Michaelmas Term
[2015] UKPC 43
Privy Council Appeal No 0072 of 2014

JUDGMENT

The National Housing Trust (Appellant) *v* YP Seaton & Associates Company Limited (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Neuberger
Lord Mance
Lord Sumption
Lord Toulson
Lord Hodge

JUDGMENT GIVEN ON

19 October 2015

Heard on 3 June 2015

Appellant
Stuart Ritchie QC
Alexander Robson
(Instructed by Signature Litigation LLP)

Respondent
Karen Gough
Anna Gracie
(Instructed by Thomson Snell & Passmore LLP)

LORD MANCE: (with whom Lord Neuberger, Lord Sumption and Lord Hodge agree)

Introduction

1. This appeal is one, though not the only, unhappy sequel to the parties' initiative as long ago as 1999 to achieve an amicable settlement of disputes about an abortive joint venture relating to the Phase II development and sale of 259 housing units on land at East Prospect in St Thomas, Jamaica.

2. It concerns the jurisdiction to make and legitimacy of a supplementary award by an arbitrator, Mr Maurice J Stoppi, on 10 May 2007 of compound interest amounting to J$214,512,232.76 on a principal sum of J$24,325,000. Mr Stoppi had, by an original award dated 12 July 2005, held the principal sum to be payable by the appellant, The National Housing Trust ("the Trust"), to the respondent, YP Seaton & Associates Co Ltd ("YPSA"), and the Trust had paid it in early December 2005.

3. The Trust is a statutory body tasked with increasing and enhancing Jamaican housing stock. YPSA was controlled by Mr Seaton and carried on business as engineers, building contractors and developers. Mr Seaton owned the land to be developed, comprising some 150,000 sqm.

4. The venture, formalised in a "Loan Agreement for Construction Financing" dated 28 August 1995 ("the loan agreement"), involved the Trust lending YPSA up to J$187,316,603 to finance construction of the 259 units and associated facilities. The land was to be made available by Mr Seaton for J$14,504,000, and the Trust was to take over the units with associated facilities from YPSA for J$201,820,603, on a basis which contemplated that YPSA would receive developers' profit and risk in the sum of J$29,923,440 (14.8% of the total of the price assigned to the land and the units), making a total base selling price of J$231,744,043. The Trust was to advance 10% of the base selling price (J$23,174,404) in two instalments during the first ten months if the development was on schedule. As and when units were completed and transferred to the Trust, the remaining 90% of their sale price was to be set off in discharge of the loan balance from time to time.

5. Development commenced on or about 16 November 1995, with an original deadline for completion of the whole development of 20 months. This was extended by agreement to 30 October 1997 by when it appears that the Trust had disbursed to YPSA

J$160,866,338.88 (loan moneys) together with J$23,174,404 (10% advance of base selling price).

6. Difficulties had by then also arisen, and the development was incomplete. An extension of time could not be agreed. The parties were at odds as to how far any was due, and in particular how far the delay was YPSA's fault. By notice dated 10 September 1996, the Trust asserted defaults on YPSA's side including failure to relocate squatters. The Trust also alleged failure by YPSA to deploy sufficient resources. YPSA in return alleged bad weather and strikes or labour problems. In October 1997 YPSA ceased work and the construction site was closed. It remained so for nearly two years until July 1999.

The compromise agreement

7. By notice dated 29 April 1998 the Trust sought repayment of sums it claimed were outstanding; and on 4 August 1998 YPSA served on the Trust a notice dated 21 July 1998 to the effect that sums were owed to YPSA and due for payment within 14 days. Negotiations followed, leading to a provisional agreement recorded by the Trust in a letter to YPSA dated 17 January 1999. The letter stated:

> "… we now write to outline our understanding of the agreement for the National Housing Trust (NHT) to takeover the East Prospect Phase II housing project. The operational framework for the takeover of the project is set out for your review and agreement.
>
> (1) YP Seaton & Associates agreed to handover the project as is to the NHT as of 1999 January 18.
>
> (2) The NHT agreed to takeover the project as of 1999 January 18.
>
> (3) The project accounts prepared by the NHT and dated 1999 January 7 will be considered final subject to further agreement on the interest and profit items.
>
> a. The NHT & YPS will refer the items of interest cost beyond the contract time and profit to an arbitrator if no agreement is reached by 1999 January 31.

b. The commitment fees on the project will not be for YP Seaton & Associates' account.

(4) YP Seaton & Associates has until 1999 January 18 to make full submissions to Geta Engineers of any items of final measurement. Geta Engineers' certificate issued after 1999 January 18, will be considered final.

(5) The NHT is to take possession of the site on 1999 January 18 and complete the housing project singly, without YP Seaton & Associates' involvement. The NHT is to re-configure and sell housing solutions as it sees fit.

(6) YP Seaton & Associates is to cease its involvement with the project at handover to the NHT and the final accounts are to reflect the status at handover. There will be no accounting to YP Seaton & Associates at completion of the project.

(7) The NHT would be responsible for resolving the squatter difficulties on site. YP Seaton & Associates agreed to make additional lands, originally proposed, available to NHT to resettle the squatters.

(8) A re-measurement of the works on the date of takeover is necessary to adjust the project accounts as part of the works has deteriorated while other aspects have been vandalized. This re-measurement adjustment is to be incorporated in the adjusted final project accounts.

(9) YP Seaton & Associates will ensure that the NHT has a Power of Attorney to be able to deal with the utilities, the Tax Office and any other entities to complete all transactions on the project.

(10) After the final accounts have been agreed and issued, any debt will be settled in a three-month timeframe.

Until the agreement is prepared and signed by both parties, this letter will be evidence of our (NHT & YP Seaton & Associates) understanding. As the completion of the project is paramount, the

NHT has full authority to take possession of the project lands on 1999 January 18 and proceed with the construction and complete the project."

8. Attached to the letter dated 17 January 1999 was a statement by the Trust of the project accounts, showing the sums advanced. In it the Trust claimed interest from 30 October 1997 on the J$160,866,338.88 loan moneys, and put the value of the works done by YPSA at J$135,953,468,64. The effect was to show a net claim by the Trust of J$63,002,387.14. The Trust's interest claim was not agreed by YPSA and was if necessary to be referred to arbitration, together with a cross-claim by YPSA to profit on the works (para 3 of the letter). The value of the works was also due to be re-measured (para 8). Once accounts had been agreed and issued on this basis, any debt owed was to be settled within three months (para 10). An agreement was to be prepared and signed by the parties to formalise the provisional agreement (final para).

9. With the involvement of lawyers, the parties reached and signed a formal agreement contained in Rattray, Patterson Rattray's letter dated 27 July 1999.

"**RE: EAST PROSPECT. PHASE II**

[1] The purpose of this letter is to set out the agreements arrived at between YP Seaton & Associates Company Limited (YPS) and the National Housing Trust (NHT) to:

- facilitate the handover of the East Prospect, Phase II housing project (the Project) by YPS to NHT for completion as NHT sees fit, and

- as far as possible enable NHT to be paid all sums that are due and payable to NHT by YPS and to fulfil NHT's commitment to sell housing solutions in the Project to its contributors.

[2] THE PROJECT

The Project comprises the construction of housing solutions with associated infrastructure on two hundred and fifty-nine (259) residential lots on Land situate at East Prospect in the parish of Saint Thomas, as identified on the pre-checked survey plan prepared by Leslie Mae & Associates bearing Survey Department Examination Number 255083, for sale to NHT and/or its

nominees: and for this purpose the transfer to NHT and/or its nominees of the said 259 residential lots and the roads in the Project.

The Project includes works and modifications necessary to connect the Project to the existing sewage treatment plant. The Project does not include arrangement for the ownership of the sewage treatment plant or the upgrading, repairing and operation thereof.

[3] HAND OVER OF THE PROJECT

YPS and NHT have agreed that the effective date of the handover of the Project will be the date of execution of this letter or such other date as the parties may agree in writing.

NHT will take possession of the Project site and will take delivery of the keys for the housing units from our offices on the effective date. From the date of the execution of this letter and of the Power of Attorney to NHT, YPS will have no further involvement in or liability for the Project with the exception of:

> (a) any sums (not including profit and interest) found to be due and owing to the Trust based on the Project Account dated January 7, 1999 as adjusted when the final account is prepared;
>
> (b) any sums relating to profit and interest which are found by the Arbitrator to be outstanding under the Loan Agreement between YPS and NHT for East Prospect, Phase II.

NHT will re-configure and sell housing solutions as it sees fit and will not be required to account to YPS on completion of the Project.

NHT will be responsible for resolving the squatter difficulties on the Project. To facilitate the handover of the Project to NHT, and at no additional cost to NHT, YPS will make available additional lands in the East Prospect area (as previously identified to NHT by survey plan) for the temporary re-settlement of the persons who

are squatting on a portion of the Project lands until permanent arrangements can be made regarding the future of the squatters. All costs associated with the re-settlement of the squatters will be borne by NHT.

[4] PROJECT ACCOUNTS

The Project account prepared by NHT and dated January 7, 1999 will be considered 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 … $27,255,919.92 as at the 18 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) CERTIFICATE

YPS and NHT have agreed that GETA or an agreed Consulting Engineer is to be called upon to clarify this certificate.

(d) RE-MEASUREMENT OF WORKS

A re-measurement of the works on the date of hand over will be done to adjust the project account, which re-measurement will be incorporated in the adjusted final account for the Project.

