[2017] JMCC Comm 41

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2016HCV00283

BETWEEN	**JAMAICA SOCIAL INVESTMENT FUND**	**CLAIMANT**
AND	**CONSTRUCTION SOLUTIONS LIMITED**	**DEFENDANT**

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2016CD00105

BETWEEN	**CONSTRUCTION SOLUTIONS LIMITED**	**CLAIMANT**
AND	**JAMAICA SOCIAL INVESTMENT FUND**	**DEFENDANT**

Mr Ransford Braham QC instructed by BrahamLegal, Attorneys-at-Law for Construction Solutions Limited

Ms Carlene Larmond instructed by Rattray Patterson Rattray, Attorneys-at-law for Jamaica Social Investment Fund

Arbitration – Award - Bases for disturbing award

Contract – Construction contract – Value of work done – Whether value of performance bond as stated in bill of quantities is conclusive

30th November and 15th December 2017

LAING, J

The Claims

[1] Jamaica Social Investment Fund ("JSIF") by fixed date claim form filed on 26th January 2016 sought, *inter alia*, an order that the award made in favour of Construction Solutions Limited ("CSL") in the sum of $12,256,850.13 pursuant to a ruling delivered on September 30, 2015 and confirmed on December 21, 2015 ("the Award"), by the arbitrator, the Honourable Mr. Justice Roy Anderson (retired), (the Arbitraor"), be set aside under Section 12(2) of the Arbitration Act.

[2] The gravamen of JSIF's claim is that the Arbitrator failed to correctly calculate the actual cost incurred by CSL in respect of which he awarded compensation, and in particular the cost of a performance bond.

[3] CSL by fixed date claim form filed on 26th April 2017 also sought the setting aside of the Award, asserted that the award did not represent the correct basis of compensation and that CSL is entitled to:

> *i. ...damages being the cost, value and/or expense for the performance bond and insurance as set out in the Bill of Quantities, the said value being:*
>
> *(a) Performance Bond $8,000,000.00*
>
> *(b) Insurance $6,400,000.00*
>
> *ii. ...the full cost, value, expense, and/or opportunity cost of the money that had to be borrowed while the sum of $10,000,000.00 was hypothecated by the National Commercial Bank to secure the performance bond, from February 2010 to 17th September 2012 (or such other sum as the Court may determine).*

[4] Both parties by their respective claims sought the setting aside of the Award but for different reasons. On the application of CSL, having regard to the similarity in their nature, the claims were consolidated by order of the Court on 30th May 2016 (the "Claims").

The Background

[5] JSIF is a limited liability company incorporated under the Companies Act of Jamaica and is wholly owned and operated by the Government of Jamaica. CSL is a company also incorporated under the Companies Act and its principal business involves various types of construction and general civil engineering works. In or about June 2009, JSIF invited bids by advertisement for a project at Shelter Rock in the parish of St Catherine. CSL was informed by a letter dated 19th January 2010 that it was successful in its bid. The letter also indicated that in order for CSL to sign the Construction Agreement ("the Contract"), CSL was required to provide performance security in the sum of $7,857,933.50 within twenty-one (21) days, insurance coverage in the joint names of JSIF and CSL for the duration of the contract within twenty eight (28) days, and a construction programme and cash flow forecast within fourteen (14) days of receipt of the letter. CSL duly complied with these requirements. Performance bonds are used in service or construction contracts to guarantee a contractor's performance obligation under such contracts and CSL provided performance security in the form of a performance bond in the amount of $7,857,933.50 supported by Jamaica International Insurance Company Limited (the "Performance Bond").

[6] After the Contract came into effect, but before the formal signing of it and before CSL was put in possession of the site, JSIF terminated the Contract, relying on clause 59.4 therein which provided that it may terminate the contract for convenience. CSL submitted its invoices to JSIF "*for work done as per Bill of Quantities up to the time of termination.*" The invoice included, *inter alia*, a claim for "*Provision of performance Bond*" in the sum of $8,000,000.00 and "*Provision of Insurance*" in the amount of $6,400,000.00.

[7] The parties were unable to reach a settlement and the dispute was referred to arbitration. It was that arbitration and the resulting Award which has resulted in the Claims.

