REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2015-00609

BETWEEN

IN THE MATTER OF THE ARBITRATION ACT CH 5 NO 1

AND

IN THE MATTER OF THE ARBITRATION BETWEEN CIVIL AND GENERAL CONTRACTORS LIMITED AND FIRST CITIZENS BANK LIMITED

BETWEEN

CIVIL AND GENERAL CONTRACTORS LIMITED

Claimant

AND

FIRST CITIZENS BANK LIMITED

Defendant

Before The Honourable Madam Justice Margaret Y Mohammed

Dated the 8th December 2015

Appearances

Mr. Andre Jessamy instructed by Mrs. Ruth Van Lare for the Claimant

Mr. Bronock Reid instructed by Ms. Nikola Nothnagel for the First Defendant

JUDGMENT

1. The parties in this action had entered into a contract on the 27th October 1999 for the construction of the Defendant's branch bank at Princes Town. On the 28th December 2000 the Defendant terminated the contract. To resolve the dispute which arose between the parties after the aforementioned termination, the Claimant sought and obtained, by

consent, before the High Court an order appointing a Chartered Quantity Surveyor as an Arbitrator for arbitration proceedings between the parties. An arbitration award was issued but it was set aside by the Honourable Mr. Justice Rahim on the 14th March 2013 ("the Rahim order") consequent on the Claimant's application. On the 15th July 2014 the parties again agreed to submit to another arbitration but this time it concerned the assessment of the Claimant's claim in damages since they had agreed that the issue of liability did not arise for determination. They also agreed to appoint retired Justice of Appeal Stollmeyer as the Arbitrator ("the Arbitrator"). On the 30th January 2015 the Arbitrator issued the Partial Award ("The Partial Award"). The instant matter concerns the Partial Award.

2. The Claimant applied on the 25th February 2015 ("the application") seeking an order pursuant to section 19 of the Arbitration Act [1]("the Act") to set aside the Partial Award. The grounds of the application are:-

"1. The Arbitrator failed to make his award in accordance with law.

2. In holding that the claimant has to suffer loss to succeed in its claim for restitution, the Arbitrator made an error in law on the face of the award.

3. The Arbitrator made an error in law on the face of the award in holding that the claim for reimbursement was a claim for breach of contract.

4. The Arbitrator made an error in law on the face of the award in holding that in a claim for restitution, the claim for interest is required to be grounded in a claim for special damages specifically pleaded and strictly proven.

5. The Arbitrator made an error in law on the face of the award in holding that the common law did not authorize the Arbitrator to award compound interest as a restitutionary award on the ground of unjust enrichment measured by the time value of the money that was being retained without lawful authority.

6. The Arbitrator exceeded his authority in that the payment of the bond to the Respondent was not an issue for his determination.

7. In awarding interest for one year and 323 days from the 14th March 2013, on the basis of an agreement between the Claimant and the Respondent the Arbitrator

[1] Chapter 5 No 1

misconducted himself in that there was no such agreement between the parties. Further, the existence of such an agreement is incongruous with the Record of the proceedings including the Statement of Facts, the Witness Statement and the Written Submissions of the parties and was not in issue within the consideration of the Arbitrator."

3. Based on the aforesaid grounds it appears that the Claimant has asked to set aside the award on the basis of error on the face of the law and misconduct by the Arbitrator in arriving at the Partial Award.

4. In support of the application was an affidavit of Ricky Mahadeo Bisnath who is the Secretary /Director of the Claimant. His evidence was he was present on the 29th September 2014 when the Arbitrator gave directions for the procedure to be employed in the conduct of the arbitration proceedings. The directions were incorporated in a letter dated the 30th September 2014 ("the September 2014 letter") which also incorporated the agreement between the parties. According to Mr. Bisnath, in item 6 of the claim the Claimant claims restitution and reimbursement of the sum of $529,661.46 received by the Bank from the guarantor, GTM Fire Insurance Company Limited. The Arbitrator held that the Claimant did not suffer any loss and therefore the claim was unable to succeed. On this basis the Claimant is of the view that the Arbitrator made an error in law in that for a claim in restitution, no proof of loss is necessary. Further he stated that in arriving at the Partial Award the Arbitrator wrongly held that the claim before him was for breach of contract and that in a claim for restitution, the claim for interest is required to be grounded in a claim for special damages specifically pleaded and strictly proven which is contrary to the development of the common law in the award of interest. In his view the Arbitrator therefore made an error in law in holding that the common law did not authorize the Arbitrator to award compound interest as a restitutionary award on the ground of unjust enrichment measured by the time value of the money that was being retained without lawful authority. He also stated that the Arbitrator misdirected himself in awarding interest for one year and 323 days from the 14th March 2013 on the basis of non-existent agreement between the Claimant and the Bank which was contrary to the record of proceedings including the Statement of Agreed Facts; the witness statements and the written submissions of the parties.

