

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ON MONTSERRAT
CASE MNIHCV2021/0017

**In the matter of section 11 of the
UK Arbitration Act 1889**

And

**In the matter of the
Montserrat Arbitration Act**

And

In the inherent jurisdiction of the Court

BETWEEN **THE ATTORNEY-GENERAL OF MONTSERRAT** **APPLICANT**
AND
J.E. GALLOWAY CONSTRUCTION CO. LTD. **RESPONDENT**

APPEARANCES:

Miss Renée Morgan for the Applicant;

Ms E. Ann Henry QC and Ms Marcelle Watts for the Respondent.

2022: August 02

RULING

On whether to set aside or remit an arbitrator's award

- 1 **Morley J:** Concerning an arbitrator's award, I am asked to set it aside or remit it to the arbitrator for further consideration. At its simplest, in a protracted and complicated suit concerning a major construction project, the Government of Montserrat (GoM) complains the award to Galloway

Construction (GC)¹ made a miscalculation about concrete, and awarded way too much money in interest without properly showing why nor fair calculation.

- 2 Concerning the concrete, I will leave the award untouched; concerning the interest, there is much to consider, as the award here as damages was of compound interest, greatly increasing the award, raising complaint.
- 3 The arbitrator is John Redmond, BA and FCI Arb, appointed on 20.06.13, clearly very experienced, his final assessment of quantum dated 07.06.21 running to 106 pages. Formidable London counsel were deployed, being Peter Collie of 3 Paper Buildings for GoM, and for GC Steven Walker QC of Atkin Chambers.
- 4 In 2008, GoM contracted with GC to redevelop Little Bay, and on 06.04.09 expelled GC for not completing. Litigation followed, and it appears GC by amended statement of claim dated 20.08.19 sought in East Caribbean dollars² \$18713054.73 with \$36521546.07 in interest, totaling \$55234600.80, (which figures for ease of reading will be rounded off to \$18.7m, \$36.5m and \$55.2m). The paperwork is voluminous. In the end, the arbitrator awarded a principal sum of \$2072852.49, with \$6159535.11 in interest, totaling \$8232387.60, (rounded off as \$2.1m, \$6.2m, and \$8.2m).
- 5 Put neatly, arising from 2009, in 2019 GC sought \$55.2m and in June 2021 was awarded \$8.2m, of which \$6.2m was interest.
- 6 Concerning concrete, it is suggested by GoM there should be a reduction of the \$2.1m by between \$62356 and \$213493.94, depending on how the calculation is made, for GC using GoM materials to make concrete. GoM suggested this by letter to the arbitrator on 13.05.21. In a reply on 25.05.21, the arbitrator dismissed the suggestion, stating:

Item 2: Credit re materials used in concrete

Mr Collie says that a further concession was made in Mr Walker's closing submissions. In the section of those submissions dealing with Galloway's claim in respect of additional earthworks,

¹ The parties will be so referred for ease of reading, and no disrespect is intended by using acronyms and not using the legalese of being claimants or applicants or defendants or respondents.

² All figures will be in East Caribbean dollars, often referred to as 'xcd' or 'ec'.

and specifically in the part of that section dealing with the quantum of that claim, it is acknowledged that a credit might be appropriate for savings made by Galloway in using crushed material as aggregate in concrete. Such a credit would be given against the cost claimed in respect of earthworks. I found that Galloway was not entitled to claim anything under that heading and therefore credit could not be given. Mr Collie argues that nevertheless a credit should be given against Galloway's claims generally. GoM did not include any claim for such an item in its counterclaim, and, not being a pleaded claim, it was not appropriate for me to consider it. There was no accidental slip or omission for me to correct.