The Law

[8] There was no dispute between Counsel representing the parties as to the applicable law in this case. The dispute surrounded the application of the law to the facts before the Court. Counsel were agreed that two of the relevant grounds on which the Award may be set aside are: (1) Misconduct pursuant to Section 12 of the Arbitration Act ("the Act") and (2) where there is an error on the face of the record. Although the Act has now been repealed its provisions are applicable to the Claims having regard to the time when they were filed. This is because section 64 of the Arbitration Act, 2017 provides that it applies to an arbitration agreement made before the day it comes into force if the arbitration is commenced on or after the day when the Act comes into force. The Arbitration Act, 2017 came into force by assent of the Governor General on the 21st day of June 2017. As a point of academic interest only, it should be noted that the grounds for challenging an arbitration award under this freshly minted Arbitration Act, 2017 are more limited.

[9] Both Counsel also accepted as settled, that as it relates to remission, this Court has the jurisdiction to remit the matters in respect of which there is a challenge, or any of them, to the reconsideration of the Arbitrator.

(1) Misconduct

[10] Harrison P. in the Court of Appeal decision in **Sans Souci Limited v VRL Services,** (unreported), Court of Appeal, Jamaica SCCA No. 20/2006, Judgment delivered 12th December 2008, confirmed misconduct as a ground for setting aside an award, and commented as follows:

> *16. An arbitration award is final and binding on the parties thereto, by virtue of section 4(h) of the Arbitration Act ("the Act"). However, in view of section 12(2) of the Act, a court may set aside the award in particular circumstances, namely, where he has misconducted himself. The section reads:*
>
> *" 12(1) …*

> *(2) Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured the Court may set the award aside."*
>
> *"Misconduct" is used in its widest sense and is not confined to wrongdoing. It may include a mistake of law or fact. However, the court, in addition, has an inherent power to set aside an award where there is an error on the face of the record."*

[11] Reliance was placed by both Ms Larmond and Mr Braham QC on the comments of the Privy Council in **National Housing Trust (Appellant) v YP Seaton & Associates Company Limited(Respondent)** [2015] UKPC 43, at paragraph 51 on the meaning of the term misconduct, where it was stated that:

> *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."*

[12] The Courts have taken the approach that in order to satisfy the definition of misconduct there must be more than a mere error of law or fact. As Sir John Donaldson MR in **Moran v Lloyd's (A Statutory Body)** [1983] 1 Q.B. 542 stated at page 549 F:

> *"For present purposes it is only necessary to say, as Mr. Littman fully accepted, that the authorities established that an arbitrator or umpire does not misconduct himself or the proceedings merely because he makes an error of fact or of law. Similarly the power of remission under section 22 has never been exercisable merely on the basis that the arbitrator or umpire has made such an error."*

(2) Error on the face of the record

[13] The Judicial Committee of the Privy Council in **Champsey Bhara & Co v Jivraj Balloo Spinning and Weaving Co, Ltd** [1923] All ER Rep 235, p. 238 D offers helpful guidance on what constitutes an error on the face of the record as follows:

> *"...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 one can then say is erroneous."...*

THE JSIF CLAIM

[14] JSIF has challenged two factual findings by the Arbitrator on which the Award is premised. The first of these factual findings appears at paragraph 39 of the Award as follows:

> *"I accept that there is sufficient evidence, on a balance of probabilities, to find that the sums proven as expended by the Claimant are those set out in attachments 17, 18 and 30 of Mr. Vincent Taylor's Witness Statement. Those sums are $7,857,933.50 for the performance bond and $4,398,916.63 being the insurance premium for the eleven (11) month period contemplated by the contract, amounting to a total of $12,256,850.13."*

[15] The second finding that is being challenged appears at paragraph 46(a) of the Award and is as follows:

> *"The Claimant is awarded the sum of $12,256,850.13 being the actual costs it has shown it incurred in complying with the requirements imposed by the Defendant."*

[16] Ms Larmond submitted on behalf of JCIF that:

> *...the learned Arbitrator erred as a matter of fact in finding that CSL incurred the sum of $7,857,933.50 for the performance bond as an actual cost in complying with the conditions of entering the contract; in circumstances where there was no evidence to*

support that finding and where the evidence is actually to the contrary.

Counsel asked the Court to examine each of the attachments referred to in paragraph 39 of the ruling. attachment 17 is the Performance Bond and attachment 18 is the cover note dated 8th day of February 2010 (the "Cover Note") issued by Jamaica International Insurance Company Limited ("JIIC") in respect of the insurance policy taken out by CSL. Attachment 30 is an invoice dated March 16, 2010 from Nationwide Insurance Agents & Consultants Limited to CSL ('the Invoice").