5. The Bank filed one affidavit in opposition by Lindi-Ballah-Tull, Head of Legal and Compliance. She took issue with the Claimant's contention that the Arbitrator awarded interest for one year and 323 days from the 14th March 2013. She stated that she understood from the Claimant's written submissions that it accepted that payments became due on the 14th March 2013 which the Bank accepted and that there was agreement that interest would be calculated from that date.

6. The documents which were placed before this Court to determine the application were the Rahim judgment, the September 2014 letter, the witness statements, the Agreement to Arbitrate, the Partial Award and the Agreed Statement of Facts. Although both parties referred to the Claimant's written submissions presented for the Arbitrator's consideration, this document was not placed before this Court.

7. It was common ground that the Court has the jurisdiction to set aside an award made by an Arbitrator pursuant to section 19 of the Act and under the common law, independent of the Act. Section 19 of the Act provides the basis for setting aside an award where the Arbitrator has misconducted himself as:

> "(1) where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him, but before making such order the arbitrator or umpire may, if the Court so directs, be given an opportunity of showing cause against such order.
> (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside."

8. In the local case of **ICS (Grenada) Limited v NH international (Caribbean) Limited** Jamadar J (as he then was) described misconduct as:

> "Misconduct is generally a 'mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice'(see Halsbury's Laws of England , 4th ed. Vol. 2 page 402, paragraph 684). One must often look to the terms of reference; surrounding circumstances and the conduct of the arbitrator to

determine if there has been misconduct (see Halsbury's supra and Mustill supra at pages 550-553). The following general proposition is relevant to this case. It is misconduct where an arbitrator fails to comply with the terms of an arbitration agreement, including a failure to decide all matters submitted or to decide matters not in fact included (described hereinabove as 'technical misconduct')

9. The Court also has the inherent jurisdiction to set aside the award where it is found that there is an error of law on the face of the award. In **R v Northumberland Compensation Appeal Tribunal Ex parte Shaw**[2] Lord Goddard explained the position as :

> "It was said that the jurisdiction to set aside the award of an arbitrator for error of law appearing on its face is one that exists at common law independently of the Arbitration Acts. It is also said that the jurisdiction is not confined to consensual arbitrations, but extends to arbitrations under statutes. Both these questions are unquestionably correct. "

10. However the Court is very cautious when exercising this power to set aside an award. In **National Insurance Property Development Company Limited v NH international (Caribbean) Limited**[3] Bereaux JA recognized this caution when he expressed the following opinion:

> "[40]…The court's discretion to set aside an arbitral award is also circumscribed by the nature of the dispute. The court will refuse to remit or set aside the award if what is referred to is a specific question of fact or law or some principle of construction for the determination of the arbitrator. This is so even if the error is clear on the face of the award. Two leading cases fall to be considered here. Kelantan Government v Duff Development Co [1923] A.C. 395 and f. R Absalom Ltd v Great Western (London) Garden Village society [1973] A.C 592."

11. In **Government of Kelantan v Duff Development Co** [4] a dispute arose as to the construction of a deed and was the question specifically referred to arbitration. The arbitrator decided against the Kelantan Government and the Court of Appeal refused to set aside the Arbitrator's award. The House of Lords upheld the Court of Appeal's

[2] (1951) 1 All ER 268
[3] CA No 281 of 2008
[4] [1923] AC 395

decision to uphold the arbitrator's award, finding that the reference was specifically one of construction. Per Viscount Cave at 408:

> "If this be so, I thinking it follows that 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 the 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 permissible 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 for the arbitrator's conclusion on construction is not enough for that purpose."

At page 410 he went on to say:

> "...To the same effect are the decisions of this house in Holmes Oil Co v Pumpherston Oil Co. (4) and of the Judicial Committee of the Privy Council in Attorney General for Manitoba v Kelly (5); and in Re King and Dunveen (6) Channell J. stated the rule as concisely as follows: " It is no doubt a well-established principle of law that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad and it can be set aside**....., but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside**. Otherwise it would be futile ever to submit a question of law to an arbitrator. (Emphasis added.)

Lord Parmoor at page 418 further explained:

> "In the present appeal it was argued by the counsel on behalf of the appellants that the question of the construction of the deed had not been specifically referred to the arbitrator, although the construction of the deed was absolutely necessary for the determination of the disputes which had been referred to him. In my opinion this contention is not maintainable. Whether, however, a question of law has been specifically submitted to arbitration, falls in each cased to be determined on the terms of the particular submission**. If the Court, before which the award is sought to be impeached, comes to the conclusion that the alleged error in law, even if it can be maintained, arises in the decision of a question of law**

> **directly submitted to the arbitrator for his decision then the principle stated by Channell J. In Re King and Dunveen (2) applies, and the parties having chosen their tribunal... are no in a position to question the award or to claim to set it aside**." (Emphasis added.)

12. It is, therefore, an established principle that where a specific question of law is directly submitted to an arbitrator for a decision, then the award cannot be set aside merely because it is erroneous or because the court would have come to a different conclusion. Therefore, where there is an alleged error in law on the face of the award, the first question to consider is whether the alleged erroneous decision of the arbitrator was one which was specifically referred to him.

