IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal BZCV2014/004
BZ Civil Appeal No. 35 of 2011

BETWEEN

BELIZE NATURAL ENERGY LTD **APPELLANT**

AND

MARANCO LTD **RESPONDENT**

Before The Honourables **Mr Justice Nelson**
Mr Justice Saunders
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson

Appearances

Mr E Andrew Marshalleck SC and Mr David Morales for the Appellant

Mr Eamon Courtenay SC for the Respondent

JUDGMENT
of
Justices Nelson, Saunders, Wit, Hayton and Anderson
Delivered by
The Honourable Mr Justice Anderson
on the 10th day of March 2015

JUDGMENT

Introduction

[1] This appeal interrogates the role and remit of the courts in reviewing the discretion of arbitrators to award costs in arbitration proceedings using a percentage approach and on an indemnity basis. The Appellant, Belize Natural Energy Limited ('BNE'), challenges the judgment of the Court of Appeal of Belize upholding a decision of Mr Justice Legall which had dismissed the Appellant's application that an award by arbitrators as to costs in arbitration proceedings be set aside or remitted to the arbitrators for reconsideration. The Appellant contends that the arbitral award of costs in favour of the Respondent, Maranco Limited ('Maranco'), ought to be set aside or remitted on the ground that in making the award using the percentage approach and on an indemnity basis the arbitrators had misapplied the law and thereby misconducted themselves within the terms of sections 11 and 12 of the Arbitration Act of Belize. This is in fact the second round of challenge to the award. The original award of costs was already previously remitted by Mr Justice Legall to the Arbitrators for reconsideration. It is this 'reconsidered' award of costs that is the subject of the current round of litigation ending with this appeal.

[2] The power of arbitrators to award costs is broad. Section 15 of the Arbitration Act provides that orders as to costs of the kind made in the arbitration, "may be made on such terms as to costs, or otherwise, as the authority making the order thinks fit." Further, section 4 of the Act makes Rule 9 of the First Schedule applicable. Rule 9 provides:

> "The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between attorney and client."

[3] The general discretion thus given to arbitrators to award costs justifies and supports the reluctance of courts to intervene in arbitration proceedings or to interfere with arbitral awards. Whether the Appellant has demonstrated sufficient cause for this Court to agree that the Arbitrators in the present proceedings have so misdirected themselves that their award should be set aside or remitted to them for further reconsideration is now to be assessed but, in order to understand the issues, it is first necessary to give an account of the factual background to the case.

Background

[4] On 1st May 2008, BNE and Maranco, both companies incorporated under the laws of Belize, entered into two separate Onshore Oil Drilling Contracts ('the Contracts') each for one year. The Contracts were in substantially the same terms and called for the provision by Maranco of three drilling rigs, each with ancillary equipment, for the purpose of carrying out exploratory drilling operations at the request of BNE in certain areas of Belize. Clause 12.3 of each contract recorded the parties' agreement that any dispute arising under the contract or involving the interpretation of its terms was to be settled by arbitration pursuant to the Arbitration Act of Belize.

[5] The Contracts came to an end by effluxion of time on 30th April 2009, but in early May 2009, disputes and differences arose between the parties as to the payment of compensation and fees said by Maranco to be due to it from BNE under the Contracts and the matter was referred to arbitration. Maranco appointed Mr Cedric Flowers and BNE appointed Mr Arsenio Burgos to act as arbitrators ("the Arbitrators") in the reference. Messrs Flowers and Burgos then appointed Ms Lisa Shoman SC to be the umpire ("the Umpire") for the purpose of the arbitration.

[6] In the arbitration Maranco claimed that payments were due and owing with respect to (a) the daily rate for drilling operations under the Contracts, (b) demobilization fees provided for under the Contracts, and (c) damages in respect

of failure to pay the demobilization fees on time. Maranco also claimed interest and the costs incurred in preparation for and in the conduct of the arbitration. BNE defended on the grounds that on a true construction of the Contracts the daily rate was not payable because the contract works had been completed and that the demobilization fees were not payable until the rigs were exported and the rigs had not then been exported.

[7] During the course of the arbitration the rigs were demobilized and the demobilization fees paid in full so that the Arbitrators regarded Maranco as having "effectively abandoned its claim for demobilization fees." In relation to the claim for damages and interest for late payment of the demobilization fees, the Arbitrators, being unable to agree whether BNE's contractual obligation to pay the demobilization fees arose before or after the actual exportation of the rigs from Belize, referred the matter to the Umpire. She determined that the obligation did not arise until actual exportation. Applying this ruling the Arbitrators decided that no damages should be awarded for failure by BNE to pay the demobilization fees at an earlier date than it did.

[8] Under the terms of their award dated 25th August 2010, Messrs Flowers and Burgos upheld the claim by Maranco for daily rates and awarded the sum of US $1,098,000.00 plus GST at 10%, for a total of US $1,207,800.00 plus interest on the total award at 6% per annum from 1st June 2009, "until paid, in full and final settlement of the Maranco Limited's claim arising out of matters in dispute in the reference." In relation to costs, the Arbitrators awarded Maranco one-half of its costs in the following terms:

> "Belize Natural Energy Limited shall bear its own costs and, in addition, pay one half of Maranco's total cost incurred in preparation for and conduct of this Arbitration."

[9] BNE failed to satisfy the Award and Maranco applied to the Supreme Court pursuant to section 13 of the Arbitration Act and Rule 43.10 of the Supreme Court (Civil Procedure Rules) for an Order granting permission to enforce the Award in the same manner as a judgment or order of the court. BNE filed an application

challenging the Award for serious irregularity. In an order made on 22nd November 2010, Legall J. granted leave to Maranco to enforce the Award in relation to payment by BNE for daily rates of US $1,207,800.00 plus interest at 6% per annum but remitted the award of costs to the Arbitrators for their reconsideration.

