[2010] JMCA Civ 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 8/2009

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.

BETWEEN JAMAICA HYDROPONICS LIMITED APPELLANT

AND ALUMINA PARTNERS OF JAMAICA RESPONDENT

Lord Anthony Gifford, Q.C. and Conrad George instructed by Hart Muirhead Fatta for the appellant

Walter Scott and Miss Anna Gracie, instructed by Rattray Patterson Rattray for the respondent

1, 2 March and 14 May 2010

PANTON, P.

[1] On 11 December 2008, Sykes, J. refused the appellant's application to remit the matter of the sums to be awarded to the appellant under paragraphs 1 and 9 of the final award to the arbitrator for reconsideration pursuant to section 11 of the Arbitration Act.

[2] The appellant and the respondent were in a contractual relationship whereby the respondent would provide a prepared area for the appellant to

operate six greenhouses. The respondent failed to keep its part of the bargain. The dispute was referred to arbitration. The arbitrator Miss Hilary Phillips, Q.C., (now a judge of appeal) handed down her award. There are aspects of that award which are not to the liking of the appellant. The arbitrator was written to with a view to amending the award. The arbitrator held her ground, and pointed out that the issues raised did not fall under section 8(c) of the Act, in that there was no clerical mistake or error arising from any accidental slip or omission. The appellant turned to the Supreme Court for a resolution in its favour. Sykes, J. refused the application.

[3] The final award reads thus:

> "1. The Claimant is entitled to compensation for the breach of the collateral agreement between the parties dated the 21st day of January 2005, such compensation to be calculated by way of lost profits, that is $76,398,594.67 to be paid by the Defendant subject to clause 6 below.
>
> 2. The Claimant is entitled to payment from the Defendant of the increased amount for construction costs in the amount of $12,469,163.00.
>
> 3. The Claimant is entitled to payment from the Defendant of the costs for preparing and marling the roads in the amount of $2,817,000.00.
>
> 4. The Claimant is not entitled to recover from the Defendant, Bank charges.

5. The Claimant is entitled to recover from the Defendant the sum of $9,984,045.16 representing interest on loss of profits.

6. The amount of $37,500,000.00 already paid by the Defendant pursuant to the interim order made on 30th May 2007 must be deducted from the amounts set out above.

7. I find that the Claimant has taken reasonable steps to mitigate its losses.

8. The Claimant is entitled to be paid by the Defendant, as aforesaid, all reasonable costs of these Arbitration Proceedings to be agreed between the parties and must only refer to the Arbitrator for final determination, if the parties fail to agree the sum. The amount of Six Million Dollars ($6,000,000.00) must be deducted from the costs agreed or ordered on the basis of the interim award made on the 30th May 2007.

9. The Defendant is ordered to pay the Arbitrator's fees and ancillary expenses relative to the use of the venue, which is submitted with the award.

10. Interest is due on the final amount calculated and awarded herein at the rate of 6% from the date of the award until payment.

11. There shall be deemed to be awarded and incorporated in this award the appendices attached hereto."

[4] Before Sykes, J. was an amended fixed date claim form which sought the following order:

"1. The following matters be remitted to the learned Arbitrator for reconsideration

pursuant to section 11 of the Arbitration Act, namely:

(1) What is the sum which ought lawfully to have been awarded to the Claimant under paragraphs 1 and 9 of the award, for loss of profits and interest thereon, in place of the sums set out in the said paragraphs, based on the findings of fact made by the arbitrator;

(2) What is the sum which ought lawfully to have been awarded to the Claimant in respect of bank charges and interest thereon, in place of the nil award set out in paragraph 4 of the Award, based on the undisputed evidence before the Arbitrator.

(2) Such further or other relief as may be just.

(3) The Defendant pay the Costs of these proceedings and of the reconsideration by the learned arbitrator."

[5] The grounds on which the claim was based were:

"1. The award of the learned Arbitrator in relation to loss of profits was vitiated by a serious error of law on the face of the record, in that on the basis of the facts as found by her, the only award which could lawfully have been made by (sic) for this item of loss was 117,815,976.00 and not $76,398,594.67

2. The learned Arbitrator erred in law in failing to exercise her powers under section 8(c) of the Arbitration Act to correct the error which she had made;

3. In ruling that the Claimant was not entitled to recover bank charges from the

> Defendant, the learned Arbitrator erred in law in that:
>
> (a) the projections of expenditure submitted by the Claimant were unchallenged and accepted by the learned Arbitrator (at paragraph 57);
>
> (b) those projections had included the estimated cost of repaying loan interest, and accordingly the claim for loss of profits had already been reduced by the amount of the projected loan interest; yet the Claimant had been obliged to pay out sums by way of loan interest;
>
> (c) the learned Arbitrator failed to hold that the Claimant was entitled to reimbursement of these sums if restitution (sic) in integrum was to be made."

[6] Section 11(1) of the Arbitration Act reads:

> "In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire."

[7] The appellant is contending that the arbitrator made a mathematical error in her calculation of the damages awarded to the appellant, and that the court has the power to remedy the error by remitting the matter to the arbitrator for her to make a correct calculation.

According to Lord Gifford, Q.C., for the appellant, it is impossible to reconcile the arbitrator's reasoning at page 178 of the record (paragraph 94 of the summary

of her findings) with page 189, her response to the request for correction of the amount.

[8] Lord Gifford placed great emphasis on two judgments of the Court of Appeal of England – ***Mutual Shipping v Bayshore Shipping*** [1985] 1 All ER 520 and ***King v Thomas McKenna Ltd*** [1991] 1 All ER 653. In the former case it was held as follows –

> "(1) Although s. 22 of the 1950 Act [which is identical to Jamaica's section 11(1)] did not enable the arbitrator to correct errors of judgment, whether of law or of fact, or to have second thoughts about his decision, it provided the ultimate safeguard to prevent injustice by giving the court a wide power to remit an award to the arbitrator where he had made either a clerical mistake or an error arising from an accidental slip or omission. Accordingly, the question for the court was whether the error made by the arbitrator arose from an accidental slip or omission. In the circumstances , (per Sir John Donaldson MR) in order to ascertain the nature and effect of the error it was necessary to look at the reasons given by the arbitrator, although the cases in which the court would do so were extremely unlimited since there was a public interest in preserving the finality of arbitral awards, or, alternatively (per Robert Goff LJ) it was unnecessary to refer to the reasons since the existence and nature of the error was sufficiently apparent, without breaching the confidentiality of the reasons, from the arbitrator's admission of his error and the parties' rival contentions and the evidence adduced.
>
> (2) On the facts, the arbitrator, by mistakenly attributing evidence to the wrong parties, had made an accidental error which seriously affected the award, and since the award was before the court it would be unjust to allow it to remain

uncorrected. Accordingly, the judge had been right to exercise his power under s 22 to remit the award to the arbitrator. The appeal would therefore be dismissed … .