Once the adjusted final account has been prepared and issued and the issues of interest and profit referred to

arbitration have been settled any debt owed by YPS or NHT will be settled within a six (6) months time frame. Sums not in dispute must be settled within six (6) months of the issue of the final accounts. The sums declared outstanding based on the arbitration proceedings shall be settled within six months of the arbitration decision.

[5] POWER OF ATTORNEY

YPS will execute a Power of Attorney to NHT to enable NHT to deal with the public utilities, Collector of Taxes, Land Valuation Department and any other entities to complete all transactions involving the Project.

[6] TRANSFER OF PROJECT LANDS

The Power of Attorney will authorise NHT to deal in any and every way with the Project lands including the transfer of the lands to its nominees. All costs incurred in transferring the Project lands to NHT and/or its nominees or in any way dealing with the Project lands shall be borne by NHT. YPS shall ensure however that all property taxes or outgoings on the land are current as at the date of execution of the Power of Attorney and should provide NHT with a certificate of payment of taxes in support. The Transfer Tax payable by Mr York Page Seaton in respect of the transfer of the Project lands to NHT or its nominees shall be paid by Mr Seaton by way of a non-refundable advance of the entire amount of the tax from the NHT. NHT shall be responsible for ensuring that the Transfer Tax and all other costs incurred in relation to the transfer of the Project land are paid and shall also be responsible for any late payment of such taxes.

The Project lands are included in a survey plan deposited at the Office of Titles as Deposited Plan No 9860. Splinter titles have been issued in respect of lots 127-155. NHT shall be responsible for obtaining from the Office of Titles the remaining splinter titles in respect of the lots in the Project lands and shall bear all of the costs relating thereto.

[7] SECURITY FOR ANY DEBT AFTER ARBITRATION

> The remaining residential lots the East Prospect, phase II sub-division, the roadways relating thereto and the open spaces reserved for community purposes shall be offered to the NHT as security for any debt which it may be determined that YPS owes to NHT after arbitration. The said lots, roadways and open spaces are offered as security based on the current market values as determined by a valuator to be agreed upon by YPS and NHT and the said valuation shall take into account the fact that the lots form a part of a development for which subdivision approval has been granted.
>
> The cost of preparing and registering the security documentation for these lots and of realising this security (if necessary) will be for the NHT's account. This security will become effective after the arbitration decision and only in the event that it is determined that YPS owns [sic] money to NHT."

Numbers in square brackets have been added to the text for ease of reference.

10. As this letter shows, and despite the provisional agreement of January 1999, none of the units was in fact handed over to the Trust until July 1999, and four items remained to be resolved, as envisaged in the letter of 17 January 1999, by arbitration, re-measurement or third party clarification. The final paragraph of point 4 of the letter of 27 July 1999 also contemplated an adjusted final account. Thereafter, sums not in dispute would be paid within six months. Sums still in dispute, because the arbitration proceedings provided for had not yet concluded, were to be paid within six months of the arbitration decision.

The terms of reference

11. Agreement was not reached on the interest and profit claims. Nor was it reached on the other two outstanding items mentioned in para 4 of the July 1999 letter, which the Board was told are the subject of separate arbitration and court proceedings. Time passed, for reasons about which the Board has no information, and the interest and profit items were eventually referred to Mr Stoppi by terms of reference dated 8 April 2004. These read:

> "TERMS OF REFERENCE
>
> THIS AGREEMENT is made the 8th day of April 2004 between [YPSA] …

of the ONE PART and … NHT [the Trust] of the OTHER PART.

WHEREAS:

1. The parties entered into an agreement in or around July 1999, the purpose of which was to:

> (i) facilitate the handover of the East Prospect, Phase II housing project (the Project) by YPS to NHT for completion as NHT sees fit; and
>
> (ii) as far as possible enable NHT to be paid all sums that are due and payable to NHT by YPS and to fulfil NHT's commitment to sell housing solutions in the Project to its contributors.

2. The agreement was set out in a letter dated 27 July, 1999 from Rattray Patterson Rattray - the Attorneys-at-Law for [YPSA] addressed to National Housing Trust and a copy of the said letter was signed by YPSA and [NHT] (and the Seal of each was affixed) as an indication of their agreement with the terms set out therein;

3. The letter sets out the agreement of the parties that the project account prepared by NHT and dated January 7, 1999 will be considered 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 [J$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) CERTIFICATE 19 YPS and NHT have agreed that GETA or an agreed Consulting Engineer is to be called upon to clarify this certificate;

(d) RE-MEASUREMENT OF WORKS A re-measurement of the works on the date of and over will be done to adjust the project account, which re-measurement will be incorporated in the adjusted final account for the Project.

4. Accordingly, as set out at para 3 above, the parties agreed that the following two unresolved matters should be referred to arbitration.

(a) Interest; and

(b) Profit

5. It was further agreed that:

(a) Once the adjusted final account has been prepared and issued and the issues of interest and profit referred to arbitration have been settled, any debt owed by YPS and NHT will be settled within a six (6) months time frame.

(b) Sums not in dispute must be settled within six (6) months of the issue of the final accounts.

(c) The sums declared outstanding based on the arbitration proceedings shall be settled within six months of the arbitration decision.

6. Pursuant to the agreement of the parties referred to above, the following two matters are hereby referred for arbitration:

(a) The interest portion of this statement shown as J$27,255,919.92 as at the 18th day of January, 1999;

(b) The issue of the contractor's profit which is provided for in the agreement at a rate of 14.8%;

7. The parties hereby further agree as follows:

(a) The arbitrator shall have all the powers given to arbitrators by virtue of the Arbitration Act and shall be requested to make his award on or before the day of … 2004.

(b) The arbitrator shall have the power to proceed ex parte in case either party fail after reasonable notice to attend before him.

(c) The provisions of the Arbitration Act in so far as they are consistent with the provisions hereunder shall be deemed to be incorporated herein.

(d) The parties shall do and cause to be done all such things necessary and convenient for enabling the arbitrator to make his award without delay."

The awards

12. In his first award dated 12 July 2005, Mr Stoppi, a chartered and quantity surveyor as well as a practising arbitrator, undertook for himself an assessment of the value of the works done as J$164,076,242, while stating this was not to have any relevance for other purposes. The justification for this, when the statement of account dated 7 January 1999 already included a value with a separate procedure for re-valuation which had (and has still) itself still not been finalised, has not been and cannot now be challenged. It needs no further examination here. The arbitrator went on to hold that, although the project had not been completed, YPSA was to be taken as having "earned" profit as and when units were completed. He referred to evidence that a number of units were in a state of practical completion when the whole site was handed over to the Trust (his award mentions 65, but it may have been as many as 141, albeit some with alleged defects, according to Judith Larmond-Henry's affidavit for the Trust sworn 9 November 2007). As stated in para 2 above, he awarded J$24,325,000 (14.8% of J$164,076,242). Having added the price of the land to the values he put on the works and on profit, he arrived at a grand total of J$202,905,242, over-topping, he concluded, any sum due to the Trust. On that basis, he also disallowed the Trust's interest claim. He awarded no interest on the J$24,325,000, since he said, "none was claimed/pleaded".

13. The Trust paid YPSA the award of J$24,325,000 in early December 2005 - that is within the six-month period allowed by the compromise agreement of July 1999. But in January 2006, YPSA applied to have the matter remitted to Mr Stoppi for him to deal with interest. Mr Stoppi had been wrong to say that YPSA had not claimed interest. YPSA's points of claim had claimed interest at 12% pa compounded monthly from

completion to payment. "being the same rate as that which would be paid by [YPSA] to the Trust on any sum shown to be owing by [YPSA] to the Trust". On that basis, McIntosh J on 22 January 2007 remitted the matter to Mr Stoppi for him "to consider and arbitrate on the issue of interest on the profit awarded".

14. Mr Stoppi invited the parties' further submissions and received them in written form both before and after a hearing which he also held on 13 April 2007. In submissions dated 20 March 2007, YPSA departed from its pleading and now maintained that "this was an incorrect basis for the calculation when one looks at the intention of the parties when one considers the contract as a whole", while at the same time accepting that "the issue of the appropriate rate of interest remains solely an issue for the discretion of the learned arbitrator". The claim for compound interest which it now advanced was by reference to at what YPSA's bankers Scotiabank had informed YPSA was the applicable rate to YPSA, that is "the prevailing commercial rates of interest (base plus 3%)" for the period since 1994 (see para 48 below). Calculated on an initial sum of J$24,325,000 and running from October 1997, when YPSA ceased work on the development, this gave a total of J$214,512,232.76 to the end of January 2007, the sum awarded by Mr Stoppi.

15. The Trust in submissions dated 5 April 2007 objected to any award of interest having regard to the nature and terms of the July 1999 compromise, under which the issue of profit had been referred to Mr Stoppi. It pointed out that the compromise was aimed at arriving at a final account showing a balance due (either way), which had not yet been agreed, and that it had paid YPSA the award of J$24,325,000 in early December 2005 within the six-month period allowed by the July 1999 compromise agreement. No entitlement to interest therefore arose. However, if contrary to those submissions, any interest was payable, YPSA's basis of computation was misconceived. The compromise agreement superseded the loan agreement and no interest rate was prescribed. The question of the applicable rate remained a matter for the arbitrator's discretion.