[17] JSIF contends that the evidence before the learned Arbitrator is clear that $7,857,933.50 was not expended by CSL for the Performance Bond. It is not disputed that the amount of the Performance Bond is $7,857,933.50. The Court observes that the Cover Note refers to four (4) areas of coverage, namely, Contractors' All Risks, Public Liability, Employers Liability and Performance Bond. The Invoice is in the total sum of $4,398,916.63. It ascribes an amount which represents the cost of each of these areas of coverage listed in the Cover Note and as it relates specifically to the Performance Bond, the amount attributed to it is $392,896.68.

[18] Ms Larmond submitted that based on these documents it is clear that in awarding the sum of $4,398,916.63 the learned Arbitrator would have included the $392,896.68 which was the premium and actual cost expended for the Performance Bond as reflected in the Invoice. There was therefore no basis for the additional award of $7,857,933.50.

[19] Mr Braham QC, submitted that when one examines paragraph 39 of the Award, the reasonable construction to be placed on it is that the Arbitrator was not saying that all the evidence that he has considered in order to make his finding as to the amount expended by CSL is contained in, or confined to attachments 17, 18 and 30. Learned Queen's Counsel argued that based on this construction which he posited, the Court ought to conclude that there was other evidence on which the Arbitrator relied, in arriving at the conclusion that CSL expended the

sum of $7,857,933.50 in respect of the Performance Bond. I do not accept this submission. In the first place the construction as submitted strains the literal meaning of the Arbitrator's words which in the Court's view can only be reasonably interpreted to mean that he was relying only on attachments 17, 18 and 30.

The Court's analysis and conclusion

[20] The Court finds that there is no basis for finding that there was other evidence which the Arbitrator considered on this point and a finding that he did consider other evidence would be sheer speculation. There is also no reference in his ruling to any evidence other than the attachments 17, 18 and 30, on which he may have relied to arrive at the amount of $7,857,933.50. The Court accepts the submission on behalf of JCIF that the award of the sum of $7,587,933.50, which represents more than half the Award, is premised on an error of fact by the learned Arbitrator.

[21] The Court finds that the documentary evidence clearly demonstrates that the cost of the Performance Bond was $392,896.68. The arbitrator having decided that the measure of compensation for CSL was compensation to the extent of its expenditure, had no evidence before him to support a finding that CSL had expended $7,857,933.50 in order to acquire and provide the Performance Bond. The Invoice at attachment 30 makes it demonstrably clear that the total premium in the sum of $4,398,916.63 includes the sum of $392,896.68 which is the cost of the Performance Bond. The award of $4,398,916.63 would therefore have represented the sum actually expended for the Insurance and Performance Bond. In awarding the sum of $4,398,916.63, together with the sum of $7,857,933.50, the learned Arbitrator appears not to have fully appreciated the documentary evidence, and in particular the Invoice. As a consequence, the Arbitrator fell into error in his award of the additional sum of $7,857,933.50.

Should the Award be remitted?

[22] Helpful guidance on the power to remit can be had from the observation of their Lordships in the **National Housing Trust v YP Seaton** case (supra) at paragraph 52 as follows:

> *"52….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)"*

[23] The Court accepts the submission of Ms Larmond that the Arbitrator's handling of the evidence on this point is such that it falls within the definition of misconduct. The Court further finds that it would be inequitable and would result in a substantial miscarriage of justice if the Court were to allow the Award to take effect without some further consideration by the Arbitrator. The Court will therefore order that the Award be remitted for further consideration on this point.

THE CSL CLAIM

[24] The proceedings before the Arbitrator included a claim by CSL for damages for breach of contract. The Arbitrator concluded that JSIF lawfully invoked clause 59.4 of the Contract permitting termination for convenience and consequently the claim for breach of contract was rejected.

[25] It was submitted on behalf of CSL that because the Arbitrator concluded that the contract was lawfully terminated for convenience, he was then required to apply the provisions applicable to termination for convenience. Learned Queen's Counsel referred the Court to the following provisions of the Contract as being relevant:

> *59.4 Notwithstanding the above, the Employer may terminate the Contract for convenience.*
>
> *61.2 If the Contract is terminated for the Employer's convenience or because of a fundamental breach of Contract by the Employer, the Project Manager shall issue a certificate for the value of the work done, Materials ordered, the reasonable cost of removal of Equipment, repatriation of the Contractor's personnel employed solely on the Works, and the Contractor's costs of protecting and securing the Works, and less advance payments received up to the date of the certificate.*

