However, I disagree. The footnote to clause 3.3 points to page 13 of the main award where the opinions and reasons to which the arbitrator referred are revealed. I am of the view that at that point in his reasoning the arbitrator was considering the route to be taken or the course to be followed in making a determination as to whether interest was due. That course had led him to a determination that no interest should have been awarded to the respondent on the calculations before him and none was to be awarded to the appellant in the mistaken belief that he had no jurisdiction to do so as no claim for interest had been made or pleaded by the appellant. It was clearly the arbitrator's view that the submissions made by the appellant were more in keeping with the opinions he had formed at the time of those considerations but for the error in law that he had then made. In the final analysis, it was for the arbitrator in his assessment of the material before him to come

to a determination as to the appropriate period for the computation of the interest due to the appellant on the sum he had awarded for contractor's profit and risk.

[39] **In Demolition & Construction Co Ltd v Kent River Board** (1963) 2 Lloyd's Rep 7 the court held that unless the arbitrator sets out in his award the whole of the evidence relied upon and then sets out the reasons for his conclusion and those reasons are not justified by the evidence then the award may not be attacked on the basis of error in law on its face. In the instant case, the submissions to which the arbitrator referred as being made by both sides were not set out in his reasons. Therefore, it seems to me that the learned trial judge did not have before him any material from which to arrive at a conclusion that the arbitrator had erred in relation to the date he selected. There was, in my opinion, no basis for the attack on his determination of the applicable date for the computation of the interest payable to the appellant.

(iii) The rate of interest awarded

[40] Dr Barnett maintained that this contract was quintessentially a commercial arrangement particularly suitable for an arbitrator whom the parties selected for his expertise in the particular area. Counsel submitted that the arbitrator was required to use his expertise and experience to make an assessment of what would be an appropriate method of compensation for late payment of the award. It was his submission that a perusal of the loan agreement shows that the parties had clearly intended that outstanding amounts owed under the agreement should attract interest at the rate which was truly compensatory providing restitution in their contractual

relationship and that is what the arbitrator endeavoured to achieve. This was in keeping with cases such as **British Caribbean Ins Co Ltd v Perrier** in which this court upheld the principle that the *restitutio in integrum* approach would be adopted, he argued.

[41] Counsel referred to clause 7.03 of the agreement and submitted that the rate fixed for outstanding amounts was the NHT's investment rate. It was his further submission that the parties plainly envisaged that the applicable rate of interest payable to the appellant was the commercial bank rate. He referred to the provisions of section 5.05 and 11.11 of the agreement as demonstrative of the point, providing as they did for interest on outstanding amounts to be paid "at the same rate of interest as the Developer shall pay to its bankers on any funds borrowed for the development" and section 14.05 providing that interest shall accrue on the outstanding balance calculated at the weighted average rate of the most recent treasury bill issue from the due date until the date of payment. This, Dr Barnett argued, is to be viewed with the numerous authorities which support the proposition that commercial interest may be awarded to reflect the actual loss to the parties.

[42] Mr Vassell QC contended that in relation to the issue of the applicable rate to be utilized in the computation of interest what the learned judge was basically saying was that it was for the arbitrator to decide whether it was to be the commercial rate or the judgment debtor rate of interest. The learned judge did not reject the commercial rate nor did he say that it should be that rate. He clearly took the view that it would be best

for the parties to return to the arbitrator who would then decide after hearing submissions.

Analysis

[43] It seems to me that implicit in the submission of learned Queen's Counsel (at paragraph [40] above) is an acceptance that it was open to the arbitrator to decide that a commercial rate of interest was appropriate in the circumstances of this case. The view he expressed, that the learned judge took, accords with what the arbitrator had done. He had heard submissions after which he had made his decision so that a referral to him to do what he had already done seems pointless.

Did the arbitrator's Supplementary Award disclose a failure to properly adjudicate on the questions raised in (ii) and (iii) above?

[44] Mr Vassell QC, agreed with the learned judge's findings that the approach of the arbitrator to the issues of the date and rate of interest computation disclosed a less than careful consideration such as would be expected by the parties and that warranted the matters being remitted to him for proper consideration. At page 11 of his judgment the learned judge had this to say:

> "Since the arbitrator derives his power to ward [sic] interest from the Law Reform (Miscellaneous Provisions) Act then the question of rate of interest must also be reconsidered. This is so as, based on his award of compound interest he could not have seriously if at all, considered the provisions of the Judicature (Supreme Court) (Rates of Interest on Judgment Debts) Order 1999."

He then adopted the words of Lord Donaldson MR who in **King v Thomas** had expressed the opinion that the court had jurisdiction to remit a matter to the arbitrator in any case where:

> "…notwithstanding that the arbitrator had acted with complete propriety, some aspect of the dispute which had been the subject of the reference had not, due to mishap or misunderstanding, been considered and adjudicated upon as fully as or in a manner which the parties were entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the arbitrator."

Taking guidance from those words the learned trial judge had concluded that the arbitrator had not properly adjudicated on the submission to him and should therefore be required to reconsider his award.

[45] However, Lord Donaldson MR had continued to state that there was a vital qualification to the jurisdiction to remit and that is that:

> "… it is designed to remedy deviations from the route which the reference should have taken towards its destination (the award), and not to remedy a situation in which, despite having followed an unimpeachable route, the arbitrators have made errors of fact or law and as a result have reached a destination which was not that which the court would have reached."