[10] Both parties filed written submissions on the costs award for the further consideration of the Arbitrators. Maranco argued that under section 15 of the Act, costs, which were in the discretion of the Arbitrators, should be based on the principle that costs should follow the event and that on the basis of Rule 9 of the First Schedule to the Act it was entitled to all its costs "to be paid as between attorney and client." BNE contended that the usual basis for an award of costs was on a party and party basis and that despite the provisions in Rule 9 of the First Schedule the Arbitrators ought not to depart from that basis unless they considered that BNE had acted improperly in some way. BNE further contended that it was entitled to its own award of costs based on the fact that it had successfully defended some parts of Maranco's claim. On the scale of costs prescribed in Part 64 of the Supreme Court (Civil Procedure) Rules 2005, BNE submitted that a costs award of $56,282.96 should have been made in its favour.

[11] The Arbitrators accepted that section 15 of the Arbitration Act and the First Schedule gave them discretion in awarding costs and rejected the suggestion that their failure to award costs to BNE in the initial award in relation to those aspects of the case where it had succeeded constituted a departure from the discretion provided by the Act. They accepted the general rule that costs follow the event and determined that even though there was no clear winner on all the issues Maranco could be said to have won the Arbitration when viewed from the standpoint of the overall result. They then adjusted the amount awarded to reflect the fact that Maranco had not won on all its claims. The Arbitrators took into account the Table of Costs submitted by Maranco and gave much consideration to the most significant item i.e. Attorney's fee of US$870,751.34 and to the components of that item, namely the percentage (30%) and the base

(US$2,902,504.48) and determined that the base should be reduced to be consistent with the awarded sum of US$1,207,800. The award then concluded that Maranco was entitled to US$211,069.57, as full and final settlement of costs and fees associated with the preparation for conduct of the arbitration as set out below:

Attorney's fee @ 30% of US $1,207, 800…….	US $362,340.00
GST @ 12.5% ……..….	45,292.50
Attorney's office expense ……..……	150.00
Arbitrator's (selected claimant) fee, initial award…..……	10,000.00
Arbitrator's operating fee……..	2,500.00
Arbitrator's (selected claimant) fee, remission ……...……	1,500.00
Subtotal …….…….……	422,139.13
	One-half rate x 50%
Amount of Costs ……..……...	US$211,069.57

[12] BNE again challenged the Arbitrators' award of costs before Legall J. on basically the same grounds it had argued before the Arbitrators, namely that the Arbitrators had not correctly applied the principle that costs follow the event and that the Arbitrators erred in their decision to award costs on an attorney and client basis. BNE applied for an order that the award be remitted for the Arbitrators' "further reconsideration" but this application was rejected by the learned judge.

[13] BNE's appeal was unanimously dismissed by the Court of Appeal. In a judgment delivered by Morrison JA that court held that the Arbitrators had not erred in applying the basic principle that costs should follow the event. The fact that BNE had successfully defended the demobilisation fees claim did not mean that it was somehow unreasonable for Maranco to have pursued it and should therefore be penalized in costs having lost it. Even after the rigs were demobilized and the demobilization fees paid in full it was not unreasonable for Maranco to have maintained its claim for damages for late payment given the difference of opinion that emerged between the Arbitrators themselves on the question of when the

demobilization payments ought to have been made. The fact that Maranco ultimately lost on the issue of damages did not by itself suffice to disentitle it to the benefit of the general rule that costs should follow the event. While an issues-based approach may be adopted in awarding costs, an award on a percentage basis may also be made in circumstances of partial success. In making a 50% deduction from the costs payable to reflect the fact that Maranco was not successful in its demobilization fees claim, the Arbitrators had acted well within the range of approaches sanctioned by the rules and authorities. Finally, in the absence of reasons given by the Arbitrators for awarding costs on an attorney and client basis, it was impossible to say that the Arbitrators had acted on any wrong principle given the clear wording of Rule 9 of the First Schedule.

[14] BNE now appeals to this Court submitting four grounds on which the decision of the Court of Appeal ought to be reversed. BNE argues that the Court of Appeal erred in: (i) failing to appreciate that the demobilization claim by Maranco was a separate and distinct event warranting an award of costs in favour of the Appellant on the usual principle that costs follow the event; (ii) failing to properly consider whether or not on the face of the record the Arbitrators had misapplied the general rule that costs follow the event; and (iii) wrongly assessing the reasonableness of Maranco's claim on the factual basis that as at the date of commencement of the arbitration in late 2009 Maranco was owed both the unpaid daily rates and the demobilization fees notwithstanding the umpire's finding that the demobilization fees were not due or owed until the rigs were demobilized on 30th March, 2010. BNE further argued that: (iv) the Court of Appeal failed to appreciate that the omission by the Arbitrators to give reasons for the award in the absence of a finding that the Appellant had acted improperly constituted an error apparent on the face of the award.

[15] As is evident these grounds essentially rehearse the two main positions which the Appellant has consistently taken throughout the litigation, namely that the Arbitrators had not correctly applied the principle that costs follow the event (the "costs follow the event" issue) and that the Arbitrators had improperly awarded

costs on an attorney client basis (the "costs on attorney and client basis" issue). In resolving these issues the starting point must necessarily be an exposition of the correct principles to be applied by the Court in reviewing the discretion granted to arbitrators under the Arbitration Act to award costs. There is also a procedural point to be addressed relating to the remedy sought in the Appellant's Notice of Appeal and a substantive point concerning the grounds on which that remedy may be given.

Judicial Intervention

[16] This Court recognises that arbitration is an increasingly preferred method of resolving complex commercial disputes and that it rests on the key principle of party autonomy. Parties to an arbitration agreement make the conscious decision to prefer the prompt, expedient, and final settlement of their disputes through the arbitral process rather than the often protracted process of court adjudication. As it is sometimes put, they choose finality over legality. Conflict resolution by arbitral means assists and encourages modern commercial activity and therefore the finality of arbitral awards is supported by public policy considerations. This is crystallized in section 8 of the Arbitration Act which provides that, "The award to be made by the arbitrators or umpire shall be final and binding on the parties."