[26] The Court was also referred to the definition of the term "*value of the work done*" in the following clauses:

> *42.4 The value of the work executed shall comprise the value of the quantities of the items in the Bill of Quantities completed.*
>
> *43.4 Items of the Works for which no rate or price has been entered shall not be paid for by the Employer and shall be deemed covered by other rates and prices in the Contract.*

[27] The definition of the term Bill of Quantities as stated in clause 37.1 and 37.2 was also commended to the Court as follows:

> *37.1 The Bill of Quantities shall contain items for the construction, installation, testing, and commissioning work to be done by the Contractor.*

> *37.2 The Bill of Quantities is used to calculate the Contract Price. The Contractor is paid for the quantity of the work done at the rate in the Bill of Quantities for each item.*

[28] Learned Queen's' Counsel submitted the above provisions of the Contract to which reference has been made, are to be interpreted in accordance with the recognized principles of interpretation summarized by Phillips JA at paragraph 64 of her decision in **Jamaica Public Service Co Ltd v Union of Clerical, Administrative and Supervisory Employees, et al** [2016] JMCA Civ 5, as reproduced hereunder:

> *[64] …At paragraph [49] of the judgment [Jamaica Public Service Company Limited v The All Island Electricity Appeal Tribunal and Others [2015] JMCA Civ 17], I summarized the relevant principles to be distilled from the cases emanating from the House of Lords and the Privy Council previously mentioned, which are as follows:*
>
> *" - ...in construing a document, one must not add words not originally placed therein;*
>
> - *the court does not make a contract for the parties, or attempt to improve on terms expressed by them, but must interpret the contract as stated;*
>
> *the plain and ordinary meaning must be applied unless there are ambiguities, and then that meaning is only displaced if it results in a commercial absurdity. The onus is on the person claiming that the meaning is commercially absurd to prove it;*
>
> - *a term is implied only if necessary to give business efficacy to the contract;*
>
> - *the matrix of fact against which the contract and document is to be construed include anything that would have affected the way in which the language of the document would have been understood by a reasonable man; the law excludes from the admissible background the previous negotiations of the parties and the declarations of subjective intent; and*
>
> - *the meaning of the document is what is important, not just the meaning of the words (eg grammar, syntax), that is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to whom the instrument is addressed."*

[29] The position advanced on behalf of CSL was that applying the plain and ordinary meaning of the above cited clauses of the contract, because JSIF had terminated the contract for convenience, it was required to pay CSL, the value of the work

done and this value was "*the quantities of the items in the Bill of Quantities completed*". The relevant items of work completed by CSL and the prices as reflected in the Bill of Quantities were, in relation to the performance bond $8,000,000.00; insurance $6,400,00.00, and progress Gant chart $100,000.00.

[30] CSL's complaint is that the Arbitrator did not award the value of the work done as set out in the Bill of Quantities pursuant to the Contract as he ought to have done but instead he erroneously based his conclusion regarding compensation on principles of equity and fairness.

[31] Mr Braham QC submitted that in **Sans Souci** the Court of Appeal of Jamaica regarded "the construction of the terms of a contract" as a question of law the incorrect interpretation of which can lead to a finding of an error on the face of the Award. Counsel commended the Court to paragraph 20 of the judgment where their Lordships rely on dicta of Viscount Cave, L.C. in **Government of Kelantan v Duff Development Co. Ltd** [1923] AC 395. It does not appear that on appeal from the Court of Appeal's Judgment the Privy Council took any issue with the accuracy of this proposition.

> *"20. The issue of the construction of the terms of a contract has been treated as a question of law. This issue of such specific reference was considered by the House of Lords in Government of Kelantan v. Duff Development Co., Ltd. [1923] A.C. 395. Viscount Cave, L.C., approving the dicta of the Judicial Committee of the Privy Council in In re King v. Duveen, and Attorney-General for Manitoba v. Kelly [1922] 1 A.C. 268 at page 408 said*
>
> > *"... unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally – for instance, that he has decided on evidence which in law was not admissible or on principles of construction*

> *which the law does not countenance, then there is error in law which may be ground for setting aside the award; but the mere dissent of the court from the arbitrator's conclusion on construction is not enough for that purpose."*
>
> *A court will not disturb an arbitrator's award, once it is satisfied that the arbitrator has proceeded through the process of ascertaining the facts, correctly ascertaining and identifying the relevant law and having done so, applies the law to the facts and arrives at a conclusion that he could have (Finevelt AG v. Vinava Shipping Co Ltd. The Chrysalis [1983] 2 All E.R. 658)."*

[32] Learned Queen's Counsel submitted that there has been misconduct and/or an error on the face of the Award because of the Arbitrator's treatment of the basis on which compensation should be awarded to CSL. It was further submitted that this error of law is fundamental as it goes to the interpretation of the contract and the application of its terms to the facts the case.