Per curiam. The power of an arbitrator under s 17 of the 1950 Act is the same as that of a High Court judge under RCS Ord 20, r 11 (the 'slip rule'), in that he can correct clerical errors or accidental slips, although he cannot be reconsider his award. It follows that where an error arises from an accidental slip the arbitrator can himself correct the error under s 17 of the 1950 Act without reference to the court … .

Per Sir John Donaldson MR and Robert Goff LJ,

(1) Where an arbitrator has made an accidental error, he can himself apply to the court for the award to be remitted to him. …

(2) An admission of error by the arbitrator is not a prerequisite to the exercise of the court's jurisdiction to remit, although (per Robert Goff LJ) as a general rule the court should not interfere in cases of simple mistakes unless there has been a clear admission by the arbitrator of his error … ."

[9] In ***King v Thomas McKenna Ltd*** the court held as follows –

"(1) The jurisdiction of the court under s 22 of the 1950 Act to remit an award to an arbitrator was wholly unlimited and not confined to the four traditional grounds for remission, ie where the award was bad on its face, where there had been misconduct on the part of the arbitrator, where there had been an admitted mistake and the arbitrator had asked that the matter be remitted and where additional evidence had been discovered after the making of the award, but extended to any case where, notwithstanding that the arbitrator had acted with complete propriety, some aspect of the dispute which had been the subject of the reference had not,

> due to mishap or misunderstanding, been considered and adjudicated upon as fully as 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. However, in exercising its discretion the court had to bear in mind that the jurisdiction to remit was designed to remedy deviations from the route which the reference should have taken towards its destination of an award, and not to remedy a situation in which despite having followed an unimpeachable route, the arbitrator had made errors of fact or law and as a result had reached an award which was not that which the court would have reached."

[10] The respondent, through Mr Walter Scott, argued that the alleged "error" of the arbitrator in this case does not fall within the narrow ambit of section 8 (c) of the Arbitration Act. Mr Scott contended that this was not a case where on the face of the record of the award the calculations of the arbitrator were arithmetically incorrect. The instant case, he said, was one in which the arbitrator decided to do the calculation in a particular way and that being so, there was no room for the matter to be remitted.

[11] Looking at the matter broadly, Mr Scott also said that choosing the arbitral route means that having made the choice, one has to live with it. If the arbitrator has displayed faulty logic, that is not a good reason for the matter to be remitted. Where, he said, there is a decision with which one party to the arbitration does not agree, it does not mean that the court is at liberty to intervene.

[12] In his reasons for judgment, Sykes, J. made reference to all the relevant facts and authorities. He did so in a comprehensive manner. At paragraph 31, he stated:

> "31. There were four grounds on which the courts usually acted to set aside an award in addition to that of fraud or corruption. The fraud or corruption in view here was that of the arbitrator. The other four grounds 'were (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' (per Lord Donaldson M.R. in ***King v Thomas McKenna*** [1991] 1 All ER 653, 657 e-f). His Lordship was referring to counsel's submission but he seemed to have accepted the proposition as correct."

[13] Earlier, at paragraph 23, he had delivered himself thus:

> "23. This dictum of Lord Donaldson puts an end to Lord Gifford's contentions. What Miss Phillips did was to give effect to her first thoughts and intentions when she awarded the sum that she did. What she has done is clearly what she intended to do. So even if Miss Phillips were to say, 'Good heavens, I have made an error. I should have used the figures for one greenhouse instead of two', that would not be the result of a slip of the pen or an accidental slip or omission. It would be more in the nature of having second thoughts but that cannot be corrected under section 8 (c). The real complaint of JHL is that she should have used the figure for one or one and a half greenhouses for one month and then use that

as the base figure. There is nothing to suggest that she incorrectly assessed or misconstrued the evidence or miscalculated the amounts, or as in ***Mutual Shipping*** itself, incorrectly attributed evidence to the wrong party thereby making an award to the wrong person. What she decided to do, given that there was no evidence of actual expenditure when all six green houses were in operation, was to use the operation of two green houses as the basis for finding the approximate revenue for six greenhouses. This is not a slip of the pen decision. It was a deliberate choice made by her in arriving at a base figure which was then used to complete her calculation. It cannot be said that she excluded anything she intended to include or included anything she intended to exclude. There is no indication that she intended to find the average of one or one and a half greenhouses and use that as her base figure as suggested by Lord Gifford but inadvertently used two greenhouses instead. She decided to use two greenhouses from the outset. There is no error in the expression of her conclusion. At best (and that is not being suggested) there may be an error in the thought process (see Lloyd L.J. in ***Food Corporation of India v Marastro*** [1986] 2 Lloyd's Rep. 209, 216 – 217). The best JHL can say is that she ought not to have used the evidence in that way but that is not the same thing as saying that she made slip-of-the-pen error or that there was an accidental slip or omission within the meaning of section 8 (c). What JHL was asking her to do when it asked her to revisit the matter under section 8 (c) was to have second and perhaps better thoughts on how she should use the evidence. She had no power to do this and so she was correct to refuse to amend her award. Thus even if Miss Phillips is in error it is not an error correctable under section 8 (c) of the Jamaican Arbitration Act, 1900."

[14] And at paragraph 72, he concluded:

> "72. Let me say that I am not aware of any authority of the Court of Appeal of Jamaica that compels a conclusion different from what I am about to state. I conclude, therefore, that the law I am to apply is this: a court has no power under section 11 (1) of the Jamaican Arbitration Act [to] remit the matter to the arbitrator unless it can be shown that there exists any of the grounds upon which an award would be set aside before the passing of section 8 of the 1854 Act. Those grounds are fraud, corruption as well as (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. None of those grounds has been made out."