- 7 Given the clarity with which the arbitrator has dismissed the invitation to adjust his award for concrete, in the knowledge arbitrations are supposed to be final, assessing he has reasonably addressed his mind, I will not consider this aspect further.
- 8 Concerning the interest calculation of \$6.2m, what was awarded on page 104 of the 07.06.21 award was compound interest as damages, leading to the interest over so long being three times the principal of \$2.1m. Though calculation of the principal was conducted meticulously over the preceding 103 pages, not much was said about the interest calculation, which was as below, raising the impression its assessment was more an afterthought than an in-depth analysis:

32.13. Galloway does however claim interest as damages for breach of contract. Mr Walker asserts that "*it is now well established that simple or compound interest can be awarded as damages for late payment*". He relies on the decision in *Sempra Metals v Inland Revenue Commissioners* [2008] 1 AC 561. Mr Collie says that this can be of no help as "*The point at which Montserrat's law can be said to have diverged from that of England and Wales is 1967, specifically the passing of the West Indies Act 1967 which inter alia conferred jurisdiction upon the Eastern Caribbean Supreme Court.*" I understand him to mean that the law of Montserrat stopped following decisions of the English courts at that point, in which case it remains unaffected by the decision in *Sempra Metals*. He is suggesting that before the *Sempra Metals* decision, interest could not be claimed in English law as a head of damage for late payment and therefore that remains the position in Montserrat.

32.14. I do not think that the effect of the West Indies Act 1967 was to crystallise the common law in Montserrat so that it was unable to develop in ways that seem appropriate in other common law jurisdictions. The judgment in *Sempra Metals* did not change the law, although it is accepted that *dicta* in the opinion of Lord Nichols of Birkenhead laid the basis for a change in how the courts should approach claims for interest as damages for breach of contract. Referring to the reluctance of the courts in England to allow such claims, he said: "*The House should recognise the remnant of the restrictive common law exception for what it is: the unprincipled remnant of an unprincipled rule. The House should erase the remains of this blot on English common law jurisprudence.*"

32.15. I accept that the *Sempra Metals* decision did not change the law in Montserrat. If however it had been the practice of the Montserrat courts not to allow claims for interest as damages for late payment (a matter on which I have not been given any authority), it would not be unreasonable to argue that such a practice was also a jurisprudential blot which the Montserrat courts in 2021 would be eager to erase.

32.16. I therefore accept that it is open to Galloway to claim interest as damages for late payment, subject to the normal requirement to demonstrate loss and causation.

32.17. Mr Galloway has calculated a claim for interest using a rate of 1% per month, compounded monthly. This is the rate stated in the Contract and he states that the rate broadly reflects the costs that Galloway incurs if it has to borrow money. The rate in the Contract is not relevant to a claim for damages. His statement regarding borrowing costs was not however challenged and I accept it. He has not given specific evidence that Galloway was borrowing substantial sums throughout the period from the expulsion to the present day but in view of the evidence that has been given regarding the company's financial difficulties I accept that it is very probable that it was doing so.

32.18. I have decided that Galloway is entitled to be paid the sum of...XCD \$2,072,852.49 giving credit for its liability for liquidated damages. I am satisfied that Galloway has suffered loss as a result of GoM's breaches of contract and has suffered further loss by way of interest costs of 1% per month, compounded monthly, on all of that sum from 20 April 2009 with the exception for the damages for conversion of the plant and equipment that was returned. That figure takes account of depreciation to the date of return and therefore interest should only run from the date of return... [thereby calculating \$6159535.11]

9 In assessing the witnesses, the arbitrator had earlier said:

9.1. Galloway called just one witness of fact, Mr Galloway. He is a Director of the company which had been founded by his father. He has substantial academic and practical experience of the management and coordination of construction projects in the USA and the Caribbean, but those projects were primarily construction of buildings rather than civil engineering. He was personally involved in most if not all aspects of the Little Bay project, and if Galloway was restricted to being able to call only one witness of fact, he was the obvious person to choose. With regard to several aspects however he was not the person primarily responsible. For example, he did not personally prepare Galloway's tender, although he was responsible for reviewing and approving it before it was submitted. Similarly, he did not personally prepare applications for payment, but again reviewed and approved such applications. Mr Collie was extremely critical of his evidence. He said in his closing submissions that he was "thoroughly dishonest" and made regular comment that Mr Galloway was deliberately untruthful. That was not an impression that I shared. I believe that Mr Galloway was trying very hard to give truthful evidence. Nevertheless, there were a number of instances where Mr Galloway's recollection was not supported by contemporary documentary or photographic evidence. I am quite sure that he believed that his company's works had been seriously undervalued and that it was entitled to substantial further payment. He prepared the claim interpreting the available documentary evidence in a way that appeared

favourable and over the very considerable period of time since the work was done persuaded himself that his interpretation was correct. He believed in what he said, but his belief was not always well-founded.