13. However it is important for the Court to always appreciate the guidance by Bingham J in **Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd**[5] who explained the approach the Court should take in upholding arbitration awards as:

> "…as a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye, endeavouring to pick holes and inconsistencies and faults in awards, and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."

14. There were no submissions made by the Claimant in support of Ground 7 of the application. I therefore understood this to mean that the Claimant was no longer pursuing this ground. I will now address each ground in the application.

Ground 1- The Arbitrator failed to make the Partial Award in accordance with law.

15. The Claimant submitted that the claim before the Arbitrator was for *"Reimbursement of the amount obtained by the Employer from the Guarantor".* Its view was that the issue to

[5] [1985] 2 EGLR

be determined by the Arbitrator as set out in the September 2014 letter was whether the Defendant was indebted to the Claimant in the sum of $529,661.46 for reimbursement of amounts obtained by the Defendant from the Guarantor of the Performance Bond. The issue was not concerned with whether the Claimant could retain "the overpayment" for its own use but whether the Claimant could maintain a claim against the Defendant and recover the money as the accounting party and issue of the Claimant retaining the proceeds of the bond was not for the consideration of the Arbitrator. It argued that the Claimant was entitled to bring the claim and hold the repayment for the benefit of the guarantor GTM, whether the Claimant has identified the guarantor or not. It further submitted that although the Arbitrator did not agree he acknowledged at paragraph 28 of the Award that the claim was on the basis of unjust enrichment. It also submitted that the Arbitrator was wrong to find that Defendant was not entitled to hold on to the proceeds of the Bond and its position was that the Defendant must account to the Claimant and the day of accounting is the date of the Rahim judgment. There was no intimation that the Claimant intended to retain the "overpayment" (whatever it may be) for its own use and benefit as presumed by the Arbitrator and the Claimant did not base its claim on the judgment of GTM since it is separate and apart from liability of the Defendant to the Claimant.

16. The Defendant submitted that ground 1 was a general ground upon which grounds 2 to 6 were premised and that the mere fact that an Arbitrator has decided an issue of law erroneously is not sufficient to set aside the award once it was an issue he was called upon to determine.

17. I agree with the Defendant's submissions that this ground is a general and it would be better addressed in greater detail in the following grounds. I will therefore not deal with this as a separate ground.

Ground 2- The Arbitrator made an error in law on the face of the Partial Award in holding that the Claimant had to suffer loss in order to succeed in its claim for restitution.

18. The Claimant submitted that the Arbitrator's finding that in order for the Claimant to sustain a claim for unjust enrichment it must show that it suffered a loss, was wrong in law since showing loss is not a necessary element/constituent to maintain a claim for unjust enrichment.

19. The Defendant submitted that the Arbitrator's dismissal of the Claimant's claim for reimbursement was based on its failure to adduce evidence that the performance bond was forfeited and that the Arbitrator's subsequent discussion on whether the Claimant suffered a loss and whether it could succeed on its claim in the absence of such a loss was obiter dicta. It also submitted that in any event the Arbitrator's dictum is correct in law since in order for a claimant to succeed in a claim for unjust enrichment it must satisfy the court that the Defendant has been enriched and that enrichment has been at the Claimant's expense. The absence of evidence of enrichment is fatal to the existence of a restitutionary claim and that the Arbitrator was correct to conclude that the Claimant's claim failed. Further the Arbitrator also found that the Claimant failed to establish that the Defendant was enriched at the Claimant's expense. In the circumstances the Defendant submitted that the Arbitrator made no error in law when he referred to the Claimant having suffered no loss.

20. Both parties agreed that this ground referred to the following parts of the Arbitrator's ruling namely:

> "[28] It is not in dispute that GTM performance bond on behalf of C&G relative to its obligations under the Contract. It is accepted that bonds such as this are usually for 10% of the contract sum and there is nothing that this bond was for any different amount. The amount of the bond would therefore have been $529,661.46 and C&G claims this amount from FCB on the basis of unjust enrichment describing it as being "…. a claim for the time value of money by which [FCB] was enriched unjustly" and that this amount cannot be retained by [FCB] as a windfall.
>
> [29] There is, however, no evidence of this amount, or any amount, or any other amount, having been paid by CTM to FCB, only an assertion that the bond was forfeited. On that basis any claim by C&G to this amount would have to fail.

[30] There is, however, oral evidence, unsupported by any documentation, that GTM sued C&G and obtained a judgment which was registered on 15th January 2002. There is no evidence of any step ever being taken by GTM to enforce this judgment and given the passage of more than 12 years it is clearly time-barred and cannot now be enforced. That being so, C&G has suffered no loss and can therefore is regarded as unable to succeed on this Item of Claim.