16. YPSA replied on 12 April 2007 by reiterating that it was entitled to interest as claimed. It relied on the loan agreement or the arbitrator's discretion. It submitted that the final accounts provided for by the compromise "envisage a set-off scenario in which all sums owed to the Trust (principal and interest at the appropriate rate) are compared to the sums owed to the developer (principal and interest at the appropriate rate) and based on which party owes the higher sum that party pays the difference". Since YPSA had negatived the Trust's claim to any interest (even for the period from October 1997 when the development was lying incomplete after the original scheduled delivery date), this submission is questionable.

17. Mr Stoppi's supplementary award contains references to the written submissions (para 1.9) and summarised his understanding of the parties' oral submissions (paras 1.9

and 1.10). He recorded Mr Morrison QC for the Trust as saying, first, that the Trust had "never disputed that interest would be due but rather the relative date which may be argued", secondly as arguing that interest should only run from the completion of the project and, thirdly, as presenting "Further arguments … in regard to the absence of a final account for the project" and a still further argument based on the six-month period referred to the July 1999 letter. The arguments based on the absence of a final account and on the six-month period for payment in the July 1999 letter must have been the arguments mentioned in the Trust's written submissions dated 5 April 2007, which made clear that the Trust's primary case was that there was no jurisdiction to award interest.

18. The Trust in post-hearing written submissions dated 26 April 2007 had reminded the arbitrator of the relevant paragraphs of its previous written submissions, and also expressly submitted that an arbitrator has no power either at general law or under statute to award compound interest. YPSA responded in post-hearing submissions dated 27 April 2007, reiterating its previous submissions, including the submission that the loan agreement envisaged that the Trust would pay interest at the lending rates of YPSA's bank. The arbitrator in his reasoning did not directly address the question of his jurisdiction or powers.

19. The Trust applied to have the supplementary award set aside and the matter remitted to Mr Stoppi. By judgment dated 11 September 2009 (17 months after the hearing), Hibbert J granted the applications. His judgment addresses three matters:

(i) He considered that the arbitrator had been clearly wrong to take October 1997 as the date of completion of the project, since it was only the compromise agreement in July 1999 that, in terms, facilitated "the handover of the East Project, Phase II … by YPS to NHT for completion as NHT sees fit", marking the termination of the loan agreement. YPSA's letter dated 21 July, served on 4 August, 1998 could not be an appropriate starting point, since it was related only to advances called for under the loan agreement which were expressly required to be "applied exclusively towards meeting the cost of the Development or of building materials required for it", and was irrelevant by August 1998 (YPSA having ceased all work on the development nearly a year earlier).

(ii) Nothing in the loan agreement, the compromise agreement or the reference to arbitration authorised the award of compound interest on contractor's profit. An arbitrator's only power, and his duty, in this connection is to decide according to the general law. In this connection, Hibbert J cited the well-known authority of *Chandris v Isbrandtsen-Moller Co Inc* [1950] 2 All ER 618. No such power existed under the general law: see section 3 of the Law Reform (Miscellaneous Provisions) Act (Law 20 of 1955), while enabling an award of simple interest, expressly provided that

> "nothing in this section (a) shall authorise the giving of interest upon interest."

(iii) The rate of interest adopted by the arbitrator also required consideration, 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 [sic] of Interest on Judgment Debts) Order No 63A of 1999". That order provides for a rate of 12% pa simple interest on every judgment debt - in fact reduced to 6% pa in the case of judgment debts denominated in Jamaican dollars by an identically titled order No 58 of 2006. Hibbert J clearly thought that these rates might offer relevant guidance on a proper exercise of any discretion under the 1955 Act.

The judge having concluded, in the light of point (ii), that the arbitrator had acted in excess of his jurisdiction and also misconducted himself, the award was set aside and the matter remitted to the arbitrator for reconsideration of the rate of simple interest to be applied and the starting date.

20. YPSA took the matter to the Court of Appeal [2013] JMCA Civ 44 (Harris, Dukharan and McIntosh JJA). The court on 22 November 2013 (18 months after the hearing) allowed the appeal for reasons given by McIntosh JA. Dealing first with the award of compound interest, she recited the rival cases as argued by Dr Lloyd Barnett for YPSA and Mr Vassell QC for the Trust. Dr Barnett started by arguing that compound interest was payable as of right by contract, but, in the face of Mr Vassell's challenge to the existence of any such provision, express or implied, in the loan or the compromise agreement, fell back on the submission that the arbitrator had not been interpreting either agreement, but relying on a general common law power to award damages.

21. The Court of Appeal accepted this proposition, citing in its support (paras 23-30) words of Lord Denning MR in *Tehno-Impex v Gebr van Weelde Scheepvaartkantoor BV* [1981] 2 All ER 669, together with *Chandris v Isbrandtsen-Moller* (above), *Hadley v Baxendale* [1854] EWHC Exch J70, (1854) 9 Ex 341 and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Comrs* [2007] UKHL 34; [2008] AC 561. It expressed its conclusion as follows:

> "[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."

22. With regard to the rate awarded, the court held (paras 40-43) that the arbitrator was entitled to arrive at a commercial rate, and that various provisions in the loan agreement supported the view that the rate he chose met this criterion. As to the date from which interest ran, the court accepted that it was "beyond doubt" that the project was not complete, and that one of the purposes of the compromise agreement was to facilitate its completion, but held (para 37) that the arbitrator was entitled to select October 1997 as the date from which interest should run, effectively because YPSA had by then completed such part of the construction as it ever completed. There was nothing to justify a conclusion that the arbitrator had erred in this respect.

23. Having considered these matters, the Court of Appeal turned (para 48) to question of jurisdiction to make an award of compound interest. It disposed of this in YPSA's favour by accepting a submission by Dr Barnett that the award could only be set aside if it disclosed an error of law on its face or was based by the arbitrator on some erroneously stated legal proposition. The court said that it neither did this nor disclosed any misconduct.

24. Finally, the court addressed a counter-notice of appeal by the Trust seeking to affirm Hibbert J's decision on the additional ground that the J$214,512,232.76 awarded included interest up to January 2007, that is over two years after payment by the Trust of the award of J$24,325,000 in early December 2005 within the six month period allowed by the July 1999 compromise agreement. The court rejected this on the ground, it appears, of a submission by Dr Barnett that it was outside the scope of the issue remitted to the arbitrator by Hibbert J.

The appeal to the Board

25. The Board turns to the issues on the present appeal, on which the Trust seeks to restore the judge's conclusions, although the focus has been on his award of compound interest. Whether logically or pragmatically, the Trust has not quarrelled with an award of simple interest in the exercise by the arbitrator of a discretion modelled by analogy on the discretionary power given to courts to award simple interest on any debt or damages for which judgment is given: see paras 29 and 32 below. The issues can be divided into issues going to jurisdiction and issues going to the arbitrator's exercise of such jurisdiction as he had.

26. The Court of Appeal evidently thought that the arbitrator's decision to award compound interest, far from being based on an arbitral discretion, was a decision based on some substantive legal right to interest. Any such right must have been either (i) a contractual right under the loan agreement; or (ii) a claim in damages for breach of contract or in equity. The Court of Appeal was, in the Board's opinion not only (a) wrong in viewing the award of compound interest as being made on any such basis, but

also (b) wrong in thinking that it would have been open to Mr Stoppi in the circumstances of this case to make an award on any such basis.

27. As to (a), a short answer is that Miss Karen Gough for YPSA accepts that the arbitrator did not make his award on any such basis. More specifically, to quote her oral submissions, YPSA had submitted that the arbitrator had inherent discretion to award interest and should do so by analogy with the contract; it had been left to the arbitrator in his general discretion to arrive at an appropriate rate, having regard to the various loan provisions and his original award.

28. This is also how Mr Stoppi expressed himself. What he said in para 3.5 of his reasons dated 10 May 2007, was that

> "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 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 moneys."

This is the language of discretion and analogy. That is also consistent with the way in which YPSA put the matter in both its pleaded claim and in the amended version of its claim which it later propounded (paras 13-14 above).

29. On this basis, the question is whether arbitrators have any such general discretion, or whether their power is (absent contrary agreement) limited to awarding simple interest. *Chandris v Isbrandtsen-Moller* is the English Court of Appeal authority for the proposition that an arbitrator's discretionary power to award interest is modelled on the court's statutory power, which was in England at the time of that case, and in Jamaica still is, limited to awarding simple interest on any debt or damages found due: see for Jamaica section 3 of the Law Reform (Miscellaneous Provisions) Act 1955. The contrary statement by Lord Denning in *Tehno-Impex* (at p 666) cited by the Court of Appeal was actually dissenting on this point. The majority held that an arbitrator has no discretionary power to award compound interest. Further, as the law stood at that date, in the light of the House of Lords decision in *London, Chatham and Dover Railway Co v South Eastern Railway Co* [1893] AC 429, the majority also held that neither courts nor arbitrators could award interest as damages for non-payment of a debt. Lord Denning's dissenting view of the arbitral discretion was further expressly disapproved, and the decision in *Chandris* was expressly upheld, by the House of Lords in *President of India v La Pintada Co Nav SA* [1985] AC 104, 116F-119C, in the judgment of Lord Brandon with which all other members of the House of Lords agreed.