[46] In the instant case was there a failure to adjudicate upon the issues as fully or in a manner as the parties were entitled to expect? Dr Barnett challenged this finding contending that the learned trial judge had misdirected himself in this regard as it was clear from the arbitrator's reasoning and conclusion that he had invited and considered

submissions from the parties and studied the detailed calculations submitted by the appellant. Dr Barnett supported this contention by an extract from the arbitrator's reasons in his Supplementary Award as follows:

> "I have studied the evidence submitted by the Parties and other relevant documents presented and have heard, received and carefully considered the submissions of the Parties and addresses of Counsel preparatory to the publication hereof of my Award."

[47] Counsel further submitted that the arbitrator had stated in his reasons that he "took note of the legal and other precedents put forward by the Respondent in support of [its] arguments and also on the presentation of the Claimant in respect of [its] counter-arguments". Dr Barnett contended that there was therefore no basis for the learned judge's finding that the arbitrator had not fully considered the matter.

Was the arbitrator's award to be set aside for error on its face?

[48] Learned Queen's Counsel argued that the arbitrator's Supplementary Award was bad on its face as he had no jurisdiction to make an award of compound interest and that this gave the learned trial judge jurisdiction to set it aside. However, as rightly submitted by Dr Barnett, the general rule is that the court can only set aside an arbitrator's award on the ground that there is error on its face if the arbitrator has based his award on some erroneously stated legal proposition (see for example Halsbury's Laws of England (3rd edn) volume 2 para 127; **Insurance Co of the West Indies v G G Records Ltd** (1987) 24 JLR 350; and **Marley and Plant Ltd v Mutual Housing Services Limited** (1988) 25 JLR 38). In the instant case, I accept as sound

Dr Barnett's submission that there is no erroneously stated principle of law disclosing any error on the face of the award which would require its remission to the arbitrator.

Conclusion

[49] I agree entirely with Dr Barnett's submission and reject the learned judge's conclusion that there was a need to remit the matter to the arbitrator for reconsideration on the basis that he had not fully adjudicated on the issues. It may well be that the respondent would have wished for or expected a different conclusion but the award cannot be attacked because the respondent would have liked or preferred a different outcome (see **King v Thomas**).

[50] In my opinion, nothing in the Supplementary Award and the respondent's submissions pertaining thereto disclosed any misconduct on the part of the arbitrator as found by the learned trial judge and the arbitrator having made a final award, the respondent is precluded from revisiting it especially in light of the agreement of the parties that the arbitrator's decision should be final and binding on them. The decision of the arbitrator ought therefore to have been confirmed.

The counter-notice of appeal

[51] Learned Queen's Counsel submitted in relation to the counter notice of appeal that under the Compromise Agreement the award was to be paid in six months, so it was paid in December 2005. It was not until January 2006 as amended in November 2006 that there was a challenge to the award. The NHT is now facing an award of in excess of $214,000,000.00 which includes all that time after it had paid. Interest

continued ticking up to January 2007, compounded, Mr Vassell QC submitted. The counter-notice is therefore asking the court to say that certainly there could be interest up to when the payment was made but after that, Mr Vassell QC contended, there was a freestanding interest payment not attached to any principal. That, learned Queen's Counsel argued, is what the court is being asked to set aside.

[52] It was Dr Barnett's response, however, that as there was no challenge to the sum awarded for profit and risk and the sole question which was remitted to the arbitrator was that concerning the interest to be paid thereon, the ground expressed in the respondent's counter-notice of appeal cannot therefore now be entertained. Further, Dr Barnett submitted, it is not correct to say that there was no challenge to the July 2005 award until 2006 as the appellant had sought to have the issue addressed before the arbitrator from October 2005.

Conclusion

[53] In the **Tehno-Impex** case Lord Denning MR offered some guidance on the issue of the timing of the payment of the principal sum and referring to the wide discretion of the arbitrator to award interest, concluded thus:

> "This discretion covers the rate of interest and the period for which it should be allowed, no matter whether the principal sum is paid before or after the arbitration has started, or before or after the award is made."

Lord Denning MR did continue to express the view that it would rarely be allowed when the principal sum has been paid before the arbitration has started and the claim is for interest *simpliciter* but that was not the position in the instant case. Taking guidance

from the learned Master of the Rolls it seems to me that the respondent's counter-notice of appeal fails and the arbitrator's decision in the exercise of his discretion should not be disturbed.

Disposal

[54] For the reasons I have endeavoured to set out above, I hold that the learned trial judge erred in the orders he made as there was no basis for his intervention in the arbitral arena. He erred in his finding that the arbitrator derives his power to award interest from the Act. This led him to the erroneous conclusion that the arbitrator had no jurisdiction to award compound interest and that in assuming that jurisdiction he had thereby misconducted himself. He also erred in his conclusion that the arbitrator had not fully adjudicated on the questions of the rate of interest to be applied and the date from which the computation of that interest should commence. I would accordingly allow this appeal, restoring the arbitrator's award and order that the appellant's costs both here and in the court below be paid by the respondent upon their agreement or after taxation.

HARRIS JA

ORDER

The appeal is allowed. Order of the learned judge is set aside and the arbitrator's Supplementary Award dated 11 May 2007 is restored. Costs both here and in the court below to the appellant to be agreed or taxed.