[31] I find the lack of evidence on this issue to be startling, to put it mildly. There is for example no evidence that FCB called the bond and I am left to infer, and I can put it no higher than that, that GTM in fact paid the full amount of the performance bond to FCB. I am reluctant to do so, but even if I were to so infer, it is submitted that I should award this award this item of Claim on the principle that when a bond is called, there must be at some time thereafter be an accounting between the parties. If that accounting shows the amount paid under the bound to exceed the amount actually due, then the overpayment can be recovered. In this regard I am referred to several decided cases principally Tradigrain v State Trading Corporation of India [2005] EWHC 2206 (Comm) (which reviews a line of previous decisions such as Cargill International SA and Another v Bangladesh Sugar and Food Industries Corp [1996] 1 All ER 563) and Hudson's Building Engineering Contracts 11th Ed.

[32] A review of the authorities to, however, does not in my view sustain the submission that the claimant – in the present proceedings C&G – can retain the "overpayment" (whatever it may be) for its own use and benefit, although it may have the right to bring the claim (see e.g. Morrison J in Cargill at P 568h). Any amount recovered will be held in trust for the person who provided the performance bond, if that person had not received any payment from the person or entity on whose behalf it had provided the performance bond in the first place.

[33] There is no suggestion that C&G has paid any monies to GTM, or provided any security in return for GTM providing the performance bond which has now been realised. C&G has suffered no loss. It is GTM who is out of pocket to the extent of $529,661.46 and if I am to infer, as I have set out at paragraph [31] above, that GTM paid the amount of the performance bond to FCB, then it would appear equally appropriate to inter from non-enforcement of the judgment it registered against C&G in 2002 that GTM is not concerned to do so because it has ultimately suffered no loss."

21. In the House of Lords case of **Benedetti v Sawiris**[6] Lord Clarke summarized the elements in a claim for unjust enrichment as:

> "It is now well-established that a court must first ask itself four questions when faced with a claim for unjust enrichment as follows. (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant? See *Banque Financiere de la Cite v Parc* (Battersea) Ltd [1999] 1 AC 221 at 227 per Lord Steyn; *Investment Trust Companies v HMRC* [2012] EWHC 458 (Ch) at para 38, per Henderson J[7].
>
> 13. The basic principle is that claim for unjust enrichment is "not a claim for compensation for loss, but for recovery of a benefit unjustly gained [by a defendant] ... at the expense of the claimant": ***Boake Allen Ltd v HMRC*** [2006] EWCA Civ 25, [2006] STC 606 para 175, per Mummery LJ; see also Goff and Jones, *The Law of Unjust Enrichment*, 8th ed (2011) ("Goff and Jones"), para 4-01.

22. In my view, the Arbitrator acknowledged at paragraph 32 of the Partial Award that the Claimant did have a claim/ remedy against the Defendant under the law of unjust enrichment to recover any monies paid to the Defendant pursuant to the Performance Bond. However, the Arbitrator's dismissal of the Claimant's claim for reimbursement of amounts obtained by the Defendant from the guarantee of the performance bond was on the basis that the Claimant failed to adduce evidence that the bond was forfeited. Indeed he summed up his view as *"the lack of evidence on this issue to be startling, to put it mildly*"[8]. I therefore agree with Counsel for the Defendant's submission that the Arbitrator's subsequent discussion on whether the Claimant suffered a loss and whether it could have succeeded on a claim for unjust enrichment was obiter dicta.

23. In any event, I cannot find fault with the Arbitrator's dictum. Based on the Arbitrator's reasons at paragraphs 29 to 33 of the Partial Award there was no evidence to satisfy him that the Defendant was enriched. Based on the test set out by Lord Clarke in **Benedetti**

[6] [2013] UKSC 50
[7] Supra paragraph 10
[8] Paragraph 31 of the Partial Award

this was the first limb in proving a claim of unjust enrichment. There was also no evidence before the Arbitrator from the Claimant that the Performance Bond was forfeited by the Defendant and that the Defendant called in the Performance Bond. He also found that there was no evidence before him to demonstrate that any enrichment by the Defendant was at the expense of the Claimant. Again the Arbitrator cannot be faulted since this was evidence which was necessary for the Claimant to prove the second limb of the test in **Benedetti.** Finally, the Arbitrator's statement at paragraph 30 that *" C & G has suffered no loss"* in my view referred to the absence of evidence to satisfy the test in proving a claim for unjust enrichment.

24. In the circumstances, the Claimant has failed to demonstrate that the Arbitrator made an error in law when he referred to the Claimant having suffered no loss in order to succeed in its claim for restitution and as such this ground of the application cannot be sustained.

Ground 3- the Arbitrator made an error in law on the face of the Partial Award in holding that the claim for reimbursement was a claim for breach of contract.