[17] The courts do retain residual responsibility for guaranteeing the integrity of the arbitral process in ensuring, for example, the application of the principles of natural justice but court involvement should be as minimal as possible. The margin of judicial discretion to intrude into an arbitral award is exceedingly narrow. In relation to costs, section 15 of the Arbitration Act and Rule 9 of the First Schedule to the Act confirm the trite principle that the costs of the arbitration are in the discretion of the arbitrator or umpire. In *Matheson & Co., Ltd. v A. Tabah & Sons*[1] it was said that the arbitrator is bound to exercise his discretion in relation to costs on the same general principles on which a judge in a court acts in awarding costs and therefore the starting point is that costs should follow the event. However, the arbitral tribunal's discretion is not fettered in the same

[1] [1963] Vol. 2 Lloyd's List Law Reports 270.

manner as that of a judge. The statutory rules governing costs in judicial proceedings do not apply as binding rules in arbitration and, in particular, the arbitrator's award of costs is not to be overturned simply because he did not apply the Supreme Court (Civil Procedure) Rules for the allocation of costs. The arbitrator may make the costs order on an 'issues-based' approach in respect of discrete issues but in cases of partial success he may consider it more appropriate to make the award on a 'percentage based' approach. Where a party succeeds on some issues but loses on others, the arbitrator is entitled to look at the overall result and determine which party can be said to have won the arbitration and award costs accordingly, subject to any appropriate adjustment to reflect a fair allocation of costs in the light of the overall result. It is also well established that the arbitrator may deprive a party of costs on an issue on which the party succeeds if that party has acted unreasonably in relation to that issue.

[18] The exceedingly wide discretion vested in the arbitrator to award costs means that in reviewing the arbitrator's award a court is not entitled to intervene merely because the court may itself have awarded different costs or awarded costs on different bases. The court may even entertain difficulty in understanding how the arbitrator, acting in accordance with the principles on which the court acts and on which the arbitrator ought to act, could have exercised his discretion in the award of costs the way he did. But these misgivings, if such they be, are not sufficient grounds for intervening in the award made pursuant to arbitral process chosen by the parties. As Megaw J said in *Matheson & Co., Ltd. v A. Tabah & Sons*:[2]

> "… the parties should realize that if they adopt the procedure of arbitration they will find that if an arbitrator makes an award as to costs which they regard as being unjust or unfair, the possibility of their being able to procure a review and remedy for that in the Courts is very limited almost to the point of non-existence unless the arbitrator himself sees fit, when the exercise of his discretion is challenged, to state what were the reasons, so that the Court can see whether the reasons are sound in principle. It may be that parties with their eyes open to that matter prefer to adopt the arbitral procedure rather than the procedure in the Courts where, if such an

[2] [1963] Vol. 2 Lloyd's List Law Reports 270 at 274-5.

order had been made, it could have been fully investigated and challenged in a higher Court, but that is a matter for the parties."

[19] *King v Thomas McKenna Ltd*[3] was a case involving an application to remit an award of costs for further consideration. In considering the following passage by Lord Donaldson of Lymington M.R. it must be noted that section 11 of the Belize Act has essentially identical wording to section 22 of the English Arbitration Act 1950. The learned Master of the Rolls said:[4]

> "…the great distinguishing feature between litigation and arbitration is that the parties voluntarily submit to the latter system of dispute resolution, save when it is imposed by statute, and as part of that choice can stipulate who shall be the judges and the procedures to be adopted. As a consequence, it is not unreasonable, although the matter can be more politely expressed, to require them to accept those judges and those procedures "warts and all". On the other hand, arbitration is not entirely a private matter, because the state stands in the background as the ultimate enforcer of the resulting award… In exercising a discretion under section 22, the courts must never lose sight of this fundamental distinction or the ultimate involvement of the state."

[20] A final perambulatory point may be in order. It bears stating that, whilst this Court is concerned to consider the correctness of the decision by the Court of Appeal, it is ultimately the exercise of the discretion of the Arbitrators that is under scrutiny. The review of the Court of Appeal's judgment is necessary in order to ascertain whether that court properly applied the applicable review principles in deciding whether to remit or set aside the arbitral award. As we have stated, the applicable review principles repose an exceedingly wide discretion in the Arbitrators.

Remedy

[21] In its Notice of Appeal dated 23rd May 2014, the Appellant sought an order that the decision of the Court of Appeal be set aside and that the matter of costs be remitted to the Arbitrators for reconsideration. The remedy of setting the arbitral

[3] [1991] 2 Q.B. 480 at p. 488.
[4] *Ibid*, pp. 489-90.

award aside was not expressly sought. The Appellant's written submissions dated 18th November 2014, seemingly expanded the relief sought by appealing the decision of the Court of Appeal "upholding a decision by Legall J dismissing an application challenging an award of arbitrators as to costs in arbitration proceedings for misconduct pursuant to section 11 and 12 of the Arbitration Act of Belize and seeking to have the award set aside or otherwise remitted to the arbitrators for reconsideration." Reversing the decision taken below necessarily resurrects the application to set aside as well as to remit. At the hearing before this Court Mr Marshalleck for the Appellant made clear that both remedies of remittal and, in the alternative, the setting aside of the Arbitrators' award were being sought. Mr Courtenay for the Respondent did not object and we consider both remedies in this judgment.

[22] The Arbitration Act deals separately and distinctly with the power of remittal and the power to set aside in sections 11 and 12 respectively. These sections provide as follows:

> "11.-(1) In all cases of reference to arbitration the court may from time to time remit the matters referred, or any of them, for the re-consideration of the arbitrators or umpire.
>
> (2) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.
>
> 12.-(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."

