JMSC COMM. 17

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2012 CD00046

BETWEEN	**R.A. MURRAY INTERNATIONAL LIMITED**	**CLAIMANT**
AND	**BRIAN GOLDSON**	**DEFENDANT**

Mr. Stuart L. Stimpson instructed by Patterson Mair Hamilton for Claimant.

Mr. John Graham instructed by John G. Graham and Co. for the Defendant.

IN CHAMBERS

HEARD: 10TH October & 30th November 2012.

ARBITRATION PROCEEDINGS-SECTION 12(1) OF THE ARBITRATION ACT- REMOVAL OF ARBITRATOR FOR MISCONDUCT- MEANING OF "MISCONDUCT"- MATTERS THAT MAY PROPERLY BE TAKEN INTO ACCOUNT- REMOVAL OF ARBITRATOR FOR APPARENT BIAS – WHETHER REAL DANGER OF BIAS

Mangatal J:

THE PARTIES

[1] This case is concerned with arbitration proceedings. It involves a situation where parties have essentially agreed to arbitrate rather than litigate. However, section 12 of the Arbitration Act empowers the Court to remove an arbitrator where he has misconducted himself. That is the basis of this claim.

[2] I wish at the outset to thank the Attorneys on both sides for their very interesting and helpful submissions.

[3] The Claimant R.A. Murray International Limited ("R. A. Murray") is incorporated under the Laws of Canada and has its head office in Halifax, Nova Scotia, Canada.

[4] R. A. Murray offers services including engineering design, and Project Management and has done business in Jamaica for many years. Its most recent project with the Government of Jamaica was the National Works Agency/Government of Jamaica billion dollar R. A. Murray Priority Bridge Programme.

[5] In the course of implementing the National Works Agency/ Government of Jamaica R. A. Murray Priority Bridge Programme, R. A. Murray contracted several sub-contractors to erect bridges under the programme. One such sub-contractor was Crossings Construction Limited ("CCL"). CCL was hired to construct three bridges; the Bog Walk, Johnson's River and Angel's River Bridges.

[6] Disputes arose between R. A. Murray and CCL in relation to the construction of the bridges and, in accordance with the relevant provisions of the FIDIC Forms of Contract, the parties engaged the dispute resolution mechanisms. This meant pursuing adjudication in respect of the disputes concerning the Angel's and Johnson River bridges and arbitration in respect of the disputes concerning the Bog Walk Bridge.

[7] On August 18 2010, R. A. Murray and CCL executed agreements appointing Brian Goldson, the Defendant ("Mr. Goldson"), who is a Chartered Quantity Surveyor and partner in the firm of Goldson, Barrett and Johnson, to be:

a. The Adjudicator in respect of the disputes pertaining to the Angel's and Johnson's River Bridges; and
b. The Arbitrator in respect of the disputes concerning the Bog Walk Bridge.

THE APPLICATION

[8] This is an application by Fixed Date Claim Form filed on May 15 2012 on behalf of R. A. Murray seeking the following relief:

1. An order that the Defendant, Brian Goldson, be removed as the single Arbitrator appointed by the Claimant and Crossings Construction Limited pursuant to an Arbitration Agreement executed on August 18, 2010.
2. An order restraining the Defendant from taking any further steps in the arbitration between the Claimant and Crossings Construction Limited to resolve disputes between those parties relating to the construction of the Bog Walk Bridge in Saint Catherine.
3. An order that the Defendant pay the costs of these proceedings.
4. Such further or other relief as the Honourable Court deems fit.

[9] The stated ground on which these orders are being sought is that Mr. Goldson has misconducted himself in his capacity as Arbitrator appointed by R.A.Murray and CCL to resolve disputes between those parties relating to the construction of the Bog Walk Bridge in St. Catherine. The claim is made pursuant to section 12 of the Arbitration Act, 1900.

THE ACT

[10] Section 12 of the Arbitration Act ("our Act") provides as follows:

> *Misconduct of arbitrator or umpire*
>
> *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.