25. The Claimant submitted that the Arbitrator was wrong to find that the claim against the Defendant was a claim in breach of contract since it was made clear in the Claimant's written submissions that its claim was on the basis of unjust enrichment which he acknowledged at paragraph 28 of the Partial Award where he stated *" the amount of the bond would therefore have been $529,661.45 and C& G claims this amount from FCB on the basis of unjust enrichment describing it as being "... a claim for the time value of money by which [FCB] was enriched unjustly" and that this amount cannot be retained by FCB as a windfall."* The Claimant also submitted that the paragraphs of the authority **Sempra Metals Ltd v HM Commissioners of Inland Revenue**[9] which the Arbitrator relied upon in support of his statements expressed at paragraphs 36 and 37 of the Partial Award did not reflect his contention but merely traced the origin of the issue of interest and that the relevant parts of **Sempra** are Lord Hope's findings at paragraphs 100, 112 and 114 and that of Lord Walker at paragraphs 178 and 179. It also argued that the

[9] [2007] UKHL 334

present common law position was set out in **Littlewoods Limited v The Commissioners for Her Majesty's Revenue and Customs**[10] and it relied on Lord Nicholls judgment in **Sempra.** In support of its position it submitted that Claims No. 1 *"payment of the amount certified on the interim certificate No 7"*, Claim No. 2: *"Value of works executed up to the time of determination but not yet incorporated in any interim certificate"*, Claim No 3 *"Payment of Retention held"* and Claim No 6: *"Reimbursement of the amounts obtained by the Employer from the Guarantors of the Performance Bond"* were all instances of unjust enrichment and not contract. Claim No 4 i) *"Loss of profit on works not executed due to the determination of the Agreement* and 4 ii) *"Loss of investment opportunity on profit that would have been generated"* were from the works not executed and which arose from the breach of contract and there was no contractual requirement to stipulate the payment of interest in the Agreement.

26. The Defendant submitted that the Arbitrator was correct when he classified the claim before him as one for breach of contract. The Claimant's challenge under this ground was from a specific question of law which was submitted for the Arbitrator's ruling. If in the course of dealing with this issue the Arbitrator erroneously referred to the Claimant's claim as being one in contract, this is not a ground for setting aside the award as his ruling on the issue of interest was a question of law specifically referred to him by the parties. It also submitted that in any event, the Arbitrator did not err when he referred to the claim before him as being a claim for breach of contract since none of the agreed facts before the Arbitrator referred to a claim for unjust enrichment. The claim referred to the Arbitrator for resolution was labelled in the Agreed Statement of Facts as "HEADS OF DAMAGE" which was inconsistent with a claim in unjust enrichment. From the pleadings the dispute between the parties arose out of contractual obligations and the Claimant first presented its case as one in unjust enrichment in its written submissions without any evidential basis for doing so.

27. The Claimant's challenge under this ground was with respect to paragraph 37 of the Partial Award which stated:

[10] [2014] EWHC 4302

"[37] Counsel for C&G advances that interest is payable at common law and that it should be calculated on the "compound" basis and relies on the decision in Sempra Metals Ltd v HM Commissioners of Inland Revenue [2007] UKHL 334 in relation to both, That, however, is a judgment of the House of Lords on a claim in court proceedings, not in an arbitration, for unjust enrichment and is therefore distinguishable on the law as well as on the facts. I do not find it of assistance in the present proceedings, which is a claim in breach of contract. That distinction was itself drawn in the judgment of which paragraphs 1-7 are instructive."

28. I cannot find fault in the Arbitrator's finding for the following reasons. The information before the Arbitrator which was placed before this Court all point to the Arbitrator treating with the items referred to him as an Assessment of Damages for breach of contract. In the September 2014 letter the Arbitrator set out the issues as:

"It was **Further Agreed** that the issues to be decided by the Arbitrator are:

1. Whether the Respondent is indebted to the Claimant in the sum of $224,412.36 for Loss of profit on works not executed due to determination of Agreement.
2. Whether the Respondent is indebted to the Claimant in the sum of $ 970, 004.94 for Loss of investment opportunity on profit that would have been generated.
3. Whether the Respondent is indebted to the Claimant in the sum of $ 529,661.46 for reimbursement of amounts obtained by Employer from Guarantee of the Performance Bond.
4. Whether the Respondent is indebted to the Claimant for interest on all outstanding sums including the amount due on the Interim Certificate No. 7 and the value of works executed up to the time of determination but not yet incorporated in any interim certificate the rate of interest applicable.
5. Whether the Respondent is indebted to the Claimant in the sum of $ 47,546.05 for reimbursement of loss and expense due to prolongation."

29. The Arbitrator also stated that *"the issues of law to be decided are the principles of law to be applied in assessment of damages in respect of each claim."*. There was nothing placed before this Court where it was pointed out to the Arbitrator that the aforesaid statement was incorrect or a misunderstanding of the issues *before* he embarked on the hearing of evidence.

30. Further the items of claim set out at paragraph 9 in the Agreed Statement of Facts dated the 10th November 2014 stated:

> "9. By letter dated the 25th September, 2014 from the Respondent to the Dispute Resolution Centre, the Respondent, with the concurrence of the Claimant advised that the parties were not amenable to submitting the claim to re arbitration and had agreed to submit for assessment of damages, those unresolved heads of claim in the Particulars of Damage in the Statement of Case as follows –
>
> **HEADS OF DAMAGE**

Claim Nr.	Description	Amount (s)
1	Amount certified on interim certificate nr. 7	**46,151.80**
2	Value of works executed up to the time of determination but not yet been incorporated in any interim certificate	**665.18**
3	Payment of Retention held	**111,028.63**
4i)	Loss of profit on works not executed due to determination of Agreement.	**To be determined**
4ii)	Loss of investment opportunity on profit that would have been generated	**To be determined**
5	Reimbursement of loss and expenses – Prolongation Costs	**To be determined**
6	Reimbursement of amounts obtained by Employer from Guarantors of the Performance Bond	**To be determined**
7	Interest on late payments and late certification of payment	**To be determined**
	TOTAL	

31. Based on the aforesaid the Arbitrator cannot be faulted for classifying the Claim and treating it as an assessment of damages in breach of contract since there was nothing in the September 2014 letter, Statement of Agreed Facts setting out that the basis of the claim for items 1, 2, and 6 were to be considered as a claim in unjust enrichment.