30. However, in *La Pintada*, the House recognised one exception to the general rule regarding discretionary interest, and took a limited step towards allowing the recovery of interest by way of damages. The exception regarding discretionary interest, well-illustrated in subsequent case law, related to cases within the area of equity, in the technical or chancery sense, "where money had been obtained and retained by fraud, or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position". It is presently inapplicable and irrelevant.

31. The exception to the previous general rule that interest could not be recovered by way of damages was where, by reason of specific matters known to both parties when contracting, interest could be claimed as special damages under the second limb of the rule in *Hadley v Baxendale*: see p 127A-D, per Lord Brandon. In *Sempra Metals*, the House focused on the second exception, and concluded that limiting it to damages under the second limb of the rule in *Hadley v Baxendale* involved an illogicality. There was no basis for distinguishing between the two limbs. Claims for loss of interest or interest incurred might in particular contexts be proved to be within the parties' contemplation under either limb. It was thus open to a claimant to plead and prove an actual loss of interest caused by late payment of a debt, which might include an element of compound interest, and such a claim would be subject to the usual principles governing damages for breach of contract, including remoteness and failure to mitigate. But the House underlined the need for pleading and proof. Such claims are for actual or real damages, not theoretical and non-existent loss.

32. *Chandris v Isbrandtsen-Moller* and the majority decision in *Tehno-Impex* therefore are and remain good authority for the proposition that arbitrators have no general discretion to award compound interest, and should proceed by analogy with the courts' limited power, contained in the present case in section 3 of The Law Reform (Miscellaneous Provisions) Act 1955, to award simple interest on sums awarded due. The law as regards arbitrators has been changed in England and Wales by the Arbitration Act 1996, but there has been no equivalent legislation in Jamaica.

33. In awarding compound interest in his supplementary award Mr Stoppi therefore acted in excess of his jurisdiction and the powers impliedly conferred on him. This is a fundamental flaw which requires his award to be set aside. As a matter of analysis, he also erred in law in a manner which is patent on the face of his award, which would by itself lead to the same result.

34. An arbitrator can in theory be given power to determine the scope of his own jurisdiction or powers (see further para 37 below). That happens very rarely in practice, and is clearly not the position under the present reference. Similarly, there is authority that the principle of error on the face of the award does not apply, at least with the same intensity, where the error lies in the answer to a question specifically referred to the arbitrator: see *DS Blaiber & Co Ltd v Leopold Newborne (London) Ltd* [1953] 2 Lloyd's

Rep 427 and *Giacomo Costa Fu Andrea v British Italian Trading Co Ltd* [1963] 1 QB 201. That again is clearly not the present situation. The compromise agreement and terms of reference referred the question of profit to Mr Stoppi. Neither said anything about interest on profit, still less about any specific basis on which interest might or might not be awarded. So the principles governing error of law on the face of the award are applicable.

35. It follows from the above that neither the arbitrator's supplementary award nor the Court of Appeal's attempted rationalisation of it as depending on substantive rights can stand, and that Hibbert J's order should be restored.

Jurisdiction

36. The Board will, however, for completeness, consider the legal position on an opposite hypothesis, that adopted by the Court of Appeal, namely that Mr Stoppi made or purported to make an award of compound interest on one or both of the substantive bases identified in para 26 above. The question of jurisdiction then arises in a more fundamental way, and it requires examination of all relevant material, whether or not recited or referred to in the award. It involves in the first instance the interpretation of the scope of the reference to arbitration dated 8 April 2004. This is in turn only possible in the light of the provisional arrangement recorded in the letter dated 7 January 1999 and the compromise agreement recorded in the letter dated 27 July 1999, both referred to expressly in the reference. Further admissible background to all these documents is the loan agreement itself.

37. In so far as the Court of Appeal accepted as correct a submission by Dr Barnett that any question of jurisdiction could only arise, if the want of jurisdiction or some erroneous legal proposition was apparent on the face of the award (para 23 above), that submission, and the Court of Appeal's acceptance of it, were incorrect. They are both contrary to the well-established principle that an arbitration tribunal cannot give itself jurisdiction which it does not have. Aside from the very rare case (into which nothing brings the present) where a tribunal is expressly given power to determine its jurisdiction finally for itself, it is for the courts to decide what jurisdiction has been conferred on an arbitrator. See *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 AC 763.

38. It is necessary in this light to look at the context and scope of the reference. The parties' relationship had broken down in October 1997, all construction work had stopped and the site was closed and lay idle until July 1999. There was and could be neither transfer to the Trust nor sale by the Trust of any units, completed or incomplete. In these circumstances, the development project which was the subject of the loan agreement came to a halt in circumstances for which each side was denying

responsibility and claiming against the other. The compromise agreement had the aim of recording common ground, defining the outstanding issues and providing for their resolution. One matter agreed was that the development was no longer to be completed by YPSA, but handed over "as was" to the Trust. The arbitrator put the position as follows in para 1.4 of his original award:

> "The settlement of differences in connection with the Loan Agreement was thus effected with the exception of two issues referred to above: (1) INTEREST: … (2) PROFIT: …"

39. The arbitrator was not quite correct in saying this. The loose ends also included the other two open items (identified in points (c) and (d) of the compromise agreement and now, it appears, the subject of separate full blown disputes). One might well however have thought that the compromise agreement was designed to avoid and conclude issues about whose fault the breakdown of the development project had been. Not so, it appears, at least as the parties saw the matter by the time they got before the arbitrator six years later. Paragraph 1.4 of his original award goes on to record that by then the Trust was putting its interest on the basis of an alleged breach by YPSA in not completing the units in keeping with the loan agreement, as well as denying YPSA's profit claim on the basis of YPSA's alleged breaches of the loan agreement and/or failure to complete.

40. The Trust's claim for interest had a basis in the loan agreement, in that this provided in terms for advances under the loan agreement to "accrue interest at the rate of [12%] per annum compounded monthly" (clause 7.01). But the Trust's difficulty was that, so long as the development proceeded on schedule, such interest was to be chargeable not to YPSA but to the ultimate purchasers from the Trust: see the Trust's closing submissions to the arbitrator and YPSA's submission to the same effect recorded at para 1.9.3 of the original award. For that reason, the Trust had to formulate its claim as being for failure to complete timeously or at all. Put this way, the claim failed, because the arbitrator did not accept the Trust's allegations of delay by YPSA: see paras 3.1.5 and 3.1.6 of his original award.

41. YPSA's claim to profit had no express basis in the loan agreement in the circumstances which existed in July 1999. This was so for two reasons:

i) The loan agreement had never contemplated that there would be a 14.8% profit item outstanding in YPSA's favour at the completion of the project. It contemplated developer's profit of J$29,923,440 at 14.8% (see para 4 above), but it had also provided that the Trust would advance (as it did) 10% of the total base price (J$23,174,404) to YPSA at an early stage in the development. Further, the remaining 90% of the base selling price of the units and land was under the

loan agreement to be paid by set off against the outstanding loan, as and when units were completed. Profit was thus either paid in advance or to be recovered by set off against the loan advances on the handover of individual units, which was replaced by a hand over of the whole site as it was in July 1999.

ii) The terms of the July 1999 compromise agreement show that it was designed to address the breakdown of the development project, to provide a new basis of handover "as was" of the partially completed development, to draw a line so far as possible under what had occurred and to identify only four specific outstanding substantive items to be settled thereafter, within a six-month period or periods as agreed between the parties. Among these was profit, where it was envisaged that the parties would agree, or an arbitrator would determine, what, if any, profit should be recovered in the unforeseen circumstances which now prevailed. Apart from the four specified items, the evident intention was that there should be no other claims, eg for damages for non-completion or for non-performance, by either side.

42. Under the July 1999 agreement and his terms of reference, the arbitrator duly considered whether profit might be said to have been earned by YPSA in these circumstances, and held that YPSA should receive a 14.8% profit share on the value as at October 1997 of the construction works. As stated in para 12 above, he also considered that he could for this purpose put his own valuation on the works completed at that date.

43. In the Board's view, the compromise agreement and terms of reference did not permit or leave open claims of either type (i) or type (ii) referred to in para 26 above. Either of these two types of substantive claim would have represented a separate head of claim - like the Trust's own claim to interest on the outstanding loan advances which were a head in the project account which was at the basis of the July 1999 compromise. The basis of any claim of type (i) or (ii), whether under the loan agreement or in damages for breach of it or of some equitable duty, would have needed to be identified and covered by the language of the compromise agreement and terms of reference. This is sufficient alone to exclude these claims, as the Trust submits.

44. The express provision in the compromise agreement and terms of reference for profit, if found due, to be settled within six months of any agreed statement or arbitration decision underlines this. The last paragraph of the compromise agreement and clause 5 of the terms of reference envisaged the finalisation of the statement of account dated 7 January 1999, and the settlement within six months of the net balance of account. They further envisaged that, if the Trust's claim for interest and/or YPSA's claim for profit were at that point still in arbitration, settlement of any balance determined to be due on them would follow six months after the relevant arbitration decision. Leaving aside the Trust's express interest claim, which the arbitrator rejected, it is not conceivable that

the parties contemplated an inquiry at each stage into what interest might be said to be due, and from what date, on each item making up any such balances. However naively, the compromise agreement clearly contemplated a relatively short time lapse before all would be resolved, after which there would be a six month grace period for payment. A six month grace period for payment does not fit with an analysis according to which interest would at the same time be accruing on any profit awarded (and indeed, on YPSA's case now, had already been accruing for nearly two years since October 1997, despite the fact that none of the units had actually been handed over or sold).