In the instant case, we are concerned with sub-section 12(1) as no award is being challenged. It should be noted that where an award has been made by the arbitrator, section 11 of our Act empowers the court to order that the matters referred, or any of them, be remitted to the arbitrator for reconsideration.

THE MAIN ISSUES

[11] The main issues that arise for the Court's consideration are as follows:

(1) Whether the matters in respect of which R. A. Murray has complained are sufficient so as to amount to misconduct and thus to warrant Mr. Goldson's removal as arbitrator; and

(2) Whether there is a real danger of bias on the part of Mr. Goldson in the conduct of the arbitration.

MISCONDUCT

[12] Our Act does not define misconduct and neither does it state what types of acts or inaction constitute misconduct. It is therefore to the case law that I will have to look for guidance.

[13] The claim is based on the following allegations of misconduct outlined in the Affidavit of Brian Joose, a Consultant and agent for R. A. Murray, sworn to on the 15th May 2012:

(a) Mr. Goldson did not deliver his decisions in relation to the Johnson's River and Angel's River Adjudications on time.

(b) In CCL's unsuccessful attempts to enlarge the time for Mr. Goldson to deliver his decisions in the Angel's River and Johnson's River Adjudications (Claims No.'d 2011CD00083

and 2011CD00085) Mr. Goldson swore an Affidavit in which he had deponed that he was an Arbitrator even though he was appointed Adjudicator and the agreement appointing him was described as an “Adjudication Agreement”.

(c) In an Affidavit sworn to in Claims No.’d 2011 CD00083 and 2011 CD00085 (by then consolidated), Mr. Goldson partially attributed his delay to R. A. Murray. He claimed that R. A. Murray only submitted an electronic copy of the submissions relating to the Angel’s River Adjudication, which Mr. Goldson claimed he did not receive due to a computer malfunction, yet R. A. Murray’s Attorneys received a “read receipt” from Mr. Goldson.

(d) Mr. Goldson was “siding with” CCL in seeking to have the time enlarged for him to deliver his decisions in relation to the Johnson’s River and Angel’s River Adjudications (paragraph 12 of Mr. Joose’s Affidavit of May 15 2012).

(e) On October 14, 2011, the Bog Walk Arbitration was adjourned without a date being set by Mr. Goldson (this without any objection from CCL), to enable R. A. Murray to commence court proceedings to challenge a decision made by Mr. Goldson. This decision was in relation to the question of whether he had the power to award damages consequent upon his determination that the contract between the parties had been wrongfully terminated by R. A. Murray. The proceedings to challenge Mr. Goldson’s decision (Claim No. 2011 HCV 07437) are still pending. However, Mr. Goldson, at the request of CCL, some five months after the adjournment of the Bog Walk Arbitration, decided to resume, and has insisted on the resumption of the Arbitration. Mr. Goldson has insisted on the resumption even though he has

not addressed R. A. Murray's concerns and view that the Arbitration should not be resumed until Mr. Goldson reimburses its wasted costs in the Adjudications that he presided over.

BIAS

[14] R. A. Murray is of the view that Mr. Goldson's conduct in the Adjudications and the Arbitration has not only caused it to lose all confidence in his ability to act fairly and impartially in the Bog Walk Arbitration, but has also given rise to a real danger of bias on his part.

SUBMISSIONS ON BEHALF OF R. A. MURRAY

[15] Mr. Stimpson in addition to providing the Court with written skeleton submissions, also provided written speaking notes. Counsel indicated that he was no longer pursuing any of the arguments surrounding the fact of Mr. Goldson calling himself "Arbitrator" instead of "Adjudicator" as he considered that the explanation given by Mr. Goldson in his Affidavit was reasonable, particularly having regard to the area taken to be his expertise. See Mr. Goldson's Affidavit, filed on the 28th June 2012, paragraph 6. Mr. Stimpson has also candidly admitted that whilst each of the allegations of misconduct in this case may not when looked at in isolation be sufficient to amount to misconduct, when taken as a whole, they do amount to misconduct on the part of Mr. Goldson. It was Mr. Stimpson's submission that the Court is fully entitled to look at all of the allegations, including those as to what transpired in the Adjudication matters or Court proceedings in order to decide whether Mr. Goldson has been guilty of misconduct. These should be assessed to see whether they have resulted in a loss of confidence on the part of R. A. Murray in his ability to conduct the Arbitration fairly and/or whether there is a real danger of bias. He further argued that in relation to Mr. Goldson's decision to resume the Bog Walk Arbitration, it would have been reasonable for Mr. Goldson to have said to CCL, the matters being challenged go to the root of the arbitration, and that the issue in court ought to be allowed to