The Court's analysis of the Arbitrator's approach to compensation

[33] In assessing the Arbitrator's bases for compensation it is necessary to set out in detail a number of paragraphs of his Award. The Arbitrator in paragraph 20 of the Award raises the issue of compensation by posing a question, as follows:

> *20. "...Is there no obligation – (and I use the term guardedly) – where a Party, A, has said to a Party, : "I award you a contract, but it is a condition precedent to my entering into this contract with you that you incur certain items of expenditure. Nevertheless, notwithstanding your having incurred such expenditure in order to bring the contract into being, I have a right to terminate "for convenience" and to walk away without acknowledging or compensating you for the expenditure which, but for my condition, you would not have needed to incur"?*

[34] At paragraph 33 he acknowledges the significance of the items included in the Bill of Quantities as priced therein, but very importantly, limits the compensation to those costs actually incurred in order to fulfil the conditions precedent to the award of the Contract. To do justice to the Arbitrator's reasoning, I think it is prudent to set out that entire paragraph in full hereunder:

> *33. The Defendant does not deny that the Claimant incurred the expenses in relation to the provision of the performance bond and the insurance policy. The Claimant's averment is that it did incur these expenses and has not recouped them either from the Defendant or anyone else including the issue of the bond or the insurance. Clause 61.2 of the General conditions of Contract required the Project Manager to issue a certificate for the value of work done in the event of a termination for convenience or because of a fundamental breach of contract. Such a certificate has not been issued and the Claimant avers that this failure is breach of contract for which it is entitled to damages. The Tribunal accepts, as submitted by the Claimant, that in circumstances where the Defendant has terminated the contract for convenience, the certificate to be issued by the project manager should include those items of the Bill of Quantities as were in the Bill, have been priced therein and the Claimant has in fact expended resources to provide. Thus, in this case, the sums expended for the performance bond, the insurance and the progress chart, ought properly to be treated as "preliminary items of expenditure as shown in the Claimants citation of* ***Hudson's Building and Engineering Contracts****. In any event, the expert witness for the Defendant, conceded in his testimony that the Claimant should be reimbursed reasonable expenses which it had incurred, based upon industry practice. I believe that it would be grossly unfair and inequitable that the Claimant should be unable to recover those costs which it incurred, and was required to incur, in order to fulfil conditions precedent to the award of the contract.*

[35] The Arbitrator continues in paragraph 35 of the Award to list a number of propositions, a relevant one for purposes if this issue is as follows:

> *g. Notwithstanding the propositions set out above, where a party has been required to expend sums as a condition of entering into a contract, and the contract is then terminated for convenience before the contractor can be put into possession of the site, the contractor who is thus out of pocket to the extent of the expenditure incurred, is entitled to compensation to the extent of the expenditure.*

[36] At paragraph 38, the Arbitrator observed that a profit element would have been built into the various line items of the Bill of Quantities including the provision of the Performance Bond, and identified that fact as one reason for not accepting the amounts listed in the Bill of Quantities as the amounts in respect of which compensation should be payable. It is also helpful in my view if the Arbitrator's reasoning is again reproduced for completeness hereunder:

> *38. However, on the question of the sums, if any, payable for compensation, I note with some concern, the lack of specificity in the particularization of the items of expenditure, as well as some unexplained propositions. According to the Claimant's case, the project profit on this was 25%. As a result, it claims that the profit on the unexecuted portion of the contract is $35,689,667.39.in such a case, the 25% profit element is applied to every item in the Bill of Quantities apart from those already provided. The logic of this proposition must be that figure for Performance Bond, insurance and preferred charges of $14,400,000.00 must also have included a 25% profit/mark-up, if the argument is to hold. This is because, as a commercial reality, every item of cost must be taken into account when determining the mark-up to applied. Thus, using the Claimant's approach, the profit from the whole project if completed would have been $39,289,667.50. But based upon the Claimant's own case, the outstanding profit owed, (that is the profit it did not make because the contract was terminated) was only $35,689,667.39, a difference of $3,600,000.11. This sum would have to represent the "profit element" of the $14,400,000.00 for the items in the Bill of Quantities (if the $60,000.00 for the progress chart is included, the profit element therein becomes $3.615 million). If part of $14.4 million claim is actually profit notionally included therein then it cannot also be treated as an expense for purpose of the claim hereunder.*