32. Further, if the Claimant's substantive claim for items 1,2, and 6 was based on unjust enrichment and not breach of contract then based on the learning in **Sempra** it could not

pursue a relief in damages since a remedy in unjust enrichment is not a remedy in damages. Lord Hope in **Sempra** at paragraph 31 he described the difference as :

> "I would apply the reasoning in these passages to the claim for interest in this case. A remedy in unjust enrichment is not a claim of damages. Nor is it a contractual remedy, so there is no need to search for an express or implied term as the basis for recovery. The old rules which inhibited awards of interest to ancillary interest on sums due on contractual debts or on claims for money had an received do not apply. The essence of the claim is that the Revenue was unjustly enriched because Sempras paid the tax when it did in the mistaken belief that it was obliged to do so when in fact it was being levied prematurely. So the Revenue must give back to Sempra the whole of the benefit of the enrichment which it obtained. The process is one of subtraction, not compensation"

33. Finally, in **Sempra** which the Claimant relies to supports its contention does not assist it since in that case it was clear that the issue before the Court was whether a claimant, who seeks a remedy on the ground of unjust enrichment, is entitled to an award for restitution of the value of money that is measured by compound interest. In my view this was different from the issues to be decided by the Arbitrator which were whether the Claimant had proven the agreed "HEADS OF DAMAGE".

34. I therefore agree with the Defendant that on face of the Partial Ward the Arbitrator did not make an error in law in holding that the claim for reimbursement was a claim for breach of contract.

Ground 4- The Arbitrator made an error in law on the face of the Partial Award in holding that in a claim for restitution, the claim for interest is required to be grounded in a claim for special damages specifically pleaded and strictly proven

35. The Claimant argued that its claim against the Defendant was not a claim for damages in respect of which interest accrued but instead it was a claim for unjust enrichment for the time value of money in respect of which there is no requirement to claim special damages. It submitted that in the case of **Benedetti** where the issue of restitution was

discussed there was no requirement that interest is required to be grounded in a claim for special damages to establish a claim for such relief.

36. The Defendant's position was that the ground should be dismissed since the issue of whether interest was payable was a specific question of law referred to the Arbitrator for ruling and therefore an error of law on the face of the award, if any, is not a ground for setting aside the award. The Arbitrator was correct in his statement of the law that the Claimant's claim for interest must be grounded in a claim for special damages specifically pleaded and strictly proven. It also submitted that at no point prior to the Claimant's written submissions did the Claimant present its case as a claim in unjust enrichment. The Arbitrator was therefore correct to deny the Claimant's claim for compounded interest as the Claimant produced no evidence for an award on that basis

37. The part of the Partial Award relevant to this ground were paragraphs 40 to 42 which stated:

> "[40] As to the main issue of whether interest should be payable at all, I do not have any statutory power to award interest, unlike the position of arbitrators in certain other jurisdictions. My "competence" to do so flows from the agreement of the parties and, failing that, recourse must be in any arbitration proceedings. Nor do, as I have set out at [7] above, the Terms of Reference, or the Procedural Rules. Hence C&G falling back on the common law.
>
> [41] The common law position can perhaps be described as unsettled, as alluded to in Sempra (see paragraph 5-7), and in these proceedings appears to require a claim for interest to be grounded in a claim for special damages and therefore specifically pleaded and strictly proven, although there has been considered relaxation of the latter requirement in this jurisdiction.
>
> [42] Even if I were to treat C&G's claim for interest as one in special damages and specifically pleaded, however, there is no evidence upon which I can quantify the damages. Nor am I referred to any custom or practice in Trinidad & Tobago of awarding interest in successful arbitration claims in circumstances such as those now before me.

38. There are three reasons I agree with the Defendant's contention. Firstly, it was not in dispute that one of the specific issues which were referred to the Arbitrator was *"Whether the Respondent (The Defendant) is indebted to the Claimant for interest on all outstanding sums including the amount due on the interim Certificate No. 7 and the value of the works executed up to the time of determination but not yet incorporated in any interim certificate the rate of interest applicable."* In my view the Arbitrator adequately addressed the specific issue at paragraphs 40-42 of the Partial Award clearly setting out his reasons for arriving at his conclusion. Even if I would have arrived at a different conclusion from the Arbitrator because it was erroneously arrived at, it is not the role of this Court to substitute its decision for the finding made by the Arbitrator since the parties agreed to be bound by his ruling.