[15] In my opinion, the learned judge was correct in refusing to remit the matter to the arbitrator. I have noticed what appears to be a trend in the English Court of Appeal to extend the grounds, beyond the traditional, on which a matter may be remitted. I fully agree with Sykes, J. that any such extension in Jamaica ought to be by way of legislative intervention. The parties herein chose the arbitral route and there being no recognizable error in the traditional way, they ought to abide by the decision of the arbitrator. Choosing arbitration does not, and should not mean that after the arbitration process is over, the unsuccessful party is at large to launch full scale court proceedings as if there had been no arbitration. Any court proceedings must be within defined bounds.

In the instant case, that which the appellant seeks is not within the established legal limits. I would therefore dismiss the appeal and award costs to the respondent to be agreed or taxed.

DUKHARAN, J.A.

[16] I agree with my brother Panton, P., that the appeal should be dismissed with costs to the respondent to be agreed or taxed. Regretfully, I am unable to agree with my brother Harrison, J.A. that the matter should be remitted to the arbitration for reconsideration.

[17] I am of the view and agree with counsel for the respondent that the alleged "error" of the arbitrator does not fall within the ambit of section 8(c) of the Arbitration Act. Once the arbitrator chose to do the calculation in a particular way, then there was no basis for it to be remitted.

[18] Section 11(1) of the Arbitration Act sets out the grounds upon which an award can be set aside. I agree with Sykes, J., that none of these grounds have been made out.

HARRISON J.A (Dissenting)

Introduction

[19] This is an appeal from a decision of Sykes J., who on 11 December 2008 refused an application made by the appellant on a Fixed Date Claim Form seeking leave of the court to have an arbitration award remitted to the arbitrator for reconsideration pursuant to section 11 of the Arbitration Act.

Background to the appeal

[20] The appeal arose out of the following facts. The appellant is a duly registered company in Jamaica and has been in the business of hydroponics farming since 2000, growing exotic lettuce and herbs for the Jamaican market on land leased to it by Alumina Partners of Jamaica (the respondent).

[21] In 2004, the appellant's farm was damaged by Hurricane Ivan. It suffered a complete loss of its greenhouses. The greenhouses could not be rebuilt on the spot originally leased because the appellant was told that the respondent had intended to mine for bauxite on that site.

[22] On 26 January 2005 the parties entered into a lease agreement whereby the respondent leased to the appellant another area of land upon which to site its farming operations. By an agreement collateral to the lease and embodied in a letter from the respondent to the appellant, the respondent agreed to inter alia, rough level the pads for six greenhouses. However, in breach of the agreement, the respondent failed to perform any of its obligations there under and it proposed to the appellant an alternative plan to leave the farm land where it was. The appellant accepted the respondent's breach of the Agreement so the matter was referred to a single arbitrator for adjudication of three issues. Issue (a), which is most pertinent to the present appeal, is concerned with the

quantification of the amount of damages to be paid by the respondent to the appellant as compensation for the loss and damage suffered by the appellant.

[23] In order to support its claim for loss of profits, the appellant contended that its loss was made on the basis that it could sell all that it produced and was calculated by way of profit projections submitted to the Bank of Nova Scotia in 2005, for expansion of the farm. The appellant had also relied on actual income earned from the production of lettuces between November 2006 and February 2007 when production had resumed. It was also contended by the appellant that the relevant time frame for restarting production if the agreement had been performed, was from March 2005 to four months from the date of the award (that is, when it would have reached full production).

[24] Arbitration took place between 4 and 7 July 2007 and the award was handed down on 12 November 2007. A sum of $76,398,594.67 was awarded to the appellant for the loss of profits. The learned arbitrator found inter alia, at paragraph 94 of the Final Award:

> "(5) I accept that the actual revenues flowing from one (1) greenhouse in November for two (2) weeks was $968,720.00 which improved to actual revenues of $1,743,450.00 for the two (2) weeks in February of 2007 with two (2) greenhouses in operation (....)
>
> (6) That a reasonable assumption would be that actual revenues for the three month period of November 2006 to February, 2007 in respect of two greenhouses would provide an average which when extrapolated to the operation of six

(6) greenhouses produces revenues for one (1) month of J$6,798,796.00. When this figure is multiplied to arrive at annual revenues and the projected expenses, mitigated income (i.e November 2006 to February 2008) and the interim payments of $337,500,000.00 made in July 2007 are deducted from the same, the balance payable to the Claimant would amount to J$38,898,597.00.

(7) ....

[25] The arbitrator thereafter stated the bases on which the loss of profits was computed. This computation is now reproduced below:

"COMPUTATION OF LOSS OF PROFITS

6 Greenhouses Gross	$6,798,796.00 monthly
Less Expenses	$3,423,939.00
Net Profit	$3,374.857.00
$3,374,857 X 11 months August 05 — August 06	$37,123,427.00
Less one month expenses lost due to bad weather 05	$3,423,939.00
	$33,699,488.00
Plus 3 months profit May 05 to July 05 (2 greenhouses)	$3,374,857.00
Plus 3 months profit August 06 to October 06 (6 greenhouses)	$10,124,571.00
	$47,198,916.00
Plus 11 months profit November 06 to October 07 (6 greenhouses)	$37,123,427.00
	$84,322,343.00
Less Profit actually earned November 06 to October 07 (2 greenhouses)	$13,499,428.00
	$70,822,915.00
Less one month's operation cost due to bad weather October 07	$3,423.939.00)
	$67,398,976.00

Plus 4 months profit November 07 — February 08 6 greenhouses) $80,898,404.00	$13,499,428.00
Less Profit actually earned Nov. 07 to Feb. 08 (2 Greenhouses)	$4.499,809.00)
	$76,398,595.00
Less Interim Payment ordered May 07	$37.500.000.00
	$38,898,595.00"

[26] The appellant was dissatisfied with the sum awarded and made a written submission dated 3 December 2007, to the arbitrator (exhibit "RK 9" of the Record of Appeal). The appellant submitted that pursuant to section 8(c) of the Arbitration Act, a correction of the award was required by reason of an error which arose from an accidental slip. The appellant contended that the learned arbitrator had made an error in paragraph 94(5) (supra) in extrapolation of the monthly figure from assumptions which she had made based on actual revenues.