proceed before pressing on with the Arbitration. This he submitted, was particularly so, since, although R. A. Murray could have applied for a stay of the Arbitration, the context is that in fact five months had elapsed since the filing of the challenge in Court. This in circumstances where Mr. Goldson has not addressed R. A. Murray's concerns that the Arbitration should not be resumed until he has reimbursed it for its wasted costs in the futile Adjudications which he presided over. This constitutes misconduct, Counsel submits.

SUBMISSIONS ON BEHALF OF MR. GOLDSON

[16] Mr. Graham presented written and supplemental written submissions. He has also argued that in relation to R. A. Murray's criticism that Mr. Goldson has "decided to resume the Bog Walk arbitration…and has insisted on the resumption of the arbitration…", that the filing of an appeal, and therefore by extension a challenge to the arbitrator's decision, does not operate as a stay of the arbitration proceedings. Further, that no stay of the arbitration has ever been applied for by R. A. Murray. CCL on 14 March 2012 issued a formal "Request to Arbitrator to Proceed" to Mr. Goldson. Mr. Graham argues that there is a contract signed by both parties agreeing to appoint Mr. Goldson as Arbitrator. In the absence of an order staying the arbitration proceedings, Mr. Goldson would have exposed himself to another complaint if he had not responded to the request by one of the parties to resume the Arbitration. This is particularly so since, as far as CCL is concerned, there were other matters in dispute not yet heard, and which are not in its view, the subject of R.A. Murray's application to the Court. In respect of these matters in CCL's view a separate ruling could be made. There is no evidence that any of the parties asked or invited Mr. Goldson to state a special case to the Court pursuant to section 20 of the Act. Nor was Mr. Goldson a party to the Suit challenging his decision, although he was clearly aware of its existence. Counsel submits that Mr. Goldson acting in accordance with the Arbitration Agreement dated 18th August 2010, cannot be viewed as acts of, or as pointing to misconduct. It was further submitted that arbitration, and indeed, the Arbitration Agreement itself, speaks to the need for expedition. Mr. Graham

referred to paragraphs 5,8 and 9 of the Arbitration Agreement which read as follows:

> 5. *The respective parties hereto will do and cause to be done all other things necessary and convenient for enabling the Arbitrator to make his award without delay.*
>
> …..
>
> 8. *The Arbitrator may from time to time make his award upon any question or questions in dispute between the said parties that may have arisen and he shall not by doing so be deemed to have determined his authority until all matters relating to the premises shall have been finally disposed of. Any separate award shall be observed and performed without waiting for another award.*
>
> 9. The Arbitrator, if he thinks fit, shall be at liberty to order the execution of any document or documents by or between the parties to the reference or any of them either for the purpose of giving effect to the award of the Arbitrator thereon and to direct by whom and at whose expense such documents shall be prepared and executed.

[17] Mr. Graham has also argued that in relation to the grounds complained of regarding the Adjudication proceedings or wasted costs in relation to those proceedings, these matters cannot amount to misconduct on the part of Mr. Goldson because they relate to the Adjudications and not to the Arbitration. Mr. Graham further submits that the late delivery of the decisions in relation to the Adjudications affects both parties equally. He submits that R.A. Murray cannot properly assert that by Mr. Goldson delivering his decisions late, he was not acting impartially. Further, the late delivery of a decision, he submits, cannot amount to actual or imputed bias.

[18] Counsel submits that R. A. Murray has put forward no evidence to support its allegations that Mr. Goldson has misconducted himself in his capacity as an arbitrator. Nor is there evidence of actual or apparent bias.