[23] The Act does not specify the grounds on which an arbitration award may be remitted and on its face the power given to the court under section 11 (1) to remit awards is very wide. Furthermore section 11 (2) seeks to absorb the remittal process within a timetable consistent with the expectations of prompt arbitral decision-making by requiring arbitrators to make their re-considered award within

three months unless otherwise directed. To that extent the exercise of the discretion to remit ought not to be overly destructive of the promptitude expected of the arbitral process. There is, however, a distinction between the nature and scope of the remedy which Parliament has entrusted to the courts and the use which the courts are prepared to make of it in the exercise of judicial discretion and in the light of precedent: *King v Thomas McKenna Ltd*.[5] Section 11 forms part of the legislative scheme designed to enable the courts to assist the process of settling disputes by arbitration and to supervise that process. For the reasons already traversed regarding the nature and objects of arbitration a judge should be slow to remit, and ought not to do so, unless there is a good reason for the remittal. This reluctance to remit as informed by precedent and current judicial policy constitutes the 'limits' on the judicial discretion to remit.

[24] Four grounds were identified in nineteenth century authorities as entitling a court to order a remittal: (1) where the award was bad on its face; (2) where there had been misconduct on the part of the arbitrator; (3) where there had been an admitted mistake and the arbitrator had asked that the matter be remitted; and (4) where additional evidence had been discovered after the making of the award. See, for example: *Mills v Society of Bowyers*;[6] *Hodgkinson v Fernie*;[7] and *Hogge v Burgess*.[8] However, in *King v Thomas McKenna Ltd*.,[9] a case already mentioned, it was asserted that just as the courts have refused to allow the old forms of action to rule them from the grave so, too, the exercise of judicial discretion in one century should not dictate its exercise in another. In *King* the court remitted an award of costs for reconsideration even though the matter did not fall strictly into any of the four traditional grounds. The costs award had been made to one party because of the mistaken belief by the lawyer for the other side that she had successfully communicated her request for an interim award with costs to be left over for subsequent determination. In the circumstances it would be unfair to visit the blunder of the lawyer upon her client and inequitable to

[5] [1991] 2 Q.B. 480 at p. 488.
[6] (1856) 3 K. & J. 66.
[7] (1857) 3 C.B.N.S. 189
[8] (1858) 3 H. & N. 293.
[9] [1991] 2 Q.B. 480 at p. 488.

allow the award to take effect without further consideration. Speaking for the court, Lord Donaldson of Lymington M.R. stated:

> "In my judgment the remission jurisdiction extends beyond the four traditional grounds to any cases where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspects of the dispute which has been the subject of the reference has not been considered and adjudicated upon as fully or in a manner which the parties were entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the arbitrator."

[25] Similarly, the Supreme Court of Canada in *McCarthy v Keane and others*[10] affirmed the four traditional grounds for remittal but then went on to note that in addition,

> "… the discretion to remit could be invoked where it would be inequitable for the award to take effect or where the dispute between the parties had not been adjudicated in accordance with overarching requirements of fairness or to the extent envisaged in the arbitrator's terms of reference."

[26] It is to be emphasized that "misconduct" as a ground for remittal does not only connote moral turpitude. It is also used in the technical legal sense as denoting irregularity and can arise where a party is procedurally disadvantaged by the rulings of an arbitrator. A mere error on the part of the arbitrator does not constitute misconduct. The standard or test of technical misconduct is that the error in the arbitral proceeding must be something substantial which smacks of injustice or unfairness. As O'Donnell J of the Canadian Supreme Court said in *Galway City Council v Kingston*:[11]

> "The position has thus been reached where this approach can and should be taken to each of the grounds for remittal ... namely, that it is not enough that there should be an error or misconduct, or new evidence etc., but that the factor must reach the level of being 'so serious and so substantial', or

[10] [2005] 2 I.L.R.M. 241.
[11] [2010] 3 I.R. 95

so fundamental, that it smacks of injustice and the court cannot permit it to remain unchallenged."

[27] The English case of *Islamic Republic of Iran Shipping Lines v Zannis Compania Naviera SA, The Tzelepi*[12] held that it would generally not be appropriate to remit the award unless there is something further for the arbitrator to consider and upon which he should exercise his own judgment afresh. In that case the application to remit was refused. The arbitrator had clearly made an error in not applying the basic principle that charterers, who as agents of the ship owners had taken out insurance on the vessel, must be indemnified by the ship owners for the insurance premium. But that error could in the circumstances be easily corrected by the court by an appropriate amendment to the award. There was no basis to remit the matter given that the parties had placed before the arbitrator all the contentions and evidence upon which they wished to rely and these had been known to and considered by the arbitrator. By contrast remittal was permitted in *Fayleigh Ltd v Plazaway Ltd Trading as Hotel Partners and Francis Murphy*[13] where the arbitrator had refused to consider 17 files submitted on behalf of the applicant. The High Court of Ireland found that by not considering the proffered files at all the arbitrator was guilty of misconduct in the technical legal sense. A party putting forward evidence in support of its case was deprived of a fair hearing if the tribunal rejected the evidence out of hand. The arbitrator had made a serious mistake in ignoring a large body of potential evidence and this constituted a significant and even substantial risk of injustice and, accordingly, the award could not be left alone and had to be remitted.

[28] The power to set aside, as legislated in Section 12 (2), is based on the misconduct of the arbitrator or umpire or the improper procurement of the award. As with remittal "misconduct" here includes both moral shortcomings as well as deficiency in the technical application of the rules. Thus an arbitrator may have so misdirected himself as to the law or his legal duty that his award ought not to stand. Misconduct must be clearly established since setting aside an award is

[12] [1991] 2 Lloyd's Rep 265 per Hobhouse J.
[13] [2014] IEHC 52

obviously a drastic remedy which unravels and unwinds the affected arbitral award, so resulting in the wastage of time and costs. Not every technical error amounts to misconduct; something substantial is required so that the award smacks of injustice. In deciding whether there has been misconduct the court does not act as an appellate court reviewing the decision of a lower court. Nor are the general standards of judicial review applicable *ex facie* since the discretion of the arbitral tribunal should not be fettered in the same manner as that of a judge. We consider that there is force in the suggestion of Judge Thornton in *Fence Gate Ltd v NEL Construction Ltd*[14] that, in the present context, the criteria for the exercise of the judicial discretion are somewhat similar to the *Wednesbury* principles in that "the overall discretionary exercise must not be perverse nor one that a reasonable arbitration tribunal properly directing itself could not have reached."

[29] In addition to misconduct, or perhaps as a subspecies thereof, the courts have held that an award may be set aside for error of law on the face of the record: *David Taylor & Son Ld. v Barnett Trading Co*.[15] following the Privy Council decision in *Champsey Bhara & Co v Jivraj Balloo Spinning & Weaving Co Ltd*.[16] Such an error of law means that one can find in the award, or a document incorporated thereto, some legal proposition which is the basis of the award and which one can say is erroneous. The erroneous application of a legal proposition means that the arbitrator would have misdirected himself and, as pointed out earlier, misdirection can amount to technical misconduct. It should be borne in mind that the caution of O'Donnell J in *Galway City Council v Kingston*[17] remains pertinent, that is to say, it will not be enough merely to point to an error, rather the error must reach the level of being so serious or substantial or fundamental that the court cannot permit it to stand.

[30] What emerges from the cases is that there is considerable overlap of the grounds for remitting and setting aside the award particularly where, as in the present case, it is alleged that the arbitrator misconducted himself and that there was an error of

[14] [2001] All ER (D) 214 at [37].
[15] [1953]-1-W.L.R. 562.
[16] [1923] All ER Rep at p 238; [1923] AC
[17] [2010] 3 I.R. 95

law on the face of the award. It is normal for an applicant to seek both remedies in the alternative in the pleadings but the draconian effect of setting aside an arbitral award suggests that setting aside will not be appropriate where the award may be remitted for reconsideration. In other words, setting aside is a remedy of last resort. On the other hand, in the present case nearly five years have elapsed since the arbitration; the award has already been earlier remitted; and, as in *The Tzelepi*,[18] the parties had placed before the arbitrator all the contentions and evidence upon which they rely and these were known to and have been considered by the Arbitrators. In these circumstances, it may be difficult to conclude that there is something further for the Arbitrators to consider and upon which they should exercise fresh judgment, so that the appropriate remedy, assuming the case for a remedy is made out, might be the setting aside of the award. First, however, the question that must be considered is whether there was in fact misconduct by the Arbitrators or error on the face of the record warranting the granting of a remedy.

Costs follow the event

[31] Mr Marshalleck accepts that the rule that costs should follow the event is in fact the basic rule but contends that the Arbitrators misapplied the rule. He argues that there is a distinction between a claim of multiple issues and one consisting of separate and distinct claims. In the present case, he submits, there were two distinct and separate issues or events rather than one. He submits further that whilst Maranco won on the issue relating to payment of the daily rate for drilling operations under the contract, the Court of Appeal erred in not considering that the demobilization claim by Maranco was a distinct and separate issue or event which BNE won and therefore should have been entitled to its costs on that issue. The court thus failed to correct the Arbitrators' error which was apparent on the face of the award.

[32] Mr Marshalleck submits that had the regime on allocation of costs contained in Part 64 of the Supreme Court (Civil Procedure) Rules 2005 been applied the

[18] [1991] 2 Lloyd's Rep 265 per Hobhouse J.

award of costs would have been significantly different. On the premise that the arbitration was a consolidation of separate and distinct claims, the normal course of awarding costs to the successful party in relation to each claim in accordance with the basic principle that costs follow the event would have resulted in the costs awarded to Maranco being quantified at BZ$128,025.04 whilst costs awarded to BNE would have been BZ$184, 308.00. This would have resulted in a net award of costs of BZ$56, 282.96 in favour of BNE instead of the $211,069.00 awarded against it by the Arbitrators.

[33] Part 64 of the Supreme Court (Civil Procedure) Rules expressly states that it was legislated to deal "with the ways in which any costs awarded *by the court* are to be quantified" (emphasis added). These Rules do not apply to the arbitral process in allocating costs and arbitrators are not bound to follow them. That much Mr Marshalleck accepts. But he contends that the Rules can be used to show the extent of the divergence between the results produced by their application on the one hand and the decision of the Arbitrators on the other. Relying on the words of Lord Woolf in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd (No 2),*[19] counsel argued that where the respective results are so strikingly different it cannot be the case that a tribunal in the proper exercise of its discretion could come to the (aberrant) result it did without making an error of principle.

[34] We do not agree with the Appellant's line of reasoning for two reasons. The definition of what constitutes 'the event' upon which costs should follow, whether the exercise is to conducted under the Supreme Court (Civil Procedure) Rules or for purposes of arbitration, is not an exact science. Each case depends on its own peculiar facts and much depends on the tribunal's appreciation of how the case was pleaded and presented by the parties. As Omerod LJ (with whom Eveleigh LJ agreed) said in *Blue Horizon Shipping Co S.A. v E.D.F. Man Ltd, The Aghios Nicolaos:*[20]

[19] [1999] 1 WLR 1507.
[20] [1980] 1 Lloyd's Rep. 17 at p. 21.