- 10 In plain terms, it appears the arbitrator has applied the *Sempra Metals* case, though is aware it may not apply locally, yet seems to think it should, awarding compound interest at 1% per month, as that case encourages, yet makes no assessment of actual loss and causation, or its mitigation, simply asserting he thinks it probable GC was borrowing money at commercial rates, though noting there was no specific evidence of borrowing, in a context he had earlier said aspects of evidence from GC were '*not always well-founded*' and '*there were a number of instances where Mr Galloway's recollection was not supported by contemporary documentary or photographic evidence*'. GoM argues the interest calculation is flawed, reliant on no evidence of loss, from an unreliable witness, with an application of inapplicable law.
- 11 For balance, it should be mentioned in the next paragraphs the arbitrator viewed the evidence of the GoM witnesses broadly with caution, notably of Mssrs Nicholls, Lashley and Chambers.
- 12 Of concern to GoM is the appearance GC pursued an inflated claim, dragging it out over many years, not mitigating their loss, seeking broadly a principal of \$18.7m, being awarded \$2.1m (11%), including interest seeking \$55.2m, being awarded \$8.2m (15%), the huge difference meaning it could never sensibly settle, thereby becoming overlong, designed to accumulate a largesse of interest, and suggesting much of the claim at worst disingenuous, or at best unreliable, the figures being massaged, not showing actual loss but instead talking of what it could be, in theory, with troubling consequence if compound interest then follows, over so long a litigation, creating figures unconnected to actual loss, but quadrupling the award from \$2.1m to \$8.2m, being an interest claim based in the same unreality as the substantive claim, which had been so severely pruned. In short, the GoM suggest the claim being mostly exaggerated, so too has been the interest.
- 13 Though Counsel Morgan has boldly argued there should be no interest, plainly some may be appropriate, so that distilling the GoM complaint is the arbitrator has not properly or fairly calculated it, which would amount to 'misconduct', and so the award of \$6.2m should be set aside, or remitted for further consideration; while Counsel Henry QC, of much experience,

suggests setting aside a 'nuclear option', unjustified here, and argues the award discreetly within the arbitrator's meticulous contemplation, not meriting remitting.

Reviewing the law

- 14 The arbitration took place with the law of Montserrat as the law of the arbitration. Section 2 **Montserrat Arbitration Act** declares that the **UK Arbitration Act 1889** has force in Montserrat, which says:

Section 10

- (1) 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 arbitrator or umpire.
- (2) Where an award is remitted the arbitrator or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.

Section 11

- (1) Where an arbitrator or umpire has misconducted himself, the Court may remove him.
- (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.

- 15 On the face of the legislation the power to remit is broader than to set aside, which requires a finding of misconduct. Misconduct does not necessarily involve an allegation of moral wrongdoing against the arbitrator. As Atkin J remarked in **Williams, Wallis and Cox [1914]** 2 KB 478, at 485:

That expression does not necessarily involve personal turpitude on the part of the arbitrator...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.

- 16 Further in **Balfour Beatty Construction Ltd v Kelston Sparkes Contractors Ltd (No 2) (2001)** at para 26 inter alia Forbes J explored how '*all allegations of misconduct assert that the arbitrator has acted in breach of duty; and most involve the contention that the arbitrator has failed to act fairly, or at least to appear to act fairly*'.
- 17 To set aside for misconduct, it appears the arbitrator would have to have acted unfairly such as likely to amount to a substantial miscarriage of justice.

18 Remitting is a discretionary power, per Lord Hoffman at para 11 of **Michael Carter v Harold Simpson Associates 2004** UKPC 29.

19 The test for remitting is captured in **Danae Air Transport v Air Canada [1999]** 2 All ER (Comm) 943.

- a. There it is said by Tuckey LJ at para 24, quoting as a general statement of principle by Lord Donaldson in **King v Thomas McKenna Ltd (1991)** 2 QB 480 (CA), at p.491G where he said:

“In my judgment the remission jurisdiction extends...to any cases where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspect 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.