39. Secondly, although the Claimant's contention was that the Claimant's claim before the Arbitrator was a claim in unjust enrichment there was no evidence from the Statement of Agreed Facts or the September 2014 letter that it had grounded its claim as such.

40. Thirdly, the Arbitrator's position in law on the issue of interest was correct. Lord Scott in **Sempra** at paragraph 151 stated:

> "I concur with your Lordships in concluding that interest, whether simple or compound can represent an item of contractual damages or tortious damages subject to the normal rules applicable to such claims."

41. While the common law allows awards of compound interests in breach of contract claims, such claims are still subject to the rules of proof and remoteness which was stated by the Arbitrator.

42. I therefore dismiss this ground.

Ground 5-The Arbitrator made an error in law on the face of the award in holding that the common law did not authorize the Arbitrator to award compound interest as a restitutionary award on the ground of unjust

enrichment measured by the time value of the money that was being retained without lawful authority.

43. The Claimant's position was that the arbitration before the Arbitrator was concerning money unlawfully held by the Defendant which was a claim for restitution and was a claim for the time value of money by which the Defendant was enriched unjustly. It argued that the **Sempra** case established that the common law required that it be paid a sum which represents the value of the money over the period of that enrichment and that this sum falls to be calculated by compounding interest over that period since simple interest does not reflect the actual value of the money and if the law is to achieve a fair and just outcome when assessing financial loss it must award interest on a compound basis for the loss of use of money.

44. The Defendant argued that the Claimant's challenged under this ground was misconceived for three reasons. Firstly, the Arbitrator did not find that the common law did not allow him to award compound interest on a restitutionary claim on a ground of unjust enrichment. He found that the claim was not a claim for restitution but one for breach of contract. Secondly, the Arbitrator found that based on the unsettled position of the common law in relation to claims for interest on a compound basis where the substantive claim was for damages for late payment of a debt i.e. breach of contract he was not persuaded to award interest on a compound basis. Thirdly, the issue of interest payable was a specific question for his determination and even if the Court considered that he made an error in law, it ought not to overturn it since he addressed it.

45. Based on the submissions made by the parties under this ground paragraphs 36-45 of the Partial Award are relevant. They stated:

> "Item of Claim 8. – Interest on late payments and late certification of payment
>
> [36] It is agreed that if I find that interest is payable, then it is to run from 14 March 2013, that being the date of Mr. Justice Rahim's judgment setting aside the original arbitration award. The issues between the parties are first, whether

interest should be paid at all and second if it is to be paid, whether it is should be calculated on a "simple" or "compound" basis.

[37] Counsel for C&G advances that interest is payable at common law and that it should be calculated on the "compound" basis and relies on the decision in Sempra Metals Ltd v HM Commissioners of Inland Revenue [2007] UKHL 334 in relation to both, That, however, is a judgment of the House of Lords on a claim in court proceedings, not in an arbitration, for unjust enrichment and is therefore distinguishable on the law as well as on the facts. I do not find it of assistance in the present proceedings, which is a claim in breach of contract. That distinction was itself drawn in the judgment of which paragraphs 1-7 are instructive.

[38] Counsel for FCB, on the other hand, contends that no interest is payable, but that if I find that it is, then it is to be calculated on a "simple" basis and at the rate of 6% citing the Order made in CV2011-02039 Peak Petroleum Trinidad Limited v Primera Oil and Gas Limited & Ors.

[39] Regrettable, neither Counsel cited any decisions of the Trinidad & Tobago Courts in relations to either of these two Principal issues.

[40] As to the main issue of whether interest should be payable at all, I do not have any statutory power to award interest, unlike the position of arbitrators in certain other jurisdictions. My "competence" to do so flows from the agreement of the parties and, failing that, recourse must be in any arbitration proceedings. Nor do, as I have set out at [7] above, the Terms of Reference, or the Procedural Rules. Hence C&G falling back on the common law.

[41] The common law position can perhaps be described as unsettled, as alluded to in Sempra (see paragraph 5-7), and in there proceedings appears to require a claim for interest to be grounded in a claim for special damages and therefore specifically pleaded and strictly proven, although there has been considered relaxation of the latter requirement in this jurisdiction.

[42] Even if I were to treat C&G's claim for interest as one in special damages and specifically pleaded, however, there is no evidence upon which I can quantify the damages. Nor am I referred to any custom or practise in Trinidad & Tobago of awarding interest in successful arbitration claims in circumstances such as those now before me.

[43] Although it was not a matter raised in closing submissions, I have also considered whether the claim for interest being included in the Particulars of Claim can be taken either expressly or impliedly as being included in the Terms

of Reference, or the issues to be decided, or otherwise, as a basis for my assuming jurisdiction to decide the issue.