45. In the Board's opinion, therefore, it would have been outside the arbitrator's jurisdiction under his terms of reference to award any interest claimed by YPSA as of right on basis (i) or (ii) identified in para 26 above. Had Mr Stoppi purported to award compound interest on such a basis, his award should accordingly have been set aside for excess of jurisdiction. The Court of Appeal, which evidently thought he had made an award on such a basis, was correspondingly wrong in upholding it on that basis.

Misconduct

46. On the hypothesis identified in para 36 above, the Board considers that, even if (contrary to its view in paras 36-45) Mr Stoppi's terms of reference gave him jurisdiction to consider a substantive claim to compound interest on profit, his award would also have fallen to be set aside on the more confined ground of misconduct. This is because no such claim was ever advanced or supported by YPSA before Mr Stoppi: see paras 13-14 above. YPSA never suggested, and could not have suggested, that any specific term of the loan agreement covered the award of profit which Mr Stoppi made, since that award was not made under the loan agreement, but under the compromise agreement in the light of the consensual handover of the whole development for completion to the Trust. Equally, no claim for loss suffered by any breach of contract or duty was ever pleaded or supported by evidence. Any substantive claim for breach of contract or duty requires to be both pleaded and supported by evidence. The House of Lords in *Sempra Metals* was clear that this was the case with any claim for compound interest, based on the principle in *Hadley v Baxendale*: see the headnote in the Appeal Cases report.

47. What YPSA's written submissions dated 20 March 2007 alleged was that it was "plain that the parties envisaged that the interest payable by the Trust to the Developer was the commercial bank rate". In support of this YPSA cited four clauses of the loan agreement, none applicable or even suggested to be, in the circumstances existing under and following the July 1999 compromise agreement. Clause 5.05 provided for the Trust to pay interest on advances which the Trust was required by 14 day notice, but failed, to make under the loan agreement "at the same rate of interest as the Developer shall pay to its bankers on any funds borrowed for the Development". Clause 11.11 provided for the same rate to apply from a date 14 days after completion of the development in

respect of excess sums (if any) payable to YPSA after YPSA had repaid the loan and all other moneys due from it. Clause 14.05 provided that, if the Trust terminated the loan agreement on account of YPSA's default, any sums to YPSA should be payable within 14 days of the date of completion of the development, failing which interest would "accrue on the outstanding balance at the weighted average rate of the most recent treasury bill issue". Clause 7.01 provided that the loan advances outstanding from time to time should "accrue interest at the rate of … 12% per annum compounded monthly". This was the provision by analogy of which YPSA pleaded its claim for interest on profit, but which in its written submissions it now submitted "was the incorrect basis for the calculation when one looks to the intention of the parties when one considers the contract as a whole".

48. After setting out these clauses, none actually applicable, or alleged to be so, YPSA continued:

> "27. By letters dated 23 June 2006 and 13 March 2007, the respondent's bankers, Scotiabank wrote to the respondent setting out the base rate for the period 1994 to 2005 and stating that the applicable rate to the respondent was Base plus 3%. Copies of the said letters are attached hereto for completeness.
>
> 28. Following from the above using the commencement date of 30 October 1997 and applying the prevailing commercial rates of interest (base + 3%), the interest owed to the respondent may be calculated as follows:-
>
> > [There followed a month by month computation of compound interest on the sum of J$24,325,000 from October 1997 to January 2007, leading to the total of J$214,512,232.76]
>
> 29. Notwithstanding the foregoing, the issue of the appropriate rate of interest remains solely an issue for the discretion of the learned arbitrator."

49. This was not an allegation that YPSA had ever borrowed J$24,325,000 prior to or in October 1997 for the development or any other purpose, still less that through any such borrowing YPSA had actually run up additional overdraft amounts totalling J$214,512,232.76. It is inconceivable that YPSA did so, or that, if inconceivably it had done so, it would not have said and shown this. There is no suggestion that YPSA had in fact borrowed, or in the light of the Trust's advances needed to borrow, any moneys at all to complete such part of the development as it did complete. No bank statements

at all were tendered to show the actual banking relationship with Scotiabank. The claim was a purely theoretical one: it was that, had YPSA had an overdraft of J$24,325,000 in October 1997 and had it left this untouched for nearly ten years, then it would, at the standard rate which Scotiabank would have charged it, have run up an additional indebtedness of J$241,512,232.76. That is not a tenable basis for either a contractual or a damages claim. Nor was it put forward as such. It was, as para 29 in the written submissions quoted in the previous paragraph states, put forward as a claim invoking the arbitrator's discretion.

50. On this basis, if Mr Stoppi is read as purporting to make a substantive award either under or for breach of the loan agreement or any other legal duty, he went beyond both the submissions and the evidence put before him and failed to decide the case on the basis argued before him. In doing so, he was guilty of misconduct in the technical, rather than opprobrious, sense covered by section 12(2) of the Arbitration Act of Jamaica, which is in pari materia with section 23(2) of the old English Arbitration Act 1950 and its predecessor provisions. His conduct also justified and called for remission to him for reconsideration under section 11(1) of the Arbitration Act: see further para 52 below.

51. As Atkin J remarked with regard to the word "misconduct" in *Williams v Wallis and Cox* [1914] 2 KB 478, 485:

> "That expression does not necessarily involve personal turpitude on the part of the arbitrator, and any such suggestion has been expressly disclaimed in this case. The term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice."

Or as Russell on Arbitration (20th ed (1982)) put it at p 409:

> "'Misconduct' is often used in a technical sense as denoting irregularity, and not any moral turpitude. But the term also covers cases where there is a breach of natural justice. Much confusion is caused by the fact that the expression is used to describe both these quite separate grounds for setting aside an award; and it is not wholly clear in some of the decided cases on which of these two grounds a particular award has been set aside."

52. In the present case, it is unnecessary to distinguish between irregularity, breach of natural justice and other cause for remission. Deciding a case on a basis not covered by submissions or evidence in the Board's view clearly constitutes misconduct justifying setting aside under section 12(2) of the Arbitration Act. But, independently

of whether it constitutes technical misconduct, it also constitutes a cause for remission under section 11(1). The power to remit is not available merely to require or enable an arbitrator to correct ordinary errors of fact or law, or have second thoughts: *The Montana* [1985] 1 WLR 625, 632, per Donaldson J. But it extends under both the English Arbitration Act 1950 and the current Jamaican Arbitration Act to cases beyond technical misconduct, including procedural mishap and error of law on the face of the record: see Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* (1989) pp 58 et seq, and the later still broader view taken both by Evans J in *Indian Oil Corp Ltd v Coastal (Bermuda) Ltd* [1990] 2 Lloyd's Rep 407, 414-416, and by the Court of Appeal in *King v Thomas McKenna Ltd* [1991] 2 QB 480. The last case contains a full examination of the case law, leading the Court of Appeal to confirm that, the words being general, the jurisdiction to remit extends to

> "cases where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspects [sic] of the dispute which has been the subject of the reference has not been considered and adjudicated upon as fully 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." (p 491)

Simple interest

53. It follows from all the above that Mr Stoppi's award of compound interest must be set aside and the matter remitted to him for him to make an appropriate award of simple interest.

54. For completeness, however, and because Hibbert J's judgment and order also addresses aspects relating to the appropriate period and rate of any award of simple interest, the Board will also deal with the constraints which operate even in relation to awards of simple interest. The position established under the 1950 Act in relation to both costs and interest is that it constituted conduct calling for remission where an arbitrator either failed to address costs or interest at all, or made an unusual order in respect of either, without giving reasons which justified such an order: see *Panchaud Freres SA v Pagnan & Fratelli* [1974] 1 Lloyd's Rep 394 (CA), *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 1 Lloyd's Rep 391 and *Warinco AG v Andre & Cie SA* [1979] 2 Lloyd's Rep 298.

55. In *Warinco*, Donaldson J at p 299 encapsulated the position as follows:

> "… if there is an order which on its face is unusual there is a rebuttable presumption that the arbitrators are wrong. In this case

> it is said that the award is unusual on its face. That is right. … It is said that … it is unusual that the sellers, the main beneficiaries [of the award] should be expected to pay the costs. That also is right. It calls, therefore, not for an explanation of what the board had in mind but it calls for the buyers, if they wish to hold this award, to point to factors which in the exercise of a judicial discretion the arbitrators could have relied upon as justifying their award."

He continued as regards interest at p 300:

> "Now the question of interest is quite different in its application, although the principle is, I think, the same. ... [The board] have made what, to me, is a most unusual order in respect of interest on the carrying charges."

Donaldson J then identified two unusual two aspects of the award on interest. First, the arbitrators had awarded interest for the whole of May on the total of the carrying charges which had only accumulated day-by-day throughout May to reach that total, and, second, they had failed to award any interest for the period after May until the carrying charges were paid. On that basis the award was remitted for reconsideration.

56. In the present case, Mr Stoppi's supplementary award was not only irregular in awarding compound interest for reasons already given, it was in the Board's view also unusual in the rates which he adopted and the total at which he arrived. All he said on this score was in para 3.4 that:

> "Further, respondents submitted detailed statements of how interest payments and the basis of their claim had been computed. No commensurate calculations were submitted by the claimants."