> "The law is perfectly clearly stated although it is not easy to apply it. We were referred to the well-known passages containing the principles that costs should follow the event and that a successful party should not be deprived of his costs without there being some compelling reason, which we were all brought up on since we were pupils. The problem is not in the statement of these several principles but in the application of them. Once one has said 'costs follow the event' the next step is to determine what is meant by 'the event'…
>
> Of course there are many cases. Mr Justice Donaldson refers to them where there are what appear to be two separate issues but in reality only one issue: a counterclaim may be put forward more by way of defence than otherwise. There are many cases in which a plaintiff claims more than he succeeds in recovering. The defendant can therefore be said to succeed on a part of the case. The practice is in most cases to give the plaintiff his costs if he is the successful party. Each case must of course depend to a great extent on its own facts, and there can be no clear-cut distinction between a successful and a partially successful plaintiff or between one event and the two events, because everything depends on what you mean by 'event'."

[35] The learned editors of *Russell on Arbitration*[21] also address the question of what constitutes 'the event' in the following passage quoted in the judgment of the court below:

> "Where one of the parties is the clear winner on all issues it will be a straightforward task to award costs in a way that follows the event. In many cases however parties will succeed on some claims but not others, and win on some of the contested issues and arguments and lose on others. How then is a tribunal to go about determining the relevant event for these purposes? The answer is that in most cases the tribunal will look at the overall result to determine which party can be said to have won the arbitration. This does not involve an issue by issue analysis, but rather requires the tribunal to decide which party overall can be said to have succeeded in the reference. Of course it may be that neither party can be said to have 'won', in which case it may be appropriate to order that each party bears its own costs. Often when considering 'the event' a tribunal will consider, at least in broad terms, on which of its claims a party has succeeded and will adjust the proportion of recoverable costs awarded to reflect the fact that the other party has defeated certain claims or indeed won on other claims it has brought. This is not an exact science but in broad terms a tribunal should start from the premise that the successful

[21] *Russell on Arbitration* (23rd edn Sweet & Maxwell, London 2007) 6-139.

> party should recover its costs and then make appropriate adjustments to reflect what the tribunal considers a fair allocation in light of the overall result and state the reasons for making them."

[36] It cannot reasonably be said that the Arbitrators in the present case acted outside of these perimeters in identifying the event that would dictate the award of costs. They expressly accepted the general rule that costs follow the event and stated that while there was not a clear winner on all issues, Maranco could be said to have won the arbitration when viewed from the standpoint of the overall result. The Arbitrators then adjusted the recoverable costs to 50% to reflect that Maranco had not been successful in its damages claim regarding the demobilization fees. It may be that in court proceedings a different assessment might have been made of the distinctiveness of the claims presented and of the differences in value and complexity of the respective claims leading to a different allocation of costs. But the parties did not choose to resolve their dispute through court proceedings. They chose arbitration and in all the circumstances it cannot be said that the methodology employed by the Arbitrators for the award of costs was perverse in light of the overall result of the arbitration.

[37] *AEI Rediffusion* dealt with an altogether different situation from the case at bar. There the applicant ('AEI') required a licence in order to broadcast sound recordings and it notified the licensing body ('PPL') of its intention to avail itself of a statutory licence pursuant to section 135C of the Copyright, Designs and Patents Act 1988. AEI found the terms of payment proposed by the PPL unacceptable and applied to the Copyright Tribunal to settle the terms of payment pursuant to Section 135D of the Act. The Tribunal found the payment proposals of both parties to be unreasonable and set terms which were in between those that each had suggested. An application relating to conditions under section 135E was not determined by the Tribunal since AEI ultimately dropped its opposition and accepted PPL's proposed terms.

[38] Each party incurred costs of approximately £600,000 and the impression of the Chairman of the Tribunal was that neither side had won the application which

meant each side should pay its own costs. However the Tribunal felt constrained by the principles enunciated by Nourse LJ in *In re Elgindata Ltd (No. 2)*[22] to identify a winner in order to apply the basic rule that costs follow the event. The Tribunal held that as the applicant had had to apply to the Tribunal in order to achieve less onerous terms than those proposed by the licensing body, it had won the application and awarded it its costs subject to a one-third reduction because of the way it had conducted its case. The final order required PPL to pay to AEI approximately £400,000 thus increasing PPL's liability in relation to its own costs and AEI's costs to approximately £1m and reducing AEI's expenditure on its own costs to £200,000. On appeal the judge held that as neither side had won the application the Tribunal's decision should be set aside and he ordered that there should be no order for costs in relation to section 135C application. As regards the section 135E application he determined that PPL was to receive its costs. Thus, under the judge's order, instead of AEI receiving £400,000, AEI had to pay PPL over £100,000 and PPL would therefore be over £500,000 better off.

[39] The judge's jurisdiction to intervene in the Tribunal's costs award and his substantive intervention was upheld on appeal. Lord Woolf MR said that the differing figures on costs:[23]

> "…demonstrate the very different practical consequences of the order made by the tribunal from those of the order made by the judge. The initial impression must surely be that the results are so strikingly different, that it cannot be the case that a tribunal, in the proper exercise of its discretion could come to either result without making an error of principle. A decision by this court that it is possible, as a matter of discretion, for a tribunal to perfectly properly reach either of such different decisions would send an appalling message as to the scale of the uncertainty which litigants face in relation to orders as to costs. It would place the results of orders as to costs on a par with those provided by a lottery."

[40] In this passage Lord Woolf does appear to sanction judicial intervention in circumstances where the costs awarded are significantly different from those

[22] [1992] 1 WLR 1207 at 1214.
[23] Supra, *AEI Rediffusion*, note 19 at 1521.

which a court would have awarded but at least two distinguishing factors must be borne in mind. First, it was clear the Copyright Tribunal had erred and acted upon a wrong principle in considering that the law required it to find a winner of the application in favour of whom to award costs when it was of the view that that there had been no clear winner of the application. To then award that 'winner' its costs of £400,000, compounded the error and was clearly unreasonable. The tribunal had misdirected itself and its award was perverse; it could be said that the Tribunal had misconducted itself. Secondly, the case dealt with a standing tribunal established by statute to which affected persons were compelled to have recourse; not with arbitration freely chosen and arbitrators voluntarily selected by the parties. The Court of Appeal referenced important policy considerations having to do with ensuring the size and unpredictability of costs awards by the Tribunal did not deter litigants of modest means from bringing applications. This is quite different from a 'one-off' arbitration as in the present case where no precedent is set by the award and the parties can, if they wish, agree the rules applicable to allocation of costs beforehand.