[44] I have come to the conclusion that it would be appropriate for me to do so. In short, the Reference to me is "...for assessment of damages, those heads of claim set out in the Particulars of Damages in the Statement of Case" (see the joint letter from the Attorneys-at-law to the Dispute Resolution Centre of 25 September 2014) and the issue of interest is clearly set out there. Additionally, this issue was clearly among those agreed to be decided by me as set out in my letter of 30 September 2014 to the Dispute Resolution Centre referred to at [5] above. Further, Counsel for FCB never raised the issue of my competence to do so in his submissions. It is clear to me that the parties intention was that I decide not just whether interest should be payable, but in what amount.

[45] As to the basis for calculating the interest, however, I am not persuaded that I should so on a compound basis. I am not satisfied that the common laws permits me to do so, as I have said, and in any event there is no evidence before me on which on might perform that calculation, such as the rate or rates to be applied from time to time."

46. I have not been able to find any reason under this ground to fault the Arbitrator's reasoning for the following reasons. Firstly, the issue of the payment of interest was a specific issue which was identified by the parties for the Arbitrator's determination. In the 30th September 2014 letter the Arbitrator identified it as *"Whether the respondent is indebted to the Claimant for interest on all outstanding sums including the amount due on the interim Certificate No. 7 and the value of works executed up to the time of determination but not yet incorporated in any interim certificate the rate of interest applicable"*. Having examined aforesaid paragraphs of the Partial Award, I am satisfied that the Arbitrator adequately addressed the specific issue of interest and clearly set out the reasons for not awarding compound interest.

47. Secondly, at paragraph 37 of the Partial Award the Arbitrator was clear that the claim was not one for restitution on the ground of unjust enrichment but one for breach of contract. Thirdly, it was on this basis that he made his finding at paragraph 45 that the unsettled position of the common law did not permit him to award compound interest where the substantive claim was for breach of contract. The Arbitrator also made it clear

that the Claimant had failed to prove that it was entitled to be awarded compound interest for its loss.

48. This ground is dismissed.

Ground 6- The Arbitrator exceeded his authority in that the payment of the bond to the Respondent was not an issue for determination.

49. The Claimant argued three points under this ground. Firstly, its position was that the Arbitrator derived his authority from the agreement which contained his terms of reference contained in the 30th September 2014 letter. The Arbitrator cannot make an award in excess of the terms of reference. Secondly in considering this ground the Court can have recourse to the pleadings and the evidence given at the trial before the Arbitrator to identify the dispute. Thirdly, the issue to be determined by the Arbitrator as set out in the 30th September letter 2014 was *"Reimbursement of the amounts obtained by the Employer from the Guarantee of the Performance Bond $529,661.46"* which demonstrated that there was no dispute of the call or payment by the Guarantor of the Bond in the said sum.

50. The Defendant submitted that the Claimant's challenge to the Award under this ground was without merit. It agreed that the Arbitrator's authority was set out in the Terms of Reference and repeated in the 30th September 2014 letter and that the issues were set out in the Agreed List of Issues one of which was issue 3 which stated *"Whether the Respondent is indebted to the Claimant in the sum of $529,661.46 for reimbursement of amounts obtained by the Employer from Guarantee of the Performance Bond."* This issue was repeated in the Agreed Statement of Facts. However its position was that the question of whether the bond was paid to the Defendant was implicit in the determination of the issue of whether the Defendant was indebted to the Claimant which was within the Arbitrator's authority to determine. Therefore in the absence of any evidence of any receipt of the bond by the Defendant, the Claimant's claim under this head was doomed to fail.

51. It was common ground that the Arbitrator derived his authority from his Terms of Reference which were repeated in the Arbitration Agreement between the parties approving the Arbitrator's appointment. At page 2, clause ii of the Agreement appointing the Arbitrator the matters which were referred were:

> "ii. All questions and matters of difference between the Parties arising out of or relating to or in connection with the assessment of damages of those unagreed heads of the Claimant's claim are hereby referred to the award and final determination by the Arbitrator."

52. I have concluded that the Arbitrator did not exceed his authority in determining that payment of the bond to the Defendant was an issue for his determination for the following reasons. Firstly, paragraph 3 of the Statement of Issues stated that the issue with respect to bond was :

> "3.Whether the Respondent is indebted to the Claimant in the sum of $529,661.46 for reimbursement of amounts obtained by the Employer from Guarantor of the Performance Bond".

53. In my view, whether the Performance Bond was paid to the Defendant was critical and inextricably bound in determining whether it should be paid the sum of $529,661.46 as one of the "Head of Damage".

54. Further, there was no evidence in the Claimant's witness statement that the sum of $529,661.46 was paid to the Defendant. This was not disputed by the Claimant in its written submission to this Court since it accepted that the Claimant's witness statement established that no money was paid under any head of the claim which I understood to mean that the sum of $529,661.46 was not paid to the Bank. In my view such evidence would have assisted the Claimant's position.

55. This ground is also dismissed since I do not find that the Arbitrator exceeded his authority.

ORDER

56. The Claimant's notice of application filed on the 25th February 2015 as amended on the 27th March 2015 is dismissed.

57. The Claimant to pay the Defendant's costs of the said notice. I will hear the parties on costs.

Margaret Y Mohammed
High Court Judge