MISCONDUCT

[19] At paragraph 587 of **Halsbury's Laws of England**, 4th Edition, Volume 2, published 1973, (that paragraph and others having been cited by Mr. Stimpson on behalf of R.A. Murray), it is stated that "At common law the court had no jurisdiction to remove an arbitrator or umpire; but by statute where an arbitrator or umpire has misconducted himself or the proceedings he may be removed by order of the High Court." A footnote refers to sub-section 23(1) of the English Arbitration Act of 1950, which is in *pari materia* to our sub-section 12(1). In our Court of Appeal's decision in S.C.C.A No. 20 of 2006, **Sans Souci Ltd. v. VRL Services Ltd.** delivered 12th December 2008, Harrison P., at paragraph 17, stated that subsection 23(2) of the 1950 English Act is in *pari materia* with sub-section 12(2) of our Act. The expression "misconduct" is of wide import and does not necessarily connote that the arbitrator has been guilty of moral turpitude. It ranges from a fundamental abuse of his position, i.e. "on the one hand, that which is misconduct by any standard, such as being bribed or corrupted, to "mere 'technical' misconduct, such as making a mere mistake as to the scope of the authority conferred by the agreement of reference. That does not mean that every irregularity of procedure amounts to misconduct" –Halsbury's paragraph 622. Our Act does not define misconduct, and it is tolerably clear that it is difficult to define exactly what this term means. However, in the following circumstances, it has been held that misconduct occurs:

> ….
>
> *(4) if there has been irregularity in the proceedings, as for example, where the arbitrator failed to give the parties notice of the time and place of meeting, or where the agreement required the*

evidence to be taken orally and the arbitrator received affidavits, or where the arbitrator refused to hear the evidence of a material witness, or where the examination of witnesses was taken out of the parties' hands, or where the arbitrator failed to have foreign documents translated, or where, the reference being to two or more arbitrators, they did not act together, or where the umpire after hearing evidence from both arbitrators, received further evidence from one without informing the other…,

(5) if the arbitrator or umpire has failed to act fairly towards both parties, as, for example, by hearing one party but refusing to hear the other, or by taking evidence in the absence of one party or both parties, or by failing to give a party the opportunity of considering the other party's evidence, or by using knowledge he has acquired in a different capacity in such a way as to influence his decision or the course of the proceedings, or by making his award without hearing witnesses whom he has promised to hear, or by deciding the case on a point not put to the parties ;

(6) if the arbitrator or umpire refuses to state a special case himself or allow an opportunity of applying to the court for an order directing the statement of a special case;

…. – see paragraph 622 of the Halsbury's and the numerous cases there footnoted.

[20] It has also been held to be misconduct for a party to decide the case against a party without having heard submissions. In the English Court of Appeal's decision in **Modern Engineering (Bristol) Ltd. v. C.Miskin & Son Ltd.** [1981] 1 Lloyd's Reports, 135, cited by Mr. Stimpson on behalf of R.A. Murray, a useful distinction was made between whether an arbitrator had misconducted himself as opposed to the proceedings. The Court was here considering sub-section 23(1) of the English Arbitration Act of 1950. At page 138, Dunn L.J. declared that "Arbitration is now

one of the most important spheres of activity in the system of administering justice in this Land." I daresay arbitration is also an important process in the administration of justice in Jamaica. In **Modern Engineering**, it was held as follows (as set out in the Headnote):

> *Held, by C.A. (Lord Denning M.R. and Dunn L.J.), that (1) there was no suggestion that the arbitrator had misconducted himself but it was plain that he misconducted the proceedings in that he had decided a case against a party without having heard the submissions in the case and that was clearly a breach of natural justice;…*
>
> *(2) the question here was whether his conduct was such as to destroy the confidence of the parties or either of them in his ability to come to a fair and just conclusion and here it appeared that if the arbitrator was allowed to continue with the arbitration one at least of the parties would have no confidence in him and would feel that the issue had been prejudged against him…*
>
> *(3) although the removal of the arbitrator would give rise to delay, extra expