

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. SLUHCV2023/0168

BETWEEN:

NAGICO (ST. LUCIA) LIMITED

Claimant

and

CEPAL HOLDINGS INCORPORATED

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Ms. Vanessa Pinnock for the Claimant

Mr. Horace Fraser for the Defendant

2025: May 8; (Trial)
2026: February 16. (Decision)

JUDGMENT

[1] **CENAC PHULGENCE J.:** The claimant, Nagico (St. Lucia) Limited (“Nagico”) filed a fixed date claim pursuant to section 19(2) of the **Arbitration Act**¹ (“the Act”) against the defendant, Cepal Holdings Incorporated (“CHI”), seeking an order setting aside the arbitration award² made by the arbitrator, Mr. Roderick Clarke (“the Arbitrator”). It is supported by the affidavit of Mr. Jeff Dupree, Claims Supervisor of Nagico.

[2] A notice of opposition was filed by CHI on 16th May 2023 and is supported by the affidavit of Daniel Cepal, Managing Director of CHI. On 12th July 2024, an affidavit in response to Mr. Cepal’s affidavit was filed on behalf of Adele Jn Baptiste, General Manager of Nagico. Submissions were filed by Nagico and

¹ Cap. 2:06, Revised Laws of Saint Lucia, 2020.

² Dated 26th March 2023 and delivered on 3rd April 2023 (“the Award”).

CHI on 26th August 2024 and 11th September 2024 respectively. Nagico filed its submissions in reply on 23rd September 2024.

Background Facts

- [3] At the center of this matter is a policy of insurance no. 80421815725 which existed pursuant to a cover note issued on 6th December 2018. By that policy, CHI sought and obtained comprehensive insurance for the period 6th December 2018 to 2nd December 2019. The subject matter of the insurance policy was a 2007 DAF CF75 Concrete Mixer Truck, registration number PL4074, chassis number XLRAJ75PC0E765682, (“the Truck”).
- [4] On 2nd December 2019, an accident occurred at “Caye Manje” involving the Truck. CHI alleges that the Truck lost control while driving uphill because of aggregate deposit on the road causing it to roll backwards and veer off the road, with the Truck sustaining extensive damage and being deemed a “write off”³.
- [5] On 15th January 2020, Nagico instructed loss adjusters, Francis, Rosemin and Company Limited to investigate the circumstances of the accident and provide a report on liability and quantum. According to Nagico, investigations commenced in January 2020 and involved the interviewing of the driver of the Truck, among others. The actual inspection of the damaged Truck by Nagico occurred on 16th March 2020.
- [6] By letter dated 12th April 2020 sent to Nagico, the loss adjustor, Mr. Claudius Francis (“Mr. Francis”) advised that seven (7) of the Truck’s ten (10) fitted tyres did not meet the legal minimum tyre thread depth requirement in order for the Truck to be deemed roadworthy pursuant to the **Motor Vehicles and Road Traffic Regulations** (Second Schedule) (Regulation 31). Nagico then advised CHI⁴ that the state of the tyres caused it to be in breach of condition 1 (which requires the insured to maintain the insured vehicle in an efficient and

³ Exhibit “JC2” to Witness Statement of Jenna Cepal at p. 128 of the Trial Bundle (TB).

⁴ When this occurred was in dispute as Nagico alleges the letter was forwarded to CHI on 12th May 2020, but CHI alleges that it received the letter sometime in July 2020.

roadworthy condition) of the insurance policy and that the condition was a condition precedent to liability. Consequently, Nagico denied liability.

- [7] After receipt of Nagico's letter, CHI verbally advised Nagico that in order to safeguard the Truck from theft, all the tyres which were on the Truck at the date of the accident were removed and replaced with the 'old' tyres which were the ones seen by the loss adjuster on the date of the inspection.
- [8] Nagico did not accept CHI's explanation as being truthful as it only made this disclosure after it was informed of the breach of the policy and the fact that its claim had been denied.
- [9] CHI filed a claim for breach of contract against Nagico on 27th July 2021. By Order dated 13th October 2021, CHI's claim was referred to arbitration in accordance with the Commercial Vehicle Policy.
- [10] The parties signed an Arbitration agreement dated 22nd June 2022 appointing the Arbitrator. Directions were given for the filing of all relevant documents. The parties agreed to be governed by the **2013 UNCITRAL Arbitration Rules** ("2013 UNCITRAL Rules").
- [11] In accordance with the Arbitrator's directions, witness statements of Jeff Dupree and Claudius Francis were filed on behalf of Nagico, and of Jenna Cepal, Daniel Cepal, Gibson Alexsis and Jonah Ramlal on behalf of CHI along with the Police Report. Submissions were filed by the parties, and the hearing was conducted over three days, during which time all witnesses were cross-examined by Counsel as well as the Arbitrator.
- [12] Closing submissions were filed and the Arbitrator delivered his Award. The Award was accompanied by a two-page document titled 'Rationale' which contains the Arbitrator's analysis and reasons for the Award ("the Rationale"). It is this Award and Rationale which are the subject of this claim.

The Arbitrator's Award

[13] The terms of the Arbitrator's Award are as follows:

- (i) I award/instruct that Nagico Insurance negotiate a settlement with their insured Cepal Holdings for the market value of the vehicle on the day of the accident not to exceed the Sum Insured by the policy less any policy deductible and the value of the salvage. There has been considerable delay and I would order that interest at the prevailing fixed deposit rate of 2.5 % per annum be added to the amount agreed upon to run from the date of denial being 12th April 2020.
- (ii) With regard to item 2 of the claim, I am not able to allow any sum with regard to Loss of income or loss of use. Consequential losses such as the above are not insured and this arbitration is limited to matters covered by the policy of insurance. Such losses would form part of any claim for damages arising from a breach of the policy and would be subject to separate legal action.
- (iii) Each party is to bear their own costs.

The Applicable Law

[15] Section 19(2) of the Act states:

“Where an Arbitrator or umpire has **misconducted himself** or herself **or the proceedings, or an arbitration or award has been improperly procured**, the Court may set the award aside.”

The Act does not define what constitutes misconduct to satisfy section 19(2). As a result, one must look to the case law.

[16] Counsel for Nagico relies on the case of **Carillion Irishenco formerly Irishenco Construction v Dublin City Council & Anors**.⁵ In **Carillion**, McKenchie J examined the Court's powers under the Arbitration Acts 1954-1998. Section 38(1) of the 1954 Arbitration Act, which the court in

⁵ [2009] IEHC 225 at paras 54-56.

Carillion had to consider, is *ad idem* with section 19(2) of the Act. It is therefore appropriate for the Court to take into consideration decisions which interpret section 38(2) of the 1954 Arbitration Act. Counsel for Nagico also relies on the authorities discussed by the Court in **Francis Dariah and anor v Eastern Caribbean Insurance Limited**.⁶

[18] Of misconduct, the Privy Council in **National Housing Trust v YP Seaton & Associates Company Limited**⁷ stated as follows:

“... 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.”

[19] In the case of **Moran v Lloyd’s (A Statutory Body)**,⁸ Sir John Donaldson MR stated the following:

“Paragraph 67 of the Commercial Court Committee Report on Arbitration (1978) (Cmnd. 7284) drew attention to the fact that the term “misconduct ” can give a wholly misleading impression of the complaint being made against an Arbitrator or umpire. It said:

‘Misconduct’

67. Section 23 of the Act of 1950 provides certain remedies if the Arbitrator or umpire has ‘misconducted himself or the proceedings.’ Few would object to this terminology if what was referred to was dishonesty or a breach of business morality upon the part of the Arbitrator or umpire. But the section has been **held to apply to procedural errors or omissions** by Arbitrators who are doing their best to uphold the highest standards of their profession. In this context the terminology causes considerable offence, even in a permissive society. The committee would like to see some other term substituted for ‘misconducted’ which reflects the idea of irregularity rather than misconduct. It may be said that this point is merely cosmetic, but **Arbitrators are not to be criticised for their sensitivity** and the courts should not be required to use opprobrious terminology about Arbitrators and be obliged to take time explaining that when they have found that the

⁶ SLUHCV2017/0436 at paras 7-9.

⁷ [2015] UKPC 43 at 51.

⁸ [1983] 1 QB 542 at p. 548 G-H, 549 A-C.

- Arbitrator has misconducted himself, they were not using the words in any ordinary sense." (my emphasis)
- [20] Reliance is also placed on **Galway City Council v Samuel Kingston Construction Ltd & Anor**⁹ where the Supreme Court accepted as correct the principles of law as set out by the High Court in its judgment. Those principles gleaned from case law, were stated in the main to be as follows:
1. The term 'misconduct' is used in a technical sense as denoting irregularity, and not any moral turpitude or anything of that sort.¹⁰
 2. The expression 'does not necessarily involve personal turpitude on the part of the arbitrator' and that it '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'.¹¹
 3. The standard or test of misconduct ... would be something substantial, something that smacks of injustice or unfairness.¹²
 4. The Court has a common law jurisdiction to set aside or remit an award for an error of law on the face of the record.¹³
 5. This jurisdiction is limited to 'an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged'¹⁴ or is "clearly wrong".¹⁵

[21] As to the acts that constitute misconduct, Mckenzie J in **Carillion**¹⁶ said that the conduct complained of must cause or result in an injustice which must be undone. An arbitrator, the court said, does not misconduct himself merely because he gets the decision wrong, as long as the decision is within the jurisdiction of what the arbitrator has been asked to determine.

⁹ [2010] IESC 18.

¹⁰ London Export Corporation Ltd. v Jubilee Coffee Roasting Co. Ltd. [1958] 1 W.L.R. 661 at p. 665.

¹¹ Williams v Wallis and Cox [1914] 2 K.B. 478 at p. 485.

¹² McCarthy v Keane [2004] 3 I.R. 617 at p. 627.

¹³ Church & General Insurance Co. v Connolly & McLoughlin (unreported, High Court, 7th May, 1981).

¹⁴ Keenan v Shield Insurance Company Ltd [1988] IR 89 at 96

¹⁵ McStay v Assicurazione Generali SPA & Anor [1991] 2 ILRM 237.

¹⁶ At paras 66-72.

- [22] It is clear from the case law that however dissatisfied either party may be with any of the Arbitrator's findings, they are bound by them, and the High Court has no jurisdiction to interfere unless the award carried on its face an error so fundamental that it should be set aside.¹⁷
- [23] The learned authors of **Russell on Arbitration**¹⁸ stated that:
- “It is not misconduct on the part of the arbitrator to come to an erroneous decision whether his error is one of fact or law, and whether or not his findings are supported by evidence.”
- [24] In **MacPherson Train & Co. Ltd. v. Milhem & Sons**¹⁹ the Court of Appeal stated that it is not misconduct for an arbitrator to misstate or misconceive the arguments addressed to him.
- [25] In **McCarthy v Keane**²⁰ the Supreme Court held that it was not surprising, that cases in which arbitral awards have been set aside for misconduct are few and far between. They went on to say that cases of misconduct may arise in the conduct of arbitration where the arbitrator acts unfairly, either by clear acts of favouritism towards a party or adopts procedures which place one or other party (perhaps even both) at a clear disadvantage.
- [26] In the Jamaican case of **R.A. Murray International v Brian Goldson**,²¹ the Court said:
- “...the expression “misconduct” is of wide import and does not necessarily connote that the Arbitrator has been guilty of moral turpitude. It ranges from a fundamental abuse of his position, i.e. “on the one hand, that which is misconduct by any standard, such as being bribed or corrupted, to “mere ‘technical’ misconduct, such as making a mere mistake as to the scope of the authority conferred by the agreement of reference. That does not mean that every irregularity of procedure amounts to misconduct”. Our Act does not define misconduct, and it is tolerably clear that it is difficult to define exactly what this term means. However, in the following circumstances, it has been held that misconduct occurs:

¹⁷ Sheahan v. FBD Insurance plc. (Supreme Court, Unreported, 20th July, 1999), per Keane J.

¹⁸ (20th Ed.) (1992) at p. 422.

¹⁹ [1955] 2 Lloyd's Rep. 59.

²⁰ [2004] 3 I.R. 617 at pp. 626-627.

²¹ Claim No. 2012 CD 0046 at para 19.

....

(4) if there has been irregularity in the proceedings, as for example, where the Arbitrator failed to give the parties notice of the time and place of meeting, or where the agreement required the evidence to be taken orally and the Arbitrator received affidavits, or where the Arbitrator refused to hear the evidence of a material witness, or where the examination of witnesses was taken out of the parties' hands, or where the Arbitrator failed to have foreign documents translated, or where, the reference being to two or more Arbitrators, they did not act together, or where the umpire after hearing evidence from both Arbitrators, received further evidence from one without informing the other..."

[26] Case law has identified examples of misconduct.²² These include (a) refusing to hear evidence on a material issue; (b) adopting procedures placing a party or parties at a clear disadvantage; (c) acting with clear favouritism towards one party; (d) deciding a case on a point not put to the parties or failure to resolve an issue in the proceedings.

[27] In **Galway**, the Court stated that the approach to be taken in relation to each of the grounds for remittal is that it is not enough that there should be an error or misconduct but each factor must reach the level of being so serious and so substantial, or so fundamental, that it smacks of injustice and the court cannot permit it to remain unchallenged.²³

[28] It is important to bear in mind the nature and purpose of arbitration proceedings and the intention behind them when dealing with a review of an arbitration award. In the matter of the **In Arbitration Acts, 1954 and 1980**,²⁴ Hamilton CJ refers to an excerpt of **McCarthy J in Keenan v Shield Insurance Co Ltd**²⁵ where he stated that:

"Arbitration is a significant feature of modern commercial life; ... and the field of international arbitration is an ever expanding one. It ill becomes the courts to show any readiness to interfere in such a process; if policy considerations are appropriate, as I believe they are in a matter of this kind, then every such consideration points to the desirability of making an arbitration award final in every sense of the term. *Church and General Insurance Company v Connolly and*

²² Galway at p 6.

²³ Galway at p 8.

²⁴ [1995] 2 IR 424.

²⁵ Fn 14.

McLoughlin (Unreported, High Court, Costello J, 7th May, 1981) itself is an example of the type of fine combing exercise which courts should not perform when it is sought to review an arbitration award. There may be instances in which an award which shows on its face an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged.”

[29] In **Keenan**, the Court stated that the purpose of arbitration is to provide:

“a comprehensive scheme whereby matters commercial, such as in construction, insurance, financial services, shipping and kindred and other industries might be resolved without recourse to the courts and, in many instances, by those best equipped for that purpose by training and experience in the particular field.”²⁶

[30] Speaking further on the approach to be taken in these matters, O'Donnell J in **Galway** states:

“Accordingly I would suggest that it is important that the courts in considering challenges to arbitral awards should firstly remind themselves of the high tolerance that the system of arbitral review has for arbitral error and furthermore should seek to articulate as fully as possible the consideration of law and policy, and the analysis of the individual proceedings, which lead the court to conclude that in any given case a substantial error has or has not been established which is so fundamental that the proceedings cannot be allowed to stand.”

[31] Based on the authorities, the Court is empowered to set aside an award if the misconduct complained of is something so substantial, something smacking of injustice or unfairness, or in exercising its common law jurisdiction where an award shows on the face of it an error so fundamental that the courts cannot stand aside and allow it to remain unchallenged.

Inapplicable Law

[32] Counsel for Nagico, Ms. Vanessa Pinnock (“Ms. Pinnock”) also makes reference to sections 68(1) and 68(3) of the **UK Arbitration Act 1996**, which provides what the Court may do when “serious irregularity” has been found to have occurred. However, as mentioned previously, the wording of the Act is *ad idem* with section 38 of the **Arbitration Act 1954**, and it is more appropriate to rely on authorities which discuss the latter act.

²⁶ At p 93.

[33] The following excerpt from **Russell on Arbitration** further discusses the differences between the 1954 and 1996 Act on conduct required to set aside an arbitrator's award and states:

"Misconduct. This word does not appear in the Arbitration Act 1996 but under the previous law it covered a wide range of errors on the part of an arbitrator. It ranged from a fundamental abuse of his position to what was often referred to as "technical misconduct", i.e. where the arbitrator made errors but not in a culpable way or so as to impugn his integrity. Technical misconduct in that sense has no place in the law since the Arbitration Act 1996. Under the 1996 Act the grounds for removing an arbitrator are confined to the four grounds specified in s.24."²⁷

[34] It is apparent that whilst the provisions of the 1954 Act and the 1996 Act provide for the Court to set aside the award of an arbitrator, the test and considerations for setting aside the award are different. Counsel's reliance on the provisions of the 1996 Act is therefore misplaced and not applicable to these proceedings.²⁸

[35] Counsel for CHI, Mr. Horace Fraser ("Mr. Fraser") referred to the "Chablis test" as utilised by Taylor-Alexander J in **Palmavon Webster v John Dyrud**²⁹ in its notice of opposition³⁰ and submissions. In its reply submissions, Nagico submits that the Chablis test is to be applied where an application for leave to appeal an award of the arbitrator is made which the Court agrees with. The case and the test are inapplicable to the present circumstances and would not be considered by the Court.

The Issues

[36] The crux of Nagico's claim is that the Arbitrator misconducted himself and the proceedings in the seven (7) ways outlined in its fixed date claim form and expanded on in its affidavit in support, and as a result the award was improperly procured.

²⁷ Paragraph 7-126 Russell on Arbitration, 23rd ed., Sweet & Maxwell 2007.

²⁸ Counsel for CHI accepts the law as set out by Nagico. However, as stated above, the Court is of the opinion that the provisions of the 1996 Arbitration Act relied upon are inapplicable.

²⁹ AXAHCV2017/0034.

³⁰ p. 378 of Trial Bundle 3.

[37] Nagico also claims that the award is bad on the face of it and against the weight of the evidence such that no reasonable arbitrator could have arrived at such a decision and must be set aside. It alleges this based on the Arbitrator's failure to properly deal with the evidence before him regarding the changing of the tyres and the cause of the accident.

[38] Therefore, two issues arise for determination:

- (i) Whether the Arbitrator misconducted himself or the proceedings and if so, whether the award should be set aside pursuant to section 19(2) of the Act; and
- (ii) Whether the Arbitrator's award shows on the face of it an error so fundamental that the Court cannot stand aside and allow it to remain unchallenged.

Discussion and Analysis

[40] I have found that none of these seven (7) grounds constitute misconduct as contemplated by the Act, nor has Nagico been able to show that the award carried an error so fundamental that the Court cannot stand aside and allow it to remain unchallenged. The Court's reasons are provided below.

[41] Additionally, I thought it desirable to categorise the grounds to avoid unnecessary repetition in the analysis. I have categorised them as follows: errors of law/fact, procedural irregularities and failure to provide details of analysis.

[42] The Court wishes to highlight that no transcript of the arbitral proceedings has been placed before it. The Court is therefore not apprised of what was said and done during the proceedings by the Arbitrator, Counsel, the parties or their witnesses, separate and apart from what is contained in the submissions of the parties. This proved to be a limitation to the Court in its assessment.

Ground J

[43] In its affidavit in support of the claim, Nagico states as follows:

“J. The award is bad on the face of it and is against the weight of the evidence such that no reasonable Arbitrator could have arrived at such a decision and must be set aside.”

[44] In relation to this ground, Nagico states that upon a review of the evidence along with the legal authorities presented throughout the Arbitration proceedings, it is clear that the Arbitrator did not fully and properly consider all the evidence adduced at the hearing. They say that the Arbitrator failed to appreciate all the inconsistencies which were revealed during the cross examination of CHI's witnesses in relation to whether the tyres were ever changed.

[45] Paragraphs 73 to 78 of the affidavit in support are reminiscent of the points raised in relation to Category 1-Grounds A to D. Since four (4) of the grounds³¹ of misconduct overlap with the allegations raised in support of the Award being bad on its face, I will consider those grounds for misconduct and the Court's jurisdiction to set aside an award in those instances, together.

Category 1: Errors of Fact/Law

[46] The first category consists of the following grounds for setting aside the award as set out fully in Nagico's affidavit in support the claim:

- (i) Grounds A and B: The arbitrator's finding that there was “ample opportunity” for the tyres to be changed, since the evidence highlighted under cross-examination revealed that CHI was never able to prove that the tyres were indeed changed and the motor vehicle form submitted by CHI stated that some tyres were damaged; The Award is against the weight of the evidence and no reasonable arbitrator would have come to such a decision.
- (ii) Grounds C and D: The arbitrator's finding that there was insufficient evidence as to the actual cause of the accident and having resolved that uncertainty in favour of CHI; The Award is against the weight of the evidence, and no reasonable arbitrator would have come to such a decision.

³¹ Category 1: Grounds A to D

- (iii) Ground G: The Arbitrator's reliance on and highlighting of Nagico's acceptance of the Motor Vehicle Inspection Document; and
- (iv) Ground H: The Arbitrator placed a misconceived and irrelevant emphasis on the delay in inspection by Nagico's loss adjuster.

Category 2: Procedural Impropriety

[47] The second category consists of the following two grounds:

- (v) Ground E: The arbitrator mishandled the arbitration as he asked questions in relation to the Insurance Industry Code of Ethics despite it being inapplicable to the proceedings; and
- (vi) Ground F: The arbitrator mishandled the arbitration by allowing a witness to proceed with giving *viva voce* evidence despite the witness stating under oath that he did not sign the witness statement which formed a part of the record, without carrying out any enquiries into the origins of the document.

Category 3: Failure to provide details of analysis

[48] The third category is as follows:

- (vii) Ground I: The award was improperly procured since the Arbitrator failed to provide any details of his analysis of the evidence presented in cross-examination or the legal authorities which were submitted in the proceedings in his rationale.

Category 1: Errors of Fact/Law

Grounds A and B

[49] In relation to the changing of the tyres, the Rationale states as follows:

"The vehicle in question (TL 4074) was inspected on Friday 29th November, 2019 and the accident took place on Monday, 2nd December, 2019. I have difficulty in accepting that the condition of the tyres of the vehicle would have changed in such a short space of time particularly as it was over a weekend.

The insurer, Nagico, accepted the inspection which was presented in evidence (ref. # 533909 by Fixit dated 29/11/2019), and had no issues with it, indeed the insurance was renewed on the basis of the inspection all be it on different to the expiring contract. whilst it is true to state that the inspection only speaks to the condition of the vehicle

on the day and time of inspection, the time frame involved in this matter is so short (3 days) it hard to conceive in my mind that the condition of the tyres would have changed and been any different to that when inspected. Had it been months later my view may well have been different. I can only conclude that the tyres were in a roadworthy condition at the time of the accident.

...

Whilst there is some doubt as to how and when the tyres, seen by the Loss Adjuster at the time of his visit, were changed there was ample opportunity for this to be done, as there was a delay of at least Three months after the accident before the Loss Adjuster inspected the vehicle. The Damage report / valuation presented as part of the claim by the insured, by Monroe makes no mention of the tyres. Indeed none of the photos allegedly taken by the staff of Nagico soon after the accident were available for presentation to the Arbitrator.”

[50] Nagico has expounded on Grounds A and B in its submissions as follows: that the arbitrator misconducted himself by completely ignoring the evidence highlighted under cross-examination and failing to properly consider the main fact in issue regarding the alleged removal of the tyres resulting in the improper procurement of the award. Also, that the arbitrator committed more than a mere error of law or fact by finding that there was ample opportunity for the tyres to be changed since the evidence highlighted under cross-examination revealed that CHI was never able to prove that the tyres were indeed changed and the motor vehicle form submitted by CHI stated that some tyres were damaged.

[51] **In the matter of Arbitration Acts**, Hamilton CJ found that the plaintiffs sought in those proceedings to do a complete re-hearing of the arbitration and re-argue the merits of the evidence with regard to the compensation to which they claimed to be entitled.³² He stated that they were not entitled to such relief and the appeal was dismissed.

[52] I am also of the opinion that Nagico has sought to re-argue the merits of the evidence which the Arbitrator had to consider during the arbitration proceedings, by supporting Grounds A and B through highlighting the “undeniable facts”, “facts revealed/confirmed during cross-examination”, and

³² Fn 24 at p. 446

“contradictory evidence of the witnesses”. Consequently, I have chosen not to repeat them in this judgment as to do so would be inappropriate and contrary to the exercise the Court is tasked to undertake in the given circumstances. These proceedings are not an appeal or review of the arbitrator’s decision; rather it is an assessment of the Arbitrator’s decision and conduct of the proceedings to see whether there was misconduct on the part of the Arbitrator which should lead to the award being set aside.

[53] I am not of the opinion that the Arbitrator made any error of law or fact. Having read the Rationale, the Arbitrator states clearly that whilst there is some doubt as to how and when the tyres were changed, there was ample opportunity for it to be done given the delay between the time of the accident and when Nagico’s loss adjuster actually did the inspection of the Truck.

[54] Furthermore, the Arbitrator comments on the fact that none of the photos allegedly taken by the staff of Nagico soon after the accident were available for presentation to him.³³ To me, it is clear what the Arbitrator has stated in his Rationale: there being an absence of evidence from Nagico, and a delay of three months before the inspection of the Truck was done, the timeframe between the time of the accident and the inspection would have allowed for the change to be done as CHI has alleged. He therefore accepted CHI’s evidence with respect to the changing of the tyres before the inspection by Nagico’s loss adjuster in March 2020. I therefore do not accept Nagico’s submission that the Arbitrator misconducted himself by ignoring the evidence highlighted under cross-examination or failed to properly consider the main fact in issue. Rather, he clearly did consider these items as shown by his Rationale.

[55] Having considered the evidence before him, it was open to the Arbitrator to find that CHI had ample opportunity to change the tyres. This is a finding of fact of the Arbitrator with which the Court will not interfere. In any event, the

³³ Exhibit 4 of the Witness Statement of Jeff Dupree dated 5th August, 2022 contains a letter from Nagico to CHI stating that “representatives from the claim department visited the scene of the accident on 12th December, 2019 and took photos of the vehicle and area where the loss occurred” (p. 88 of Trial Bundle). These photographs do not feature in the documents before the Arbitrator.

Court has nothing by which to assess the Arbitrator's treatment of the evidence since as mentioned earlier, Nagico did not exhibit a transcript of the proceedings and cannot ask the Court to simply accept that its version of the evidence is correct.

Grounds C and D

[56] Regarding the cause of the accident the Arbitrator had the following to say:

"There has been no conclusive evidence submitted as to the cause of the accident and unfortunately the one truly independent witness, Investigating Officer P.C. 147 , Martin Cadette , was not available to give evidence but the written Police Report states that the cause "was TL4074 encounter gravel on the road surface " (Police Report 27/7/20).

The vehicle would have been traveling very slowly uphill and to say it skidded would be a misnomer, it may have lost traction and slid back down the hill and there may be several reasons for this happening (nature of the load, shifting of the load, condition of the road, condition of the tyres etc), but no conclusive evidence has been presented.

...

Under the circumstances and based on what evidence is available, I am forced to conclude that there is insufficient evidence as to the actual cause of the accident."

[57] Nagico expands on Ground C by stating that the arbitrator deliberately ignored applicable principles of law and committed more than a mere error of law or fact by failing to find that CHI did not discharge its burden of proof regarding the actual cause of the accident. Nagico also states that the Arbitrator misconducted himself by analysing the various reasons the accident may have been caused and resolving the uncertainty in favour of CHI.

[58] As stated above³⁴, the parties agreed to be bound by the 2013 UNCITRAL Rules. Article 27 of the rules states as follows:

"Article 27 1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

21 2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to

³⁴ Above at para [10].

the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.”

[59] I reject Nagico's submissions as the Rationale makes it clear that at the end of the proceedings, the Arbitrator found that there was insufficient evidence as to the actual cause of the accident. He did not, as Nagico has submitted, resolve the uncertainty in favour of CHI. In fact, the Arbitrator made no finding as to the cause of the accident as neither party was able to discharge its burden of proof regarding the actual cause of the accident, as he was entitled to do pursuant to Article 27 of the 2013 UNCITRAL Rules.

[60] In these circumstances, the Court also sees no reason why it should exercise its jurisdiction to set aside the Award as Nagico has failed to show an error of law on the face of the record with respect to the changing of the tyres or the cause of the accident.

Ground G and H

[61] Nagico submits that the Arbitrator misconducted himself by relying and highlighting Nagico's acceptance of the inspection document and the delay of the loss adjuster in conducting the inspection, in making his finding that the tyres were in a roadworthy condition when the accident occurred. The reasons put forward by Nagico unmistakeably calls into question the weight the Arbitrator placed on the evidence before him, which this Court cannot be expected to interfere with.

[62] According to Article 27.4 of the 2013 UNCITRAL Rules, the arbitrator determines the admissibility, relevance, materiality and weight of the evidence offered. The Arbitrator was therefore at liberty to rely on the document and the

delay mentioned, in coming to his decision. His doing so, cannot by any stretch of the imagination be misconduct on his part.

- [63] Nagico has failed to show why the Court should exercise its jurisdiction to set aside the award based on the grounds raised in Category 1.

Category 2: Procedural Impropriety

Grounds E and F

- [64] Nagico submits that the Arbitrator mishandled the arbitration as he asked questions in cross-examination in relation to the Insurance Industry Code of Ethics despite the fact that it was inapplicable to the proceedings.

- [65] Nagico submits that during cross-examination/questioning of Mr. Claudius Francis, the Arbitrator made reference to Clause 19 of the Code, which states as follows:

“Insurance Personnel shall at no time seek to repudiate liability where there has been a breach of warranty or condition but the circumstances of the loss are unconnected to the breach.”

- [66] Nagico contends that in doing so, the Arbitrator would have considered the document in making his decision and therefore overstepped his mandate since the Code is an agreement between the insurance companies which are signatories to same regarding how they settle claims amongst themselves. It does not apply to and is not binding in situations involving an insurance company and its insured as only the insured's policy and the relevant laws of the island of Saint Lucia govern the rights of the parties in that insurance relationship.