[27] The arbitrator responded to the submissions made by the appellant (see exhibit "RK 10" in the Record of Appeal) and stated inter alia:

> "...I find that the request of the Claimant does not fall within section 8 (c) of the **Arbitration Act**. There is no clerical mistake or error arising from any accidental slip or omission.
>
> The figures set out in paragraph 94(7) of the Award are based on the actual figures submitted over a particular period, by way of extrapolation, on an average, on a balance of probabilities, in the exercise of the discretion of the Arbitrator in

> circumstances where no actual figures were given for any month in which all six (6) greenhouses were functioning, and having regard to the vagaries of agricultural experiences and contingencies. Therefore no correction to paragraph 1 of the Award is required.
>
> Accordingly, I decline to make any adjustment to the Award."

[28] A Fixed Date Claim Form was filed by the appellant in the Supreme Court. It sought inter alia, the following order:

> "1. The following matters be remitted to the learned Arbitrator for reconsideration pursuant to section 11 of the Arbitration Act, namely:
>
> (1) What is the sum which ought lawfully to have been awarded to the Claimant under paragraphs 1 and 9 of the award, for loss of profits and interest thereon, in place of the sums set out in the said paragraphs, based on the findings of fact made by the arbitrator.
>
> (2) ....."

[29] The matter came before Sykes J., and he refused to grant the application to remit the matter to the arbitrator.

[30] A Notice of Appeal was filed in the Registry of the Court of Appeal on 22 January 2009 against the order of Sykes J. The appellant contended that the learned judge had erred in holding that he had no power to remit the matter under section 11(1) of the Act.

The judgment below

[31] The judgment of Sykes J., is quite detailed. It looked first at the background of the matter which was referred for arbitration. Thereafter the learned judge in considering whether the arbitrator had committed an error of law, looked at the courts' attitude to arbitration awards. He then examined some leading authorities on the subject matter. These cases included ***Sutherland & Co. v Hannevig Bros. Ltd.*** [1921] 1 KB 336; ***Mutual Shipping Corporation v Bayshore Shipping Co. Ltd, The Montan*** [1985] 1 All ER 520; ***Food Corporation of India v Marastro*** [1986] 2 Lloyd's Rep. 209; ***King v Thomas McKenna Limited*** [1991] 1 All ER 653; ***Fuller v Fenwick*** 136 E.R 282; ***Hodgkinson v Fernie*** 140 E.R 712 and ***Hogge v Burgess*** 157 ER 482. At times, the learned judge was most critical of the of the views expressed by Lord Donaldson M.R in ***King v Thomas McKenna*** (supra).

[32] The learned judge had also considered the evolution of the English Arbitration Acts, 1854, 1889 and 1950 as well as the Jamaican Arbitration Act of 1900. Section 11(1) of the Jamaican Act, which is the equivalent of section 22 of the English 1950 Act, was specifically dealt with. The judge observed that section 8 of the 1854 Act was reproduced in section 10(1) of the 1889 Act and that the same provision became section 22(1) of the 1950 Act. At paragraph 26 of his judgment he stated inter alia:

> "26 – In an effort to persuade me that the legal basis for the remission under section 11(1) exists, Lord Gifford has relied on Lord Donaldson M. R's judgment in ***King v Thomas McKenna Limited*** [1991] 1 All ER 653. Unfortunately, I disagree with Lord Donaldson and consequently with Lord Gifford. Lord Donaldson's basic thesis, when speaking of the equivalent English provision (i.e section 22 of the Arbitration Act, 1950), is that the words of the statute are sufficiently broad to entertain a remission beyond the four usual grounds so long as it is necessary to prevent injustice. I must confess that I have formed the view that the development of the law does not, at this point in legal history, permit this conclusion. The way forward has to be legislative reform. The judiciary has gone as far as it can legitimately go."

[33] The four grounds referred to by the learned judge above, were set out at paragraph 31 of his judgment and are repeated in this judgment. They are: "(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" (per Lord Donaldson M. R in ***King v Thomas McKenna*** [1991] 1 All ER 653, 657 e-f)"

[34] At paragraphs 54 and 55 of his judgment Sykes J. stated:

> "54 ...after the 1854 Act it was the law that remission by the court to the arbitrator under section 8 of the 1854 Act would only be done on grounds which would have induced the courts to set aside the award. This reasoning applies to section 11(1) of the Jamaican Act. Jamaica was not purporting to make new law or to break with the past. We were copying existing law that had, by 1900, developed a particular understanding and application.

> 55. English Court of Appeal authority from the nineteenth century suggests that despite the passage of the 1899 Act, which repealed the arbitration provisions of the 1854 Act, section 10(1) of the 1899 Act was not understood as conferring a wider power than previously existed. This was made abundantly clear in ***In re Keighley, Maxstead & Co. and Durant & Co.*** [1893] 1 QB 405."

[35] The learned judge then examined the principles of law enunciated by the learned judges in ***Keighley.*** He referred to a passage in the judgment of ***King*** where the Master of the Rolls stated at page 659 lines b-c:

> "In ascertaining the limits of the court's jurisdiction, properly so called, I can see no reason why section 22 and the other section should not be construed as meaning what they say. Certainly so far as section 22 is concerned, there is no element of doubt or ambiguity. The jurisdiction is wholly unlimited. It may well be the case that section 8 of the Common Law Procedure Act 1854 was enacted with a view to providing a statutory alternative to 'Mr Richards's clause', the terms of which I have not been able to discover, but this objective cannot limit the effect of the words used in the section in the absence of ambiguity. How that jurisdiction should be exercised is a quite different matter and to that I now turn."

[36] Sykes J. found the above passage "very difficult to reconcile with over one hundred years of case law". The learned judge took further issue with Lord Donaldson M.R where he stated at page 660 letters h-j of the ***King*** judgment (supra):

> "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."

[37] In his judgment, Sykes J. stated:

> "67 – Lord Donaldson has therefore expanded the grounds on which a court may order that an arbitration award may be remitted. Such innovation would need to come from the legislature. I have the highest regard for Lord Donaldson and I have not often disagreed with him but in this case I respectfully decline to follow his lead. Nowhere in his judgment did the learned Master of the Rolls meet head on the passages from the nineteenth century cases cited earlier which indicated how the court understood section 8 of the 1854 Act. Neither did he demonstrate that that understanding was changed by subsequent enactments. In other words, the provision before the Master of the Rolls was not free from authority and regrettably, his Lordship did not undermine the reasoning of those cases on point and so (sic) in my view has not demonstrated why that interpretation no longer held good..."