[41] But there is a more fundamental reason for the failure of this ground of appeal. In adhering to the basic rule that costs follow the event the Arbitrators had the discretion to apply the 'issues-based' approach introduced by the current civil procedure rules contained in the Rules of the Supreme Court and favoured by the Appellant. These rules represent a marked departure from the old 'winner takes all' approach. However, the issues-based approach was not the only option available to the Arbitrators. They could instead have awarded costs on a percentage basis, and they did so. The discretion as to the manner in which to express an award of costs so that costs follow the event is part and parcel of the function of arbitration as an alternative method of dispute resolution to court proceedings.

[42] For what it is worth there is some support for deviation from the issues-based order in the case of partial success even in conventional court proceedings. The English CPR Rule 44.3(7) states that the court must only consider using the issue-

based approach when other forms (which include a proportion based approach) are impractical. *Blackstone's Civil Practice*[24] comments on that Rule to the effect that the "usual approach in the event of partial success is to award the successful party a proportion of its costs rather than an 'issues-based' order." And Lord Phillips MR in *English v Emery Reimbold and Strick Ltd*[25] said the following:

> "However, we would emphasize that the CPR requires that an order which allows or disallows costs by reference to certain issues should be made only if other forms of order cannot be made which sufficiently reflect the justice of the case (see CPR 44.3(7), above). In our view there are good reasons for this rule. An order which allows or disallows costs of certain issues creates difficulties at the stage of the assessment of costs because the costs Judge will have to master the issue in detail to understand what costs were properly incurred in dealing with it and then analyse the work done by the receiving party's legal advisers to determine whether or not it was attributable to the issue the costs of which had been disallowed. All this adds to the costs of assessment and to the amount of time absorbed in dealing with costs on this basis. The costs incurred on assessment may thus be disproportionate to the benefit gained. In all the circumstances, contrary to what might be thought to be the case, a 'percentage' order under CPR 44.3 (6) (a) made by the Judge who heard the application will often produce a fairer result than an Issues-based' order under CPR 44.3(6)(f). Moreover, such an order is consistent with the overriding objective of the CPR."

[43] Mr Marshalleck contends that even if the approach of a global reduction in the circumstances to achieve an appropriate apportionment of costs was permissible, the reduction made by the Arbitrators in fact bore no relation whatsoever to the degree of success in fact achieved by the respective parties in the arbitration. He suggested that as the Respondent had succeeded on only 11% of its total claims as quantified by it, that success could not without more be a proper basis for allowing recovery of 50% of its costs.

[44] We cannot agree. The determination of the relative success of the parties is first and foremost a matter for the arbitrators and the degree of success need not

[24] Blackstone's Civil Practice 2012 at 66.13.
[25] [2002] EWCA Civ. 605 at [115].

necessarily correspond to a simple mathematical calculation of percentage success on individual aspects of the case. In the present case the Arbitrators determined the overall winner of the arbitration. They made a direct connection between the outcome of the case and the award of costs, stating that "… costs should be awarded to the Claimant, but after adjustments to reflect the fact that the Claimant did not succeed in all its claims." They then "reviewed the base (US$2,902,504.48) against which the rate was applied and determined that the base should be reduced to be consistent with the sum awarded of US$1,207,800." The Arbitrators reduced by 50% the costs which they were minded to award the Claimant to mark the Claimant's success in relation to its claim for the daily rates for operation of the rigs and its overall winning of the arbitration. We cannot agree that the Arbitrators acted perversely in making this award.

[45] Given that the Arbitrators did not misdirect or misconduct themselves in the award of costs, certain allegations made against the judgment of the Court of Appeal necessarily fall away. Mr Marshalleck had argued that the Court of Appeal had erred in considering whether it was unreasonable for Maranco to proceed with its claim for damages for late payment of the demobilization claim and that, in any event, that court proceeded on its analysis of the reasonableness of Maranco's claim on a factual basis which wrongly interpreted the ruling of the umpire. In the latter regard Mr Marshalleck submitted that the umpire had found that the demobilization fees were not due or owed until the rigs were demobilized on 30th March 2010.

[46] These allegations reveal the danger identified earlier [at para. 20] of the pursuit of collateral issues arising from the judgment below rather than focussed scrutiny of the process by which the Arbitrators reached their award. In any event, as Mr Courtenay correctly points out, this ground of appeal contains an important error. The umpire did not hold that the demobilization fees were not owed but rather than the fees "were not yet due." Neither did the Court of Appeal consider whether the fees were "due". Rather, that court found that:[26] "The fact is that, as

[26] Civil Appeal No 35 of 2011 (unreported) at [46].

at the date of the commencement of the arbitration in late 2009, Maranco was owed both the unpaid daily rates and the demobilization fees… [and it] cannot therefore be said to have been unreasonable for it to commence arbitration proceedings to recover those amounts." The fact is that the fees were owed and were in fact paid by BNE to Maranco.

Costs on Attorney and Client Basis

[47] Under the CPR costs are not awarded on an indemnity or attorney and client basis but rather on a party and party basis. However, Rule 9 of the First Schedule to the Arbitration Act expressly gives power to arbitrators to "award costs to be paid as between attorney and client." Mr Marshalleck concedes that the Arbitrators had this power but argues that the power must be exercised judicially and in accordance with general principles that would bind a judge of the Supreme Court. Relying on a passage from *Mustill and Boyd's Law and Practice of Commercial Arbitration in England*[27] he contends that the Arbitrators ought properly only to award costs on an indemnity basis if they considered that the party ordered to pay the costs has in some way acted improperly. It was therefore wrong for the Arbitrators to visit upon the Appellant the Respondent's contingency fee arrangement without offering any reason for doing so and this error was apparent on the face of the award.