In so expressing myself I am not seeking to define or limit the jurisdiction or the way in which it should be exercised in particular cases, 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.

This essential qualification is usually underlined by saying that the jurisdiction to remit is to be invoked, if at all, in relation to procedural mishaps or misunderstandings. This is, however, too narrow a view since the traditional grounds do not necessarily involve procedural errors. The qualification is however 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 that of a judge is that he will necessarily and in all circumstances arrive at the “right” answer as a matter of fact or 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”.

- b. Tuckey LJ continued at para 25 referring to an earlier case **The Montan 1985** 1 WLR 625, where the arbitrator had mistakenly attributed the evidence of one party to the other and

consequently made an award in favour of the wrong party, so in remitting the award to the arbitrator Lord Donaldson said at page 632:

“[The section] empowers a court to remit an award to an arbitrator for reconsideration. It provides the ultimate safety net whereby injustice can be prevented, but it is subject to the consideration that it cannot be used merely to enable the arbitrator to correct errors of judgment, whether on fact or law, or to have second thoughts, even if they would be better thoughts.”

20 At the heart of Counsel Morgan’s complaint is the arbitrator appears to have applied the **Sempra Metals** case³, being told it did not apply, but thinking it should, thereby awarding a compound interest formula, while not having calculated what interest realistically the \$2.1m would or could have attracted over 12 years from 2009 to 2021. There are two cases local to Caribbean jurisprudence of interest: **The National Housing Trust v YP Seaton and Associates [2015]** UKPC 43 (the NHT case), originating from Jamaica; and **Andrey Adamovsky v Andriy Malitskiy 2017 BVIHCPMAP2014/0022** (the Adamovsky case), originating from the British Virgin Islands.

21 Concerning **Sempra Metals**,

a. Lord Hope said:

17. I also agree with Lord Nicholls that the loss on the late payment of a debt may include an element of compound interest. But the Claimant must claim and prove his actual interest losses if he wishes to recover compound interest, as is the case where the claim is for a sum which includes interest charges...

50. ‘For these reasons...Sempra’s claim for restitution ought to be measured by an award of compound interest at conventional rates calculated by reference to the rates of interest and other terms applicable to borrowing by the Government in the market during the relevant period.

b. Lord Nicholls said:

94. To this end...the House should now hold that, in principle, it is always open to a Claimant to plead and prove his actual interest losses caused by late payment of a debt. These losses will be recoverable, subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth.

³ See *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Her Majesty’s Commissioners of Inland Revenue and another* [2007] UKHL 34; also [2008] 1 AC 561.

95. In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the Plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will, here as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law.

96. But an un-particularised and unproved claim simply for “damages” will not suffice. General damages are not recoverable. The common law does not assume that delay in payment of a debt will of itself cause damage. Loss must be proved.

22 Concerning the **NHT** case:

a. In the leading judgment of Lord Mance:

33.... It was...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.

b. In the judgment of Lord Toulson, dissenting:

87. 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.

23 Concerning the **Adamovsky** case, in the judgment of Michel JA, of note are the following paragraphs:

13. It cannot be disputed that a party wrongfully deprived by another of money to which the first party is entitled ought to be compensated for his loss, not just by an award to him of the sum of money to which he was entitled, but so too by an award of the time value of the money from the date of its appropriation to the date on which it is ordered to be paid to him. This latter award is what is referred to as an award of pre-judgment interest...

20. Having been satisfied of this Court’s jurisdiction to award pre-judgment interest, the question then arises as to how the interest is to be calculated or what measure should be applied when awarding pre-judgment interest...

25. ... the House of Lords in **Sempra Metals 2007** extended the law to provide that, where the court upholds a claim for non-payment of debt, damages for breach of contract or tort, the court may award simple or compound interest by way of damages. In these types of claims, interest can be awarded subject to the rules of remoteness and causation that govern the substantive award of damages.