[38] Finally, Sykes J. concluded inter alia, at paragraphs 72 and 73 of his written judgment:

> 72. "... a court has no power under section 11(1) of the Jamaican Arbitration Act (sic) remit the matter to the arbitrator unless it can be shown that there exists any of the grounds upon which an award would be set aside before the passing of section 8 of the 1854 Act. Those grounds are fraud, corruption as well as (1) where the award was bad on its face, (2) where there has 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. None of those grounds has been made out.
>
> 73. It would seem that as far as Jamaica is concerned, until the legislature provides otherwise, parties would do well to revisit the practice of the nineteenth century to how the various clauses were drafted to allow the parties to mitigate the rigours of the all or nothing approach to arbitration awards. They are even at liberty, it appears to create, their own court of appeal."

The grounds of appeal

[39] The following is the ground of appeal relied upon:

> "(a) the learned trial judge erred in holding that the appellant was not entitled to have the matter of the sums to be awarded to the Claimant under paragraphs 1 and 9 of the Final award (being loss of profit and interest thereon) remitted to the learned Arbitrator for reconsideration pursuant to section 11 of the Arbitration Act."

The submissions

[40] Lord Gifford Q.C. submitted that Sykes J. was wrong to hold that he had no power to remit an award under section 11(1) of the Arbitration Act for the arbitrator to correct a mathematical error made by the arbitrator in calculating the said award. He has contended that the learned arbitrator made an error which fell squarely within section 8 (c) of the Act.

[41] Learned Queen's Counsel submitted that the learned arbitrator made certain assumptions in arriving at the award and that these assumptions had led

her into making certain factual errors. Paragraphs 9-12 of his written submissions are reproduced below:

> "**Assumptions made by the Arbitrator in reaching the Award.**
>
> 9. The Arbitrator made the following assumptions in calculating the lost profits and the said assumptions formed the basis of her calculations:
>
> a. That the Appellant was entitled to recover lost profits from May 2005 (when the Appellant should have started production, had it not been for the breach of contract) to February 2008. She allowed for one month in which there would be no production due to bad weather;
>
> b. That actual revenue figures would be useful in arriving at damages reasonably due to the Appellant on the balance of probabilities;
>
> c. That actual revenue for a three month period of November 2006 to February 2007 in respect of two greenhouses would provide an average which could be extrapolated to six greenhouses (full production) to produce revenue figures for one month, and subsequently multiplied to reach annual revenues;
>
> d. That projected expenses, mitigated income and the interim payment of $37,500,000.00 made in July 2007 should be deducted from revenue calculations to arrive at the balance payable to the Appellant.
>
> **The Mathematical error**
>
> 9. The Arbitrators (sic) assumption as stated in paragraph 7 (c) (sic) above stipulated that in reaching an average which would then be extrapolated to six greenhouses actual revenues for **TWO** greenhouses between November 2006 and February 2007 would be used. However the Arbitrator did the following to reach her average monthly revenue.

Actual Revenues:

November 2006 – ONE greenhouse for two weeks	- $968,720.00
December 2006 – ONE greenhouse for the full month	- $1,783,098.00
January 2007 – TWO greenhouses for the full month	- $2,303,528.00
February 2007 – TWO greenhouses for two weeks	- $1,743,450.00
	$6,798,796.00

10. The Arbitrator used these revenue figures to arrive at the revenue figures for six greenhouses:

$6,798,796.00 x 3 = $20,396,388.00

Then to produce a monthly figure of:

$\frac{\$20,396,388.00}{3}$ = $6,698,796.00 per month

11. However it is clear that the Arbitrator erred in using the actual revenues as stated above as the figures for the two weeks in November and the entire month of December 2006 reflect the employment of only **ONE** greenhouse. The use of these figures is inconsistent with her initial assumption that actual revenues in respect of two greenhouses should be used to determine the revenue figures for one month.

12. By making this initial error the subsequent calculation of the lost profits was inherently flawed and the resulting award made by the Arbitrator was therefore incorrect."

[42] Lord Gifford Q.C submitted that the correct calculation based on the assumptions made by the arbitrator, should be as follows:

"Correct Calculation based on Arbitrators Assumptions

13. Applying the Arbitrators assumption as stated in paragraph 7(c) (sic) above the actual revenues in respect of TWO greenhouses being employed for the entire period should be:

November 2006

TWO greenhouses for two weeks:

($968,720.00 x 2) = $1,937,440.00

December 2006

TVVO greenhouses for full month:

(1,783,098.00 x 2) - $3,566,196.00

January 2007 — TWO greenhouses for the full month - $2,303,528.00

February 2007 — TWO greenhouses for two weeks - $1,743,450.00

$9,550,614.00

And extrapolating this figure to six greenhouses:

$9,550,614.00 x 3 = $28,651,842.00

To produce a monthly figure of:

$28,651,842.00 = $9,550,614.00 per month

14. The award given to the Appellant should have therefore been calculated as in Column B below and not as calculated by the Arbitrator in Column A:

	Column A **Arbitrator's calculation** $	**Column B** **Corrected calculation** $
6 Greenhouses Gross	6,798,796.00	9,550,614.00
Less Expenses Net Profit	(3423,939.00) 3,374.857.00	(3,423,939.00) 6,126.675.00
Net Profit for 11 months (August05— August 06)	37,123,427.00	67,393,425.00
Less one month expenses lost due to bad weather 05	(3,423,939.00) 33,699,488.00	(3,423,939.00) 63,969,486.00
Plus 3 months profit May 05 to July 05 (2 greenhouses)	3,374,857.00	6,126,675.00
Plus 3 months profit	10,124,571.00	18,380,025.00

August 06 to October 06 (6 greenhouses)		
Plus 11 months profit November 06 to October 07 (6 greenhouses)	37,123,427.00 84,322,343.00	67.393,425.00 155,869,611.00
Less Profit actually earned November 06 to October 07 (2 greenhouses)	(13,499,428.00) 70,822,915.00	(24,506,700.00) 131,362,911.00
Less one month's operation Cost due to bad weather October 07	(3,423.939.00) 67,398,976.00	(3.423.939.00) 127,938,972.00
Plus 4 months profit November 07 — February 08 (6 greenhouses)	13,499,428.00 80,898,404.00	24,506,700.00 152,445,672.00
Less Profit actually earned November 07 to February 08 (2 Greenhouses) LOST PROFITS	(4.499,809.00) 76,398,595.00	(8,168,900.00) 144,276,772.00
Less Interim Payment Ordered May 07	(37.500.000.00)	(37,500,000.00)
LOST PROFIT AWARD	**38,898,595.00**	**106,776,772.00**

[43] In his oral submissions, Lord Gifford Q.C. submitted that ***the Mutual Shipping Corp.*** case is relied on for two reasons viz:

1. That where there is an accidental mistake in the expression of the arbitrator's intention it can be corrected by the arbitrator under section 8 (c); and

2. If the arbitrator does not correct the error there is power in the Court under section 11(1) to intervene and order the remission to the arbitrator.