- [67] Firstly, there is no transcript before the Court. The Court has not been apprised of the nature of the questions asked in relation to the said Code, nor its relevance. Secondly, the Court is also not of the opinion that the reason provided amounts to misconduct as contemplated by section 19(2) of the Act especially having regard to the authorities of **Carillion, Galway** and **In the matter of the 1954 Arbitration Act**, as well as section 27 of the 2013 UNCITRAL Rules.

[68] Moreover, Nagico submitted that the Arbitrator overstepped his mandate in considering the Code of Ethics, but the Arbitration agreement before this Court does not speak to nor does it prevent the Arbitrator from considering the Code.

[69] With respect to Ground F of this category, Nagico relies on **Galway** to support its submission that the Arbitrator committed more than a mere error of law or fact and mishandled the arbitration proceedings as he allowed a witness to proceed with giving evidence despite the witness stating under oath that he did not sign the witness statement which formed a part of the record, without carrying out any enquiries into the origins of the document. In particular, Nagico relies on page 13 of the judgment given by O'Donnell J where it states:

“With great respect, I cannot agree. First, this was an issue of alleged misconduct. A normal and fundamental component of a fair hearing, is that one party is given the same opportunity and facility to make his or her case, as their opponent has been afforded. Classic examples of misconduct leading to the setting aside of an award are where one party is excluded from the hearing, or is prevented from calling a witness, or is limited to written evidence, when the other side are permitted to call oral evidence. The understandable sense of injustice a party will feel in such circumstances can only be compounded if the reasons given for the exclusion of evidence the party wished to call, are plainly erroneous.”

[70] In **Galway**, the arbitrator did not consider the evidence of an expert witness which was material to an important issue in the case: the delay. O' Donnell J states at page 15:

“The exclusion of a relevant witness, without addressing the admissibility of that evidence, and the maintenance of that position on a basis that did not even address the substance of the complaint, is so far removed from the basic procedural fairness that a party is entitled to expect that the decision must be set aside.”

[71] This is the very opposite of what Nagico is saying to the Court. In **Galway**, the court was of the opinion that two courses were open to the arbitrator in those circumstances: either there should have been a determination on the question of admissibility at the arbitration, then and there, or alternatively the expert's report should have been admitted *de bene esse*, with the arbitrator making a ruling on admissibility in the context of his award.

- [72] According to Nagico, on the date of the trial, the witness Mr. Jonah Ramlal stated that the signature on the bottom of his witness statement was not his. Thus, there was a new development in the way in which evidence was given at the arbitral proceedings. Mr. Ramlal was then allowed to give *viva voce* evidence in the circumstances. I am certain that this situation is not what O'Donnell J was referring to in his judgment when he stated that a classic example of misconduct is where one party is limited to written evidence while the other is permitted to call oral evidence.
- [73] I cannot accept Nagico's submission that it was limited to written evidence when CHI was permitted to submit oral evidence. From Nagico's own account, on 12th August 2022, both parties filed witness statements in accordance with the Arbitrator's directions. Clearly, both parties were afforded the opportunity to give written evidence.
- [74] By Nagico's own account, and as stated by CHI in submissions, Nagico thoroughly cross-examined Mr. Ramlal after his examination in chief was concluded and did not raise any objection to the witness' testimony being given. CHI submits that Nagico waived its right to now seek to challenge the Arbitrator's Award on this ground after fully acquiescing in the process.
- [75] In its reply submissions, Nagico does not deny that it did not object to Mr. Ramlal giving evidence. Furthermore, the Arbitration agreement does not limit the Arbitrator to only accepting written evidence.
- [76] Article 17 of the 2013 UNCITRAL Rules states as follows:
- "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

[77] According to Article 32 of the 2013 UNCITRAL Rules:

“A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.”

[78] Having considered the Arbitrator’s role pursuant to Article 17 and Nagico’s waiver of its right to object without showing that under the circumstances its failure to object was justified, it cannot be said that the arbitration was misconducted in this regard and went significantly awry in this respect, nor that it would certainly smack of injustice to allow the Award to stand.

[79] As such, the grounds in Category 2 (Grounds E and F) do not show misconduct on the part of the Arbitrator.

Category 3: Failure to provide details of analysis in rationale (Ground I)

[80] Article 34 of the 2013 UNCITRAL Rules states as follows regarding the form and effect of the award:

“1. The arbitral tribunal may make separate awards on different issues at different times.

2. All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

...”

[81] Nagico submits that the Award was improperly procured since the Arbitrator failed to provide details of his analysis of the evidence presented in cross-examination or the legal authorities which were submitted in the proceedings in his Rationale. Nagico submits that the Award was therefore insufficiently or deficiently reasoned, and such an occurrence would have undermined the legitimacy of the Arbitration proceedings. Reliance is placed

on **Galway** where O'Donnell J took issue with the Arbitrator's failure to discuss the submissions, cases or books in his award and stated the following³⁵:

"Although the Arbitrator recorded that he had been addressed "at length" by both sides on the law of repudiation, there is no discussion of the submissions on that point in the award. Indeed, and surprisingly, there is no reference to any case or textbook from any jurisdiction in any part of the award."