31. In **Creque v Penn 2007**⁴, the Privy Council stated that the rate of pre-judgment interest to be awarded should be “that on which the Plaintiff would have had to borrow money in place of the money wrongfully withheld by the Defendant”. There being no evidence in this case that the respondents had to borrow any money in place of the money wrongfully appropriated by the appellants, one cannot use a borrowing rate as the rate at which to award pre-judgment interest. But the Privy Council, in the same case of **Creque v Penn**, approved the decision of the Jamaican Court of Appeal in **British Caribbean Insurance Co. Ltd v Perrier 1996**⁵, where the court held that in commercial cases the rate of interest awarded must be a realistic rate if the award is to serve its purpose.

32. In the circumstances, I find that the interest rate which ought properly to be applied in this case is the simple interest rate of 8.5% per annum, since the parties had agreed that that was the term deposit rate offered by RIB from January 2010 to the date of judgment.

24 Further research shows there is also **Jerome Montoute v The Attorney General of St Lucia 2019** SLUHCVP2016/0021, where it was held at a para 55 by Webster JA:

I would only add that the House of Lords in *Sempra Metals Ltd...* has extended the law to provide that compound interest can be awarded at common law as damages for non-payment of debt, breach of contract or tort, subject to the rules relating to remoteness and causation.

25 From my reading of the case law, it is not categorically established, as Counsel Morgan suggests, **Sempra Metals** has no application in the jurisprudence of the Eastern Caribbean Supreme Court (ECSC). What has exercised the minds of the Privy Council and ECSC Court of Appeal is the correct calculation of loss, to put a party in the position she should be in if there had been no breach of contract. The issue is fair calculation; it is not whether compound interest can apply – it might. Fair interest calculation requires pleading, receiving evidence, argument over remoteness, and whether there was mitigation of the loss, with assessment then of the time value of the money.

⁴ See *Creque v Penn* [2007] UKPC 44.

⁵ See *British Caribbean Insurance Co Ltd v Perrier* (1996) 52 WIR 342

- 26 As I understand the case, the arbitrator has determined GC should have received \$2.1m in 2009, and the question is what is a fair calculation of interest to 2021 as representing what is the actual loss to GC of not having that money in 2009. But what has happened here is there has not been adequate contemplation of this question by the arbitrator, as reflected in the fact there was no evidence specifically received on the issue, but instead there has been arguably an overeasy rule of thumb application of a compound interest calculation, thought to be made possible by **Sempra Metals**, which the arbitrator thought ought to apply if it did not.
- 27 To my mind, there is no doubt the arbitrator has acute expertise in calculating the principal loss, but GoM are right to expect a more in-depth assessment of the time value of the money, consistent with the earlier in-depth assessment of the principal loss.
- 28 Counsel Morgan wants the interest wholly set aside, with no further action. I agree with Counsel Henry QC this would be a nuclear option, and would imply a strong criticism of the arbitrator which would be misplaced. It would be a finding of 'misconduct', which though it is argued capable of having an innocuous meaning, I sense must mean there has been a condemnable flaw in the proceedings, showing unfairness, amounting to a substantial miscarriage, whereas here I merely find there appears to have been an oversimplified calculation which requires revisiting, and reassessing, to be supported by evidence of the actual time value of the money.
- 29 This analysis is I hope consistent with the view of Lord Donaldson at para 19 above, that *'some aspect of the dispute ...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.'*
- 30 To this end, in my discretion under **s10 UK Arbitration Act 1889**, as in force on Montserrat, I will remit the interest calculation to the arbitrator for reassessment, with a direction as follows:
- a. Evidence should be filed by the parties on the time value of \$2.1m over the period 2009-present;
 - b. Evidence should be filed on the actual loss to GC by reason of not having the \$2.1m;
 - c. Evidence should be filed on whether GC tried to mitigate the effect of not having the \$2.1m;

- d. Submissions and argument should follow examination and cross-examination of the evidence;
 - e. The arbitrator shall thereafter calculate the time value of the money, offering full written reasons; and
 - f. The timings of the above shall lie with the arbitrator.
- 31 There shall be no order as to costs, because neither side got what they wanted, namely the interest calculation was not wholly set aside as sought by Counsel Morgan, but remitted for review, which had been resisted by Counsel Henry QC.

The Hon. Mr. Justice Iain Morley QC

High court Judge

2 August 2022