[44] Lord Gifford Q.C further submitted that the court should follow ***King*** (supra) and not to take the more restricted path that Sykes J took. He therefore submitted that based on the legal principles enunciated in ***Mutual Shipping***

Corp., (supra) **King** (supra); ***Danae Air Transport SA v Air Canada*** [2000] 2 All ER 649, ***Sans Souci Ltd v VRL Services Limited*** (supra) Sykes J., ought to have remitted the matter for reconsideration by the arbitrator for an adjustment of the figures.

[45] Mr. Scott submitted on the other hand, that the alleged "error" of the arbitrator did not appear to fall within the narrow ambit of section 8(c) of the Act. At paragraphs 23 – 25 of his written submissions he submitted as follows:

> "23. It is submitted that the award of the sum of $76,398,594.67 is in keeping with the manifest intention of the Arbitrator to compensate the Appellant but not to punish the Respondent in circumstances where **there was a degree of assumption and uncertainty involved.**
>
> 24. There being no mathematical error arising, it is our submissions that the learned Arbitrator is now *functus officio* and any further consideration of this matter would give rise to the issue of *res judicata* as the award of loss of profit has already been considered by the Arbitrator.
>
> 25. Further, the Respondent has already paid the full judgment on the basis that the matter has now been concluded and will be unduly prejudicial should these proceedings be re-opened."

And at paragraph 33 he submitted thus:

> "33. .... the learned judge in the Court below was correct to find that he ought solely to remit this matter to the learned Arbitrator, in circumstances where he was certain that there was **Fraud, the award was bad on its face, there was apparent misconduct, admitted mistake or some error on the face of the award or some evidence discovered after the making of the award.**"

[46] Mr. Scott argued that for this court to determine whether or not the matter should be remitted, one must look at the facts which were before the arbitrator at the time the decision was made. He further argued that at the material time the sole evidence before the arbitrator were revenues in respect of November 2006 to February 2007 notwithstanding the fact that there ought to have been revenue figures available in respect of March 2007 to May 2007. He submitted that the arbitrator having exercised her discretion in determining the monthly figure, the learned arbitrator then proceeded to calculate the loss of profits. In the circumstances, he submitted that the decisions of Sykes J., and the learned arbitrator ought not to be disturbed.

[47] Mr. Scott also relied on additional skeleton submissions and placed strong emphasis on the approach of the courts in Jamaica to the remission of awards by an arbitrator. He referred to and relied on the cases of:

(a) ***The Insurance Company of the West Indies v G.G Records Limited*** (1987) 24 JLR 350;

(b) ***Marley and Plant Limited v Mutual Housing Services Limited*** (1988) 25 JLR 38; and

(c) ***Alcan Jamaica Company v Nakash Goshine Engineering Co. Limited*** (1994) 31 JLR 266.

[48] Mr. Scott submitted that even if the findings of the arbitrator were based on "faulty logic", her decision would still not be reviewable. In relation to what the arbitrator said in response to the request for reconsideration of the alleged mathematical error, he said:

> "I agree that what the arbitrator did subsequently, cannot be reconciled, but is it a procedural mishap that ought to be remitted to the arbitrator?"

[49] In conclusion, Mr. Scott submitted that the appellant is apparently dissatisfied with the amount of money awarded to it. He argued that having agreed to an arbitration from which there is no appeal the appellant has decided to try to find a "creative manner" to get the matter back before the arbitrator. Accordingly, he submitted that this "disguised attempt" to appeal the decision of the arbitrator ought to be "roundly rejected" and that the decision of Sykes J., ought to be upheld and the appeal dismissed with costs to the respondent.

The Issues

[50] Two issues arise for consideration in this appeal. The first concerns the powers of the court to remit a matter to the arbitrator pursuant to section 11(1)

of the Act. The second issue relates to the extent of the powers conferred upon arbitrators under section 8 (c) of the Arbitration Act (the Act). Both issues are difficult and important in the determination of this appeal.

The Analysis

[51] Sections 8(c) and 11(1) read respectively as follows:

> "8 The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power-
>
> (c) to correct in an award any clerical mistake or error arising from any accidental slip or omission."

And

> "11(1) In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire."

[52] Section 11(1) of the Jamaican Act (supra) is identical to section 22(1) of the English Arbitration Act of 1950. The latter section states as follows:

> "22(1) – In all cases of reference to arbitration the High Court...may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator..."

[53] It is clear from a reading of the authorities that the arbitrator's powers of remission are very limited. The early English cases on remitting awards to arbitrators have decided that the words in section 7(c) (the equivalent to the Jamaican section 8(c)) ought to be construed fairly strictly. The authorities show

that from the moment the arbitrator puts forward a paper as his award he was functus officio, and could not put right any mistake at all. Any alteration was nugatory and the old award stood. The Courts then, regarded it as very dangerous to allow arbitrators to touch their awards after they had been made, and ***Mordue v Palmer*** L. R. 6 Ch. 22. is a well-known case upon the subject. In that case the error corrected by the arbitrator arose from the mistake of a clerk in copying the draft award, and it was held that the arbitrator could not put the mistake right being functus officio. In the Jamaican case of ***The Insurance Company of the West Indies v G.G. Records Limited*** (1987) 24 JLR 350 on which Mr. Scott relies, the arbitrator's award was appealed. The appellant in that case by notice of originating motion sought an order to set aside the award. At the hearing of the motion, a preliminary objection to the application was made by the respondent, which was upheld by the trial judge. He dismissed the motion principally on the ground that specific questions of construction and law were submitted to the arbitrator and therefore the Court could not interfere. The appellant appealed and this court held inter alia:

> "(iii) no error of law appears on the face of the award which would entitle the court to interfere with it;
>
> (iv) where a specific question of law not depending on a finding of fact was submitted to an arbitrator for his decision, such decision however manifestly erroneous it may be, cannot be set aside by the Court, fraud and corruption excepted."