[82] It is important to note that in **Galway**, the arbitration proceedings which were the subject of review were conducted under the IEI Arbitration Procedure 2000.³⁶ Secondly, it was an appeal of the High Court's decision not to set aside the arbitrator's award.

[83] Although it is correct that O'Donnell J commented on the lack of submissions contained in the arbitrator's award,³⁷ this was done *obiter* as he was discussing the arbitrator's conclusion that a party to the proceedings' withdrawal was not a repudiatory breach. He did not say that the failure to include a discussion of the submissions amounted to misconduct of the arbitrator. As such, I cannot accept Nagico's submission that the requirement to provide reasons generally includes a discussion of the evidence and legal principles which support the decision and a failure to do so would result in the award being deemed improperly reasoned, especially as Article 34 of the 2013 UNCITRAL Rules does not specify the manner in which the reasons of the Arbitrator are to be provided.

[84] Furthermore, the argument is unmeritorious as the Rationale was a statement on the Arbitrator's reasons for the Award. It is in effect the outcome of the arbitration proceedings and does not speak to how or by which methods the Arbitrator has actually conducted (or misconducted) the arbitration proceedings.

[85] Nagico also advances the argument that a fully reasoned award would allow the parties to understand the basis of the Arbitrator's decision which is

³⁵ Galway at p. 16.

³⁶ At p. 4 of Galway.

³⁷ Also at p. 18 of Galway.

essential for ensuring that the decision is made based on a fair consideration of the arguments and evidence presented. Without a reasoned decision, there may be a perception of arbitrariness or lack of transparency in the decision-making process. It would also allow the parties to identify any potential grounds for challenging the decision if it were found to be incorrect or unjust. Nagico argues that without reasons, the Arbitrator has made it extremely difficult for Nagico and the Court to properly assess all the legal and/or factual errors in the award, thus limiting Nagico's ability to obtain recourse.

[86] CHI submits that there is no duty of any tribunal to give full detailed analysis on every point raised by the parties in proceedings and that the Arbitrator fulfilled his obligation by resolving the main issues raised by the parties by giving clear and logical reasons for the decision.

[87] Whilst I do not disagree that a fully reasoned award would better inform the parties of the basis for the Arbitrator's award, I am not of the opinion that the Arbitrator's Rationale was so deficient that the parties were unable to understand his reasons for coming to his decision. Additionally, in its reply submissions, Nagico agrees with the submission of CHI that there is no duty on any tribunal to give full detailed analysis on every point raised by the parties in proceedings. It must be remembered that as was pointed out in **McCarthy v Keane** 'an arbitrator is agreed upon or nominated for his acknowledged expertise; ..., and not for the perfection of his English, his style of writing or, in this instance, his grasp of the law.'³⁸

[88] Nagico further submitted that the failure of the Arbitrator to make any sort of reference to whether or not he found a breach of the policy, which was at the heart of the claim, constituted a breach of not only the arbitration rules but also of the natural justice and procedural fairness to which Nagico is entitled. They submit that if an arbitrator ignores critical evidence or relevant legal precedents, it can be seen as a denial of procedural fairness.

³⁸[2004] 3 I.R. 617 at pp. 626-627.

[89] It is pellucidly clear to the Court, having read the Rationale and noting the Arbitrator's finding of the roadworthiness of the tyres at the time of the accident, that he did not find that CHI had breached the policy. This is also reflected in the Award in favour of CHI.

[90] Nagico has failed to demonstrate to this Court that the Arbitrator improperly procured the Award based on this ground.

Conclusion on the issues

[91] In conclusion, Nagico has failed to satisfy the Court that the Award should be set aside because the Arbitrator misconducted himself or the proceedings or that the Award was improperly procured. None of the grounds raised were 'something substantial', 'something that smacks injustice or unfairness'. It has also failed to satisfy the Court that there is an error of law so fundamental that the Court cannot stand aside and allow the award to remain unchallenged.

Matters not pleaded

[92] At paragraphs [104]-[123] of its submissions, Nagico introduces a new ground which was not contained in its pleadings: the failure of the Arbitrator to consider whether there was a breach of the insurance policy. Nagico also introduces new grounds in its submissions at paragraphs [124]-[130] of uncertainty in the arbitration award and at paragraphs [131]-[134] in relation to interest.

[93] These grounds referred to in the above paragraph also do not feature in the affidavit of Daniel Cepal filed on 13th June 2024 or in the affidavit in response of Adele Jn Baptiste filed on 12th July 2024.

[94] These grounds having not been sufficiently pleaded, I am unable to consider them.³⁹

Costs

³⁹ Frederick Henry v Marie Ketra Albert, SLUHCVP2023/0012, (delivered 20th August 2024), unreported.

[95] Given that Nagico has been unsuccessful on all the grounds raised in its claim, costs will be awarded to CHI.

Order

[96] In light of the foregoing discussion, I make the following order:

1. The claimant's claim filed on 27th April 2023 is dismissed.
2. The claimant shall pay the defendant prescribed costs in the sum of \$10,000.00.

**Kimberly Cenac-Phulgence
High Court Judge**

By The Court

Registrar