This provides no explanation of either the rates or their basis (whether practical or, as was in fact the case, theoretical).

57. However, contrary to the judge's view (para 19(i) above), the Board does not regard the starting date for interest adopted by the arbitrator as either abnormal or unsustainable, once he had found, as Mr Stoppi did, that YPSA deserved a further extension beyond October 1997. Had such an extension been given, it is at least conceivable that YPSA would then or shortly thereafter have handed over those units which it had actually or nearly completed.

58. Less easily supported is the arbitrator's award of continuing interest after early December 2005, on a basis which failed to credit the J$24,325,000 awarded as profit by the original award and paid by the Trust in early December 2005, as the Trust pointed out in its submissions dated 5 April 2007, para 6. But this (although the subject of the Trust's counter-notice before the Court of Appeal: para 24 above) was not raised in submissions before the Board, it may well be because the credit would not hugely have affected the overall total, and perhaps also because it was counter-balanced by the fact that the interest claimed and awarded by the supplementary award dated 10 May 2007 was calculated only up to the end of January 2007. If one aspect of the end point were to be opened up, all aspects of the end point would have to be. So the Board would not remit on either of the points covered in para 57 and this paragraph.

Error of law on the face of the award

59. It is in the above circumstances unnecessary to go further than above into the topic, much discussed before the Board, of error on the face of the award. As the Board has observed (para 37), errors of law going to jurisdiction, or constituting misconduct or a mistake or mishap justifying remission, do not have to appear on the face of the award, before the court will intervene to ensure their correction. Outside these categories, the question arises whether any suggested error appears on the face of the award.

60. The first step is to identify the suggested error. The only possibility not already covered is an error in awarding compound interest on the basis that the loan agreement provides, expressly or impliedly, for compound interest in the present situation. The Board has already indicated that this is not what the arbitrator in its view was either asked or purported to do. But the Board will in what follows assume that it is wrong on that. Was any such error on the face of the award?

61. To decide this, it would be necessary to look at and construe the loan agreement. The question would thus arise whether the loan agreement, or at least its relevant terms, was or were expressly or impliedly incorporated by reference in the award. That question is, on the authorities cited in the previous paragraph, one of construction of the award. A mere reference to an agreement will not incorporate it, but a conclusion expressed as based on the construction of a particular clause will incorporate it or at least that clause. (The authorities leave open which. But, for its part, the Board finds it difficult to suppose that only part of an agreement could be incorporated, since this would open the prospect of a court construing part of an agreement out of context, contrary to all usual principles of construction.)

62. In the present case, Mr Stoppi's supplementary award must be read with the original award to which it was expressly supplementary and on "the opinions and

reasons expressed" in which he expressly relied in para 3.3 of his supplementary award. The original award must also be read with the terms of reference and the July 1999 compromise agreement, the effect of which it summarised in para 1.3 and both of which it appended. Both these documents also refer to and must be read with the letter dated 7 January 1999, which is likewise therefore also indirectly incorporated in the award.

63. Is the loan agreement (or its relevant clauses – those dealing with interest) incorporated? The original and supplementary awards contain numerous references to the loan agreement and its provisions:

i) The opening paragraph of the original award, headed Overview, starts with the words:

> "This dispute arises from and is rooted in a Loan Agreement between the parties dated 28 August 1995 concerning the partial funding by the claimant of the construction of [259] housing solutions by the respondent."

ii) It then summarises the conditions and effect of the loan agreement.

iii) Paragraph 1.9.3 recites YPSA's submission that correctly interpreted the loan agreement provided for the setting off of the sale price of units against loan balances, and the Development Budget annexed as Appendix B meant that the payment of profit was not contingent on completion of the entire project.

iv) Paragraph 3.2.1 contains a reference to and a further summary of the effect of Appendix B.

v) In the Reasons which Mr Stoppi expressly made part of his original award he referred repeatedly and on various points to the interpretation and effect in context of the loan agreement as he understood it in relation to the Trust's claim for interest (paras 3.1.1 to 3.1.4) and YPSA's claim for profit (paras 3.2.1 to 3.2.7, where he reached the conclusion that the loan agreement was silent on the relevant issue, and so decided it by reference to general principle).

vi) His supplementary award referred back to the opinions and reasoning in his original award in respect of interest to justify the starting date which he took for interest on YPSA's profit claim: para 3.3.

vii) Importantly, it contained para 3.5, set out in para 28 above.

64. In the Board's opinion, it would probably be right to treat the whole loan agreement as incorporated in the awards, by virtue of the references to it and its evidently central role in the arbitrator's reasoning, as indicated in points (i) to (iv). But, whether that is so or not, point (v) would in its opinion incorporate the loan agreement, or at least all its provisions relevant to interest, if it were to be read as a conclusion by the arbitrator that the loan agreement provided for compound interest in the circumstances as they existed following the breakdown of the project in October 1997 and the July 1999 compromise agreement. On that basis, an examination of the relevant provisions of the loan agreement would reveal that there was no basis in law for the arbitrator's conclusion, and the supplementary award should be set aside for error on its face.

Disposition of appeal

65. As the Board has said, it does not in fact consider that the arbitrator based his award on a conclusion that interest was due under or by way of damages for breach of any substantive legal right; rather, he proceeded on the basis that he had an inherent discretion to award compound interest which he did not in law possess (paras 26-28). He thereby exceeded his jurisdiction or powers (paras 29-35). He also committed an error of law which appears on the face of the award without need to refer to the terms of the loan agreement (paras 33-35). Finally, if necessary, he can be seen to have erred in law by awarding interest at the unusual and essentially unexplained rates which he endorsed without explaining their basis or justification (para 56).

66. The Board will therefore humbly advise Her Majesty that an order be made to allow the appeal, set aside Mr Stoppi's supplementary award under section 12(2) of the Arbitration Act, and order that the matter be remitted to Mr Stoppi under section 11(2) in the light of this judgment, with a direction that his jurisdiction is limited to an award of interest on a simple interest basis and that he should reconsider its exercise, including the rates adopted, in the light of this judgment; and that the parties should have 21 days in which to make submissions in writing on costs before the Board and below, with a further seven days thereafter in which to reply in writing to each other's submissions.

LORD TOULSON: (dissenting)

Introduction

67. This appeal is about the validity of an arbitral award of compound interest of J$214,512,232.76 made against the appellant ("the Trust") in a dispute with the respondent ("YPSA") arising from a development agreement. The award was set aside in the Supreme Court by Hibbert J, who held that the arbitrator "acted in excess of his

jurisdiction in awarding compound interest on developer's profit and thereby misconducted himself". He remitted the matter to the arbitrator to "reconsider the rate of simple interest to be applied and the date from which the computation should commence". His decision was overruled and the arbitrator's award was restored by the Court of Appeal for reasons given by McIntosh JA in a judgment with which Harris and Dukharan JJA agreed. The Trust now appeals to the Board. The appeal raises questions about what is an error of law on the face of the award, what is misconduct and whether there was a procedural mishap such as to invalidate the award.

Arbitration Act 1900

68. The arbitration was governed by the Arbitration Act 1900. The relevant sections are 11(1) and 12(2), which respectively provide:

> "In all cases of reference to arbitration the court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire."
>
> and
>
> "Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured the court may set the award aside."

These provisions had their origin in the (English) Common Law Procedure Act 1854 and their wording is materially indistinguishable from sections 22(1) and 23(2) of the (English) Arbitration Act 1950.

Facts

69. The parties have been in dispute for nearly 20 years. On 28 August 1995 they entered into a written agreement the object of which was the construction of 259 housing units on land owned by YPSA's controlling shareholder, Mr YP Seaton, at East Prospect, St Thomas. The agreement took the form of a loan agreement, not a construction contract, but the arbitrator observed that it had a number of similarities to a construction contract and YPSA was described in the agreement as "the Developer". The Trust is a public body. It was intended that the development would be entirely financed by the Trust, but, since the land belonged to the developer, instead of employing YPSA under a conventional building contract, the Trust loaned the necessary

amount to YPSA and repayment was to be effected through the sale of completed units by YPSA to the Trust.

70. The amount of the loan was $187m in round figures. Its calculation is apparent from a development budget which was among the appendices to the agreement. This showed the anticipated development cost as $201m, including the value of the land which was shown as $14m. The amount of the loan was equal to the budgeted development cost less the value of the land (since this was effectively owned by the developer). The development budget showed a projected base selling price by YPSA to the Trust of $231m. This comprised the projected development cost of $201m plus a figure of nearly $30m in respect of "Developers Profit and Risk (fixed)". To the projected base selling price there were added other items, including interest on the construction at 12%, in order to arrive at a total selling price to the Trust. Under the loan agreement, the loan would correspondingly bear interest at 12%, compounded monthly. Interest would therefore be included on both sides of the ledger in any accounting exercise. (There was a further provision in the contract that if YPSA failed to pay interest to the Trust when due, it would carry an increased rate of 14% until paid, and that the additional interest "shall not be a cost of the development".) The present dispute is centred on the item "developer's profit and risk".

71. The loan was available to be called down in tranches to meet YPSA's requirements. YPSA was responsible for the construction of the development and undertook to pursue it with due diligence and efficiency and in accordance with sound construction practices. The construction was to be completed within 20 months, but there were provisions for extensions of time and increases in costs to be approved by a consultant appointed by the Trust. YPSA was to be paid a deposit of 10% of the specified sale price for each unit under construction. The remaining 90% of the sale price, together with the amount of any certified escalations, was to be set off against the outstanding balance of the loan.