[54] In the instant matter, the learned arbitrator was asked to reconsider her calculations which the appellant contended were based on a mathematical error. The arbitrator held that this request did not fall within section 8 (c) of the Act as "there was no clerical mistake or error arising from any accidental slip or omission". She further held:

> "The figures set out in paragraph 94(7) of the Award are based on the actual figures submitted over a particular period, by way of extrapolation, on an average, on a balance of probabilities, in the exercise of the discretion of the Arbitrator in circumstances where no actual figures were given for any month in which all six (6) greenhouses were functioning, and **having regard to the vagaries of agricultural experiences and contingencies.** Therefore no correction to paragraph 1 of the Award is required.
>
> Accordingly, I decline to make any adjustment to the Award." (emphasis supplied)

[55] Sykes J. however, held inter alia, that apart from the four established grounds for remitting an award to the arbitrator there was no other power under section 11(1) of the Jamaican Arbitration Act.

[56] Sykes J., as I have said before, was most critical of the judgment of Lord Donaldson M.R in ***King v Thomas McKenna Limited*** [1991] 1 All ER 653. He concluded that the courts in Jamaica ought not to follow.

[57] In ***Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia*** [1985] 1 All ER 520 that case held:

> "- (1) Although s 22 of the 1950 Act did not enable the arbitrator to correct errors of judgment, whether of law or of fact, or to have second thoughts about his decision, it provided the ultimate safeguard to prevent injustice by giving the court a wide power to remit an award to the arbitrator where he had made either a clerical mistake or an error arising from an accidental slip or omission. Accordingly, the question for the court was whether the error made by the arbitrator arose from an accidental slip or omission. In the circumstances, (per Sir John Donaldson MR) in order to ascertain the nature and effect of the error it was necessary to look at the reasons given by the arbitrator, although the cases in which the court would do so were extremely limited since there was a public interest in preserving the finality of arbitral awards, or alternatively (per Robert Goff LJ) it was unnecessary to refer to the reasons since the existence and nature of the error was sufficiently apparent, without breaching the confidentiality of the reasons, from the arbitrator's admission of his error and the parties' rival contentions and the evidence adduced (see p 524 j, p 525 c to f, p 528 d, p 529 d e, p 531 b c and p 532 a, post)."

[58] The ***Mutual Shipping Corp***. (supra) case was one where the arbitrator had admitted making a mistake however, Sir Roger Ormrod stated at page 532:

> "Whichever way of looking at this problem is correct it is clear to my mind that the parties themselves cannot blindfold the court, only the court itself can do that and in the vast majority of cases it will do so. But in those rare cases where an error occurs of the kind which we are considering in this case, the court cannot decline to interfere without gravely prejudicing in the eyes of the lay world the machinery of justice. For my part I do not think that either conclusion will significantly endanger the finality of arbitral awards. Section 17 is limited to clerical mistakes or accidental errors. Section 22 is limited by the discretion being subject to the constraints imposed by the overriding importance of preserving finality in all but the most exceptional situations."

[59] In ***King v Thomas McKenna Limited*** [1991] 1 All ER 653 Lord Donaldson M.R. extended the court's jurisdiction to remit the matter beyond the traditional grounds and stated at pages 660-661 as follows:

> "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. In so expressing myself I am not seeking to define or limit the jurisdiction or the way in which it should be exercised in particular cases, subject to the vital qualification that it is designed to remedy deviations from the route which the reference should have taken towards its destination (the award) and not to remedy a situation in which, despite having followed an unimpeachable route, the arbitrators have made errors of fact or law and as a result have reached a destination which was not that which the court would have reached. This essential qualification is usually underlined by saying that the jurisdiction to remit is to be invoked, if at all, in relation to procedural mishaps or misunderstandings. This is, however, too narrow a view since the traditional grounds do not necessarily involve procedural errors. The qualification is however of fundamental importance. Parties to arbitration, like parties to litigation, are entitled to expect that the arbitration will be conducted without mishap or misunderstanding and that, subject to the wide discretion enjoyed by the arbitrator, the procedure adopted will be fair and appropriate. What they are not entitled to expect of an arbitrator any more than of a judge is that he will necessarily and in all circumstances arrive at the 'right' answer as a matter of fact or law. That is why there are rights of appeal in litigation and no doubt would be in arbitration were it not for the fact that in English law it is left to the parties, if they so wish, to build a system of appeal into their arbitration agreements

> and few wish to do so, preferring 'finality' to 'legality', to adopt Diplock J's terminology."

[60] The principles in ***King*** (supra) were followed in the later case *of* ***Danae Air Transport SA v Air Canada*** [2000] 2 All ER 649. In the latter case, the English Court of Appeal held that where arbitrators had deliberately made a simple mathematical error, that error could properly be characterised as a procedural mishap, and in exceptional circumstances the court had power to remit the award if the error had not been admitted. In the instant case, it is my view that the learned arbitrator had made such an error.

[61] In ***Sans Souci Limited v VRL Services Limited*** SCCA No. 20/2006 delivered 12 December 2008, an appeal in relation to liability was dismissed but in considering the arbitrators' award of damages Harrison P., delivering the judgment of the court, stated at paragraphs 78-81 as follows:

> "78. In the instant case, the Arbitrators treated the appellant's paragraph 18 of its points of defence as a set-off, claiming a repayment of management fees overpaid in the past and therefore not subject for consideration in the reference before them. Instead, they should have considered it as a list of expenses incurred by the respondent, which the appellant was contending was "not reimbursable", and therefore should not be included in the average annual management fees ascertainable from the period January 2002 to march 2003, and to be used to assess the damages for loss of future earnings for the period 2004 to 2014, being considered by them. No implication therefore arose in the instant case, as it did in **Middlemiss v Hartlepool** (supra). The Arbitrators, in the instant case by not

considering the proper implication of clause 18 of the appellant's points of defence, were in error.