[48] The difficulty that this submission faces is that, as we have seen, whilst the arbitrator has a duty to act "judicially" the normal rules of judicial review which hold a judge to that duty do not apply in the same way to arbitrators. In particular under current law there appears no obligation on arbitrators to give reasons for departing from the normal practice of awarding costs on a party and party basis. Where no reason is given it becomes necessary as Megaw J stated in *Matheson & Co Ltd v A Tabah & Sons* "to look at the award and what is said in the award in order to see whether anything there appears which makes it clear that the arbitrator was exercising his discretion without the material on which he could properly exercise it."

[27] *Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths, London and Edinburgh 1989) 402-403.

[49] Messrs Flowers and Burgos gave no reason for their award of costs using the percentage approach and on an attorney and client basis, being simply content to restate the rival contentions of the parties as to costs without expressing a preference one way or the other. There was no error in law apparent on the face of the award that would then have opened the door for the court to interrogate the reasonableness of the award or adequacy of the reasons. In these circumstances this Court simply cannot say that the Arbitrators misdirected themselves or otherwise acted on any wrong principle in awarding costs on an attorney and client basis as they were entitled to do under Rule 9 of the First Schedule to the Act.

[50] The fact that there is no obligation under the Arbitration Act on an arbitrator to give reasons for his award may give rise to concerns given the advances in the jurisprudence of modern public law requiring decision makers to give reasons for their decisions. It is also the case that the modern trend is for arbitration legislation and arbitration rules to require the arbitral tribunal to give reasons for its award. This trend is reflected in Article 31(2) of the UNCITRAL Model Law. Thus the Arbitration Act 1996 of the United Kingdom reversing centuries of settled law and practice, requires by section 52 (4) that the award "shall contain reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons." It must be noted, however, that where the arbitrator has not given reasons when he should have done so, there is no automatic setting aside or remittal of the award since the applicant must then satisfy the conditions in section 69 (3) which are fairly onerous. Similar statutory provisions exist in Barbados (s.44(3), International Commercial Arbitration Act, 2007) and The Bahamas (s.74(4), Arbitration Act, 2009), and the modern legislation requiring the giving of reasons has been interpreted and the jurisprudence developed in several cases: *Oil Basins Ltd v BHP Billiton Ltd;*[28] *Gordian Runoff Ltd v Westport Insurance Corporation;*[29] *Thoroughvision Pty Ltd v Sky Channel Pty Ltd & Anor;*[30] *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd.*[31]

[28] [*2007*] VSCA 255, [2007] 18 VR 346.
[29] [2010] NSWCA 57 (overruled) by [2011] HCA 37.
[30] [2010] VSC 139.

[51] Be that as it may, the fact of the matter is that the Belize Act is of an earlier vintage and closer in philosophy to the oft referenced advice given by Lord Mansfield CJ in 1790 to a Colonial Governor of the West Indies: "Consider what you think justice requires, and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong."[32] In *Perry v. Stopher*[33] Lord Justice Hodson declared the submission that as the order for costs was an unusual one the arbitrator should have stated his reasons as "novel" and one for which "there is no authority… at all." *Matheson & Co v A Tabah & Sons*[34] confirmed that it was entirely up to the arbitrator himself, when the exercise of his discretion is challenged, to state his reasons and that it would not be proper for the court to compel him to supply those reasons.

[52] The Belize Arbitration Act has operated in the context of a settled commercial practice understood by legal and other practitioners and upheld repeatedly by the courts. The established judicial interpretation of the statutory provision in Rule 9 of the First Schedule is that arbitrators are not obliged to give reasons for their award of costs and if they do not give reasons the courts do not direct that they do so. In these circumstances it would be wrong for this Court to radically intervene in the legislative scheme and settled commercial practice by requiring arbitrators to give reasons.

[53] There is a further and related reason for our lack of intervention. The arbitration agreement is the controlling and defining document governing the conduct of the arbitration. Section 4 of the Arbitration Act provides that the discretion of the Arbitrator in Rule 9 of the First Schedule to award costs is subject to any "contrary intention" expressed in the arbitration agreement. As such it remains open to the parties to insert a clause in their agreement requiring the arbitrator to give reasons in the award either in every award made or upon the request of one or both of the parties. Indeed, the parties may also specify whether costs are to be

[31] [2011] QSC 174.
[32] Quoted in R.M. Jackson, *Machinery of Justice in England* (Cambridge University Press, Cambridge 1979) 97.
[33] [1959] 1 All ER 713 at 715.
[34] Supra, *Mattheson*, note 1.

awarded on a party and party or an attorney and client basis. Such provisions may be regarded as the safest practice to avoid several of the issues surrounding the award of costs. Of course, such stipulations are a matter for the parties and they may refrain from making them because of the implications for costs and timeliness in delivery of the award. In any event, the fact of the matter is that the parties in this case made no request or requirement for the giving of reasons nor did they restrict the discretion to award costs on an indemnity basis.

Disposition

[54] For the reasons stated in this judgment we find no basis to remit or set aside the award of costs by the Arbitrators in this case. Accordingly the appeal against the decision of the Court of Appeal is dismissed. The Respondent must have its costs of the appeal in this Court certified fit for Senior Counsel to be taxed if not sooner agreed.

/s/ R F Nelson
The Hon Mr Justice R Nelson

/s/ A Saunders
The Hon Mr Justice A Saunders

/s/ J Wit
The Hon Mr Justice J Wit

/s/ D Hayton
The Hon Mr Justice D Hayton

/s/ W Anderson
The Hon Mr Justice W Anderson