72. The contract provided different ways in which it might be terminated, with different accounting consequences, but the contract was not determined in accordance with any of them. Construction work ceased in October 1997. Only some of the units had by then been completed and there were mutual recriminations, but the parties reached a form of compromise by an agreement dated 27 July 1999. Under its terms the Trust would take possession of the project site and YPSA would have no future responsibility for its completion. It was also agreed that a project account prepared by the Trust and dated 7 January 1999, showing a balance due to the Trust of $63m, would be considered final except in four respects. First, the parties agreed to refer to arbitration a claim by the Trust for interest amounting to around $27m. Secondly, they 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%". Thirdly, they agreed that a particular certificate needed clarification. Fourthly, they agreed that there should be a re-measurement of the works on the date of hand over, which would be incorporated in an adjusted final account.

Once the adjusted final account had been prepared and the issues of interest and profit referred to arbitration had been settled, any debt owed by one party to the other was to be settled within six months. Sums declared outstanding based on the arbitration proceedings were to be settled within six months of the arbitration decision. Unhappily 15 years have passed since the date of the settlement agreement and the parties remain mired in legal proceedings. The Board does not know whether the parties ever considered mediation, but they might have saved themselves a great deal of time, trouble and expense.

The first award

73. The parties appointed an experienced quantity surveyor, Mr Maurice Stoppi, as sole arbitrator to determine the two disputes which were to be referred to arbitration. For reasons unknown to the Board, the appointment was not made until 17 May 2004, which was nearly five years after the settlement agreement. His award was delivered on 12 July 2005. He concluded that YPSA had not been allowed sufficient extensions of time (which mitigated its exposure to claims of delay and consequent liability to interest) and that it was necessary to assess a reasonable gross total value of the work executed by YPSA in order to determine the sum to be set against the amount outstanding under the loan. Having done so he rejected the Trust's claim for interest. On YPSA's claim, the essential question was whether (as the Trust contended) no entitlement to developer's profit arose until the last unit had been completed and handed over, or whether (as YPSA contended) the entitlement accrued incrementally. He said that the agreement was silent on the point but that it is normal in the construction industry, where profit is included in a multi-unit development, for it to be regarded as a cost component of each unit and released accordingly on certification in relation to each unit. This reasoning led him to award YPSA $24,325,000 in respect of its profit claim. At the end of his reasons he added "I have not awarded interest on the amount awarded to the Respondent since none was claimed/pleaded".

74. The Trust paid the amount of the award to YPSA within six months in accordance with the settlement agreement. The matter was remitted to the arbitrator to "consider and arbitrate on the issue of interest on the profit awarded", by an order of McIntosh J, dated 7 March 2007, who held that YPSA's pleadings had included a claim for interest.

The second award

75. The Trust contended in its written submissions to the arbitrator that there should be no award of interest for these reasons (which it repeated in its argument before the Board):

> "The award of the arbitrator was made on the issue of developer's profit, which was but one item in the account which was the subject of a compromise agreement between the parties dated July 27, 1999. The account which was agreed on that date reflected a balance due to the claimant [the Trust] of some $63m. Even if that account were restated to reflect the arbitrator's award by deducting the interest claimed by the claimant for the period October 30, 1997 to December 31, 1998, while taking into account the award of profit in the sum of $24,325,000.00 there would remain a substantial balance due from the respondent to the claimant (in excess of $9m). In these circumstances, the claimant submits that any award of interest to the respondent would be wholly inappropriate, particularly bearing in mind that the final account between the parties has still not been settled."

The Trust further argued that by paying the amount of the award within six months it had fully complied with its obligations under the compromise agreement, but that if any interest was to be awarded, it should be limited to the period between the date of the award and the date of its payment.

76. In response YPSA submitted that the taking of the final account would involve "a set-off scenario in which all sums owed to the Trust (principal and interest at the appropriate rate) are compared to the sums owed to the developer (principal and interest at the appropriate rate) and based on which party owes the higher sum that party pays the difference". According to the arbitrator's original award, $24m was due to YPSA in respect of contractor's profit by the time that work ceased in October 1997. The account which had been agreed (subject to qualifications) at the time of the compromise included interest on the loan up to that date, but did not make allowance either for the contractor's profit or interest on it. If no interest were allowed on the amount which had accrued due to YPSA in respect of contractor's profit, there would be less money to set off against the principal and interest due to the Trust. A final account could not be complete until the arbitrator specified what interest there should be on the unpaid contractor's profit. Further, it would be inappropriate to apply the rate of interest in respect of Supreme Court judgment debts when the interest on the loan was compound.

77. In a supplementary award dated 11 May 2007 the arbitrator awarded YPSA compound interest on the amount of his earlier award from 31 October 1999 (shortly after construction work ceased), totalling $214,512,232.72. In his reasons the arbitrator stated that he had never doubted YPSA's entitlement to interest on the amount awarded by him in July 2005, but his uncertainty had been as to his jurisdiction. On the question of the date from which interest would run, he said that he agreed with YPSA's arguments over those of the Trust, mainly because YPSA's arguments "reflected the opinions and reasons expressed by me in my Award". On the question of interest being compound, he said, at para 3.5:

> "As far as the right to compound the interest payments are concerned, I accepted the respondent's arguments that the parties contemplated this form in their agreements and did not find the 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 moneys."

The Supreme Court sets aside the award of interest

78. The Trust issued proceedings in the Supreme Court to set aside the supplementary award and remit the matter to the arbitrator on the following grounds:

> i) That there is an error of law on the face of the record in that the arbitrator awarded interest to the defendant on the basis of compound interest in circumstances in which he had no legal authority to do so.
>
> ii) That the arbitrator was guilty of misconduct in that he assumed a jurisdiction to award compound interest in the circumstances of this matter which he did not have, either by the terms of the submission to arbitration or by general law.
>
> iii) That the arbitrator erred in law and/or misconducted himself by awarding interest to the defendant at a rate at which and from a date on which it was not as a matter of law entitled to interest, as its entitlement to the profit had not then arisen."

79. Hibbert J held that neither the loan agreement nor the compromise agreement authorised the award of compound interest on contractor's profit, and that the arbitrator's only power to award interest was under section 3 of the Law Reform (Miscellaneous Provisions) Act, which expressly excluded compound interest. He found that the arbitrator therefore acted in excess of his jurisdiction. He further held that the arbitrator had not sufficiently considered the date from which or rate at which interest should be paid, and that it would be inequitable to allow the award to stand without further consideration.

The Court of Appeal restores the arbitrator's award

80. In the Court of Appeal, McIntosh JA cited a number of authorities, including the decision of the House of Lords in *Sempra Metals Ltd v Inland Revenue Comrs* [2007]

UKHL 34, [2008] 1 AC 561, that the court has a common law jurisdiction to award interest, simple and compound, as damages for non-payment of debts, as well as on other claims for breach of contract and in tort. She said that the views expressed by Lord Nicholls about the importance of recognising economic reality, and the need to be able to give compound interest in order to achieve full restitution and, hence, a just result, were in step with decisions in the Jamaican jurisdiction. She concluded that the power to award compound interest was part of the general law which the arbitrator was obliged to follow in coming to his decision, adding that "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".

81. McIntosh JA rejected the Trust's arguments that the arbitrator had misconducted himself in his choice of the appropriate date and rate of interest computation or that he had failed properly to adjudicate on the issues raised before him.

82. McIntosh JA also rejected the submission that the award ought to be set aside for error of law on its face. She said that "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", and that there was "no erroneously stated principle of law disclosing any error on the face of the award which would require its remission to the arbitrator".

The appeal to the Board

83. Before the Board, Mr Stuart Ritchie QC submitted on behalf of the Trust that in making the supplementary award the arbitrator exceeded his jurisdiction; made errors of law on the face of the award; misconducted the proceedings; and there was a procedural mishap such that the interests of justice require the award to be set aside or remitted.

Excess of jurisdiction

84. Mr Ritchie submitted that neither the loan agreement nor the compromise agreement provided for payment of compound interest on contractor's profit. That is correct; there was no such provision in either agreement.

85. Consequently, he submitted, the arbitrator had no jurisdiction to award such interest. I do not agree. Mr Ritchie made reference, as did Hibbert J and McIntosh JA, to the well known decision of the English Court of Appeal in *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240. The issue was whether an arbitrator had jurisdiction to award interest on an award for demurrage under a charterparty. It is important to note

that, as Tucker LJ recorded at p 256, it was common ground that interest would not have been recoverable at common law. The question was whether the arbitrator had jurisdiction to make a discretionary award of simple interest, which a court would have had under the Law Reform (Miscellaneous Provisions) Act 1934. The court held that the arbitrator had such a power, not by direct application of the Act but because the submission of the parties' dispute to the arbitrator impliedly involved giving him the same power to award interest as a court would have had.

86. In my judgment the Court of Appeal in the present case was correct to hold, applying *Sempra*, that the arbitrator had a common law jurisdiction to award interest on the amount of the contractor's profit which had accrued due at the time when construction work ceased. Mr Ritchie submitted that this involved a misapplication of the principle established by *Sempra*; the House of Lords there held that damages may, if pleaded and proved, include interest on interest, but YPSA never pleaded or proved that they had suffered loss either by having to borrow or by loss of the opportunity to lend the amount found due to it in the first award.