79. Where an arbitrator has omitted to decide something which he ought to have decided, the award may be remitted to him for such a decision to be made. (See **King et al v McKenna Ltd. et al** [1991] 1 QB 480). The power of remittal is contained in section 11 of the Act. It reads....."

And at paragraph 81 Harrison P stated:

"81. In the circumstances, this matter ought to be remitted to the Arbitrators for a reconsideration of the issue as to damages, with particular reference to the "unrecoverable expenses" claimed."

[62] Having considered and discussed the various authorities (supra), the question is how far the law has been altered by section 8 (c) of the Arbitration Act? In an old case, ***Sutherland & Co. v Hannevig Brothers Ltd***. [1921] 1 K.B 336, it was decided that upon a construction of the words used in section 7(c) (the English equivalent to Jamaica's 8(c)) it seems obvious as a matter of grammar that "clerical" belongs to "mistake" only, and that "error arising from any accidental slip or omission" is a second and independent limb of the clause. In that case Rowlatt J stated at 341:

> "An accidental slip occurs when something is wrongly put in by accident, and an accidental omission occurs when something is left out by accident..."

[63] In the present case, the learned arbitrator clearly did not make a clerical error, and the question is did she make an accidental slip or omission? In order to ascertain the nature and effect of the error I do agree with the reasoning of Lord Donaldson in ***Mutual Shipping Corp***. (supra) that it is necessary to look at the reasons given by the arbitrator for her award. The difference in the shortfall as contended by Lord Gifford Q.C appears to be extremely high as it runs into millions of dollars. In her findings (supra –para.94 of the Final Award) the learned arbitrator stated inter alia:

> "(5) I accept that the actual revenues flowing from one (1) greenhouse in November for two (2) weeks was $968,720.00 which improved to actual revenues of $1,743,450.00 for the two (2) weeks in February of 2007 with two (2) greenhouses in operation (....)
>
> (6) That a reasonable assumption would be that actual revenues for the three month period of November 2006 to February, 2007 in respect of two greenhouses would provide an average which when extrapolated to the operation of six (6) greenhouses produces revenues for one (1) month of J$6,798,796.00. When this figure is multiplied to arrive at annual revenues and the projected expenses, mitigated income (i.e November 2006 to February 2008) and the interim payments of $337,500,000.00 made in July 2007 are deducted from the same, the balance payable to the Claimant would amount to J$38,898,597.00".

[64] In her reasons for refusing to reconsider the amount awarded she stated inter alia:

> The figures set out in paragraph 94(7) of the Award are based on the actual figures submitted over a particular period, by way of extrapolation, on an average, on a balance of probabilities, in the exercise of the discretion of the Arbitrator in circumstances where no actual figures were given for any month in which all six (6) greenhouses were functioning, **and having regard to the vagaries of agricultural experiences and contingencies.** Therefore no correction to paragraph 1 of the Award is required.
>
> Accordingly, I decline to make any adjustment to the Award". (emphasis supplied)

[65] The arbitrator had decided that her final award was arrived at by deducting projected expenses, mitigated income and the interim payment from the calculated revenues. To say subsequently, that the award was arrived at in the manner stated above, is contrary to what was said earlier by her. Lord Gifford Q.C found it impossible to reconcile what the arbitrator said in her reasons for the final award with her response to the request for reconsideration. It is arguable that the arbitrator was having second thoughts about her decision but this is not permissible: see ***Mutual Shipping Corp***. (supra).

[66] It therefore becomes necessary to examine the learned arbitrator's method of calculation in arriving at her award. This method utilized by the arbitrator is set out at paragraphs 9-12 of the appellant's written submissions and I have reproduced them below for emphasis:

> "9. The Arbitrators (sic) assumption as stated in paragraph 7 (c) (sic) above stipulated that in reaching an average which would then be

extrapolated to six greenhouses actual revenues for **TWO** greenhouses between November 2006 and February 2007 would be used. However the Arbitrator did the following to reach her average monthly revenue.

Actual Revenues:

November 2006 – ONE greenhouse for two weeks	- $968,720.00
December 2006 – ONE greenhouse for the full month	- $1,783,098.00
January 2007 – TWO greenhouses for the full month	- $2,303,528.00
February 2007 – TWO greenhouses for two weeks	- $1,743,450.00
	$6,798,796.00

10. The Arbitrator used these revenue figures to arrive at the revenue figures for six greenhouses:

$6,798,796.00 x 3 = $20,396,388.00

Then to produce a monthly figure of:

$$\frac{\$20,396,388.00}{3} = \$6,698,796.00 \text{ per month}$$

11. However it is clear that the Arbitrator erred in using the actual revenues as stated above as the figures for the two weeks in November and the entire month of December 2006 reflect the employment of only **ONE** greenhouse. The use of these figures is inconsistent with her initial assumption that actual revenues in respect of two greenhouses should be

> used to determine the revenue figures for one month."

[67] I do agree with Lord Gifford Q.C when he submitted that the learned arbitrator seemed to have made a mathematical error in her calculation. It is my view such an error on the part of the arbitrator falls within the meaning of section 8(c). It would only be fair and just for the arbitrator to correct that error. I find the dicta of Lord Donaldson in **King** (supra) quite persuasive where he said:

> "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."

[68] This court in relying upon ***King*** (supra) said in ***Sans Souci Ltd.*** (supra):

> "Where an arbitrator has omitted to decide something which he ought to have decided, the award may be remitted to him for such an award to be made".

[69] In the circumstances, it is my view, that Sykes J. was in error when he held that the court had no power under section 11(1) of the Arbitration Act to remit the matter to the arbitrator unless it can be shown that there exists grounds of fraud, corruption as well as that there was apparent misconduct,

admitted mistake or some error on the face of the award or some evidence discovered after making of the award.

[70] For my part, I would allow the appeal and order that the matter of the extrapolation of revenues from a monthly average be remitted to the arbitrator for reconsideration. However, it does not seem possible for the learned arbitrator who had made the final award to carry out this exercise as she has since been appointed a judge of the Court of Appeal. In these circumstances, the provisions of section 6(b) of the Act would apply. This section reads as follows:

> "6. In any of the following cases -
>
> > (b) – if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy;
> > ....
>
> any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator."

PANTON, P.

ORDER

By a majority (Harrison, J.A. dissenting) appeal dismissed. Order of Sykes, J. affirmed. Costs to the respondent to be agreed or taxed.