[37] However, in my view, the Arbitrator's most potent argument against accepting the amounts in the Bill of Quantities, without more, as a basis of compensation, is found in the latter portion of paragraph 39 as follows:

> *...I would hold that, given the nature of a construction contract and the way in which payments are made upon certificates issued from time to time by the project manager, usually the architect, it is not possible to argue that merely because sums are set out in the Bill of Quantities, means that they are payable as such.*

Conclusion on the construction of the contract issue

[38] The Arbitrator also addressed his mind to the absence of the Quantity Surveyor's report and concluded that it did not amount to a breach of contract. It is therefore patently and demonstrably clear that the Arbitrator applied his mind to the basis for compensation in this case and for the reasons he expressed, rejected the construction which learned Queen's Counsel submits should be placed on clause 61.2. In the circumstances, I am therefore unable to accept the submissions of learned Queens's Counsel that there is an error on the face of the Award and/or

misconduct by the Arbitrator because he did not identify and apply the relevant law in relation to compensation consequent on termination for convenience.

[39] I am also unable to find from the Award that the Arbitrator decided the claim "*on principles of construction which the law does not countenance"* and that for this reason there is an error on the face of the record.

[40] Learned Queen's Counsel Mr Braham has submitted that this Court must not only determine whether the Arbitrator considered the issue in relation to the basis of compensation and his approach to compensation based on the figures stated in the Bill of Quantities, but the Court must also determine whether his analysis is correct. Queen's Counsel submitted that this is so because it is a question of fact and law. I accept these submissions as accurate. I wish to state that the Court's analysis is aligned with that of the Arbitrator on this point and the Court finds that his analysis is reasonable, logical and most importantly, correct. It is also this Court's view that, as the Arbitrator concluded, having regard to the need for certification of works in construction contracts, in the absence of the Certificate of the Project Manager, the position advanced on behalf of CSL that as it relates to the Performance Bond, CSL should be paid the "*value of the work done*" which is to be interpreted as being the price of the Performance Bond as stated in the Bill of Quantities", ($8,000,000.00), is, with respect, unsound. The suggestion is particularly weakened in the context of the unchallenged documentary evidence that the sum of $392,896.68 was the premium and actual cost expended for the Performance Bond as reflected in the Invoice.

The issue of costs

[41] Mr Braham conceded at the trial that the issue of costs was discretionary and there was no basis for the Court to review the Arbitrator's finding on this issue.

The issue of the money hypothecated to secure the Performance Bond

[42] CSL argued before the Arbitrator that it ought to have been compensated for the full cost, value, expense, and/or opportunity cost of the money that had to be

borrowed while the sum of $10,000,000.00 was hypothecated by the National Commercial Bank to secure the performance bond, from February 2010 to 17th September 2012. It argued that this was a cost associated with obtaining the Performance Bond.

[43] Ms Larmond conceded that save for the brief reference to this head of the claim in paragraph 36 of the findings (reproduced earlier in this judgement), there is no evidence on the record capable of demonstrating that the Arbitrator sufficiently addressed his mind to this issue. In the circumstances Counsel was unable to resist the submission on behalf of CSL that the Award ought to be remitted for the Arbitrator to treat with this issue.

[44] For the reasons stated herein the Court makes the following orders:

1. The award made in favour of Construction Solutions Limited in the sum of $12,256,850.13 pursuant to ruling delivered September 30, 2015 and confirmed on December 21, 2015 by the Honourable Mr. Justice Roy Anderson (retired), is set aside under Section 12(2) of the Arbitration Act and is remitted to the learned Arbitrator for him to reconsider:

    a) Whether the sum of $392,896.68 was the premium and therefore the actual cost expended by Construction Solutions Limited in providing the Performance Bond as reflected in the Invoice issued by Nationwide Insurance Agents & Consultants Ltd; and

    b) Whether Construction Solutions Limited should be compensated for the full cost, value, expense, and/or opportunity cost of the money that had to be borrowed while the sum of $10,000,000.00 was hypothecated by the National Commercial Bank to secure the performance bond, from February 2010 to 17th September 2012.