87. The Trust's failure to pay the developer's profit as and when it became due was a breach of contract. It is trite law that the purpose of the law of damages is to put the innocent party, so far as money can, in the same position as if the breach had not occurred, but until *Sempra* there was an unprincipled exception with regard to interest losses by way of damages for losses caused by a breach of contract. Following the remittal of the matter of interest to the arbitrator by the order of McIntosh J (against which there was no appeal), and in response to the directions of the arbitrator, YPSA delivered a detailed calculation of the amount claimed as interest on the profit awarded. In relation to its loss of use of the money YPSA submitted that it would have been entitled to use the unpaid developer's profit to pay outstanding interest and then the outstanding principal. As to the value of what it had lost, YPSA relied on letters from its bank (Scotiabank), attached to its submission, setting out the bank's interest rate applicable to YPSA over the relevant period. YPSA used the letters from the bank as the basis for the computation of the interest which it claimed. The arbitrator accepted that computation as the measure of what YPSA had lost through non-payment of the developer's profit, because he said in his reasons (to which I have referred in para 77) that not to have awarded the sum which he did (ie compound interest) would not have restored YPSA to the same position as if the breach had not occurred.

88. In the Court of Appeal McIntosh JA cited the following passages from Lord Nicholls' opinion in *Sempra*:

> ""'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" [as was confirmed in the present case by YPSA's bank]. … If the law is to achieve a fair

> and just outcome when assessing financial loss it must recognise and give effect to this reality. (Para 52)"

and in that case

> "An award of compound interest is necessary to achieve full restitution and, hence, a just result." (Para 112)

89. McIntosh JA justifiably regarded Lord Nicholls' words as authority supporting the entitlement of the arbitrator to award the sum which he concluded was necessary for YPSA to be restored to the same position but for the breach.

Error of law on the face of the award

90. The submission of error of law on the face of the award involves two considerations – what documents are to be regarded as forming part of the award and whether there was an error of law on the face of them.

91. Where documents are appended to an award without qualification, the natural inference will be that they were intended by the arbitrator to be taken as part of the award. In addition, where an award refers to the contents of another document in terms which implicitly invite a reader of the award to read the document in order to follow the decision, that document will be treated as incorporated; but mere reference to another document in general terms will not have that effect. See *DS Blaiber & Co Ltd v Leopold Newborne (London) Ltd* [1953] 2 Lloyd's Rep 427 and *Giacomo Costa Fu Andrea v British Italian Trading Co Ltd* [1963] 1 QB 201.

92. In this case the supplementary award is closely associated with the first award and invited attention to its reasoning (see para 77 above). The first award is therefore to be treated as incorporated in it. In turn, the first award incorporated a number of documents which formed appendices to it. These included the compromise agreement, and there is a good argument that the award incorporated the project account dated 7 January 1999, which formed an essential part of the compromise agreement. Mr Ritchie submitted that the award also incorporated the loan agreement. I am willing to accept for the sake of argument that the award incorporated the development budget containing the item for developer's profit, on the basis that it was referred to in the first award in terms which arguably directed the reader to its contents. But I am not persuaded that the award incorporated the entire loan agreement. The arbitrator's references to it were largely by way of general description, setting the background to the issues for his decision, about which the contract contained no direct provision. It cannot be said that the arbitrator incorporated the contract in the award in the sense that he implicitly

invited those who were reading the award to read the contract in order to follow his decision.

93. The Trust's case, in summary, is that the arbitrator misunderstood how the loan agreement was to operate and so reached a wrong result; but if that submission is correct, it does not amount to an error of law on the face of the award. To establish an error of law on the face of the award, it is necessary to demonstrate from the award itself that it is based on some legal misunderstanding, as was explained by Lord Dunedin in *Champsey Bhara & Co v Jivaraj Balloo Spinning and Weaving Co Ltd* [1923] AC 480, 487-488:

> "An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in the narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound."

94. Mr Ritchie's oral argument began with a close analysis of the loan agreement. But that document is not part of the award, and if the arbitrator misunderstood its effect, that is not self-evident from the award. Nor can an error of law be demonstrated from the compromise agreement and associated project account; the award does not contain any legal proposition relating to them.

Misconduct

95. It has been long established that it is not misconduct for an arbitrator wrongly (in the view of a court) to have preferred the evidence and arguments of one party to those of the other on a question of fact. The parties having chosen to submit the matter to the decision of the arbitrator, it is the arbitrator's decision which binds them. See, among many authorities, *Charles Weiss & Co Ltd v Peters, Rushton and Co Ltd* (1922) 10 Lloyd's Rep 312 (Atkin LJ), *Moran v Lloyd's* [1983] QB 542, 549 (Sir John Donaldson, MR), *Bulk Oil (Zug) AG v Sun International Ltd* [1984] 1 Lloyd's Rep 531, 533 (Bingham J) and *King & Arthur v Thomas McKenna Ltd* [1991] 2 QB 480, 490 (Lord Donaldson, MR). It would be different if the arbitrator acted unfairly, for example, by showing bias or by failing to give one or both parties a proper opportunity to present their case or by failing to consider the arguments on either side, but that is not this case. And the same principle applies to an alleged error of law, unless the award is stated in the form of a case for the opinion of the court (which the parties might have

asked, but did not ask, the arbitrator to do under section 8 of the 1900 Act) or the error is apparent on the face of the award. See again the authorities cited above.

96. It is argued by the Trust that the arbitrator failed adequately to consider the basis on which he could consider whether he was entitled to award compound interest and whether in fact or in law the claim could succeed. But there is no basis for saying that he did not diligently consider the arguments whether interest should be awarded, for what period and at what rate. He decided that not to award compound interest over the period from the time when construction work ended would fail to put YPSA in the position which it should have been in. The real complaint is that he was wrong in fact or law or a combination of the two. Despite his best efforts he may have been wrong, but on the authorities that is not the same thing as misconduct. Error of fact or law there may have been; misconduct in the established sense there was not.

Procedural mishap

97. In 1989 the editors of the second edition of *Mustill & Boyd on Commercial Arbitration* (Sir Michael Mustill and Stewart Boyd QC) identified, by reference to the authorities, four classes of case in which the court would exercise it powers under section 22 of the Arbitration Act 1950. These were cases where there was a) error on the face of the award, b) misconduct by the arbitrator, c) a mistake admitted by the arbitrator and where he requested that the award be remitted and d) fresh evidence. In *King & Arthur v Thomas McKenna Ltd* [1991] 2 QB 480 the Court of Appeal held that these categories were not exhaustive. More particularly, Lord Donaldson MR (with whom the other members of the court agreed) said at 491:

> "In my judgment the remission jurisdiction extends beyond the four traditional grounds to any cases where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspects of the dispute which has been the subject of the reference has not been considered and adjudicated upon as fully 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."

Lord Donaldson added this rider:

> "In so expressing myself I am not seeking to define or limit the jurisdiction … subject to the vital qualification 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. … The qualification is … of fundamental importance. Parties to arbitration, like parties to litigation, *are* entitled to expect that the arbitration will be conducted without mishap or misunderstanding and that, subject to the wide discretion enjoyed by the arbitrator, the procedure adopted will be fair and appropriate. What they are *not* entitled to expect of an arbitrator any more than of a judge is that he will necessarily and in all circumstances arrive at the 'right' answer as a matter of law. That is why there are rights of appeal in litigation and no doubt would be in arbitration were it not for the fact that in English law it is left to the parties, if they so wish, to build a system of appeal into their arbitration agreements and few wish to do so, preferring 'finality' to 'legality'. …"

98. The mishap in that case was that counsel appearing for one of the parties had failed to put something to the tribunal. The Court of Appeal's decision that the award should be remitted in those circumstance led to a considerable degree of criticism, and the law of England and Wales has now been tightened by the Arbitration Act 1996. But whatever the merits or demerits of that decision on its facts, it is quite clear that Lord Donaldson was speaking about mishaps in procedure not due to anything on the part of the arbitrator capable of amounting to misconduct, which he differentiated from cases where there was not a mishap of that kind but the arbitrator reached a wrong result in fact or law. In this case the Trust has not identified any procedural irregularity, as distinct from an error in the result. It presented its arguments fully to the arbitrator and there is no basis for saying that he did not consider them. He did, and he preferred the arguments of YPSA. The complaint is that he reached the wrong result. But it would be contrary to *King & Arthur v Thomas McKenna Ltd* and previous authorities to set aside the award on that ground.

Conclusion

99. In summary, in the present case the parties chose to refer the matter to an experienced quantity surveyor. They might have asked him to state his award in the form of a case for the opinion of the Supreme Court, but they did not. They were content to be bound by the opinion of the arbitrator. He considered the arguments presented and applied his judgment and experience in arriving at what he determined to be the just outcome. The amount which he awarded in interest was nearly nine times the amount which he had awarded as contractor's profit, but this reflected the fact that there had been years of very high interest rates and falling currency value. Whether he was right or wrong to award interest and, if so, to award it at the rate and for the period which he did, I agree with the Court of Appeal that there was no sufficient basis for the court to

disturb the award. I would therefore humbly advise Her Majesty that the appeal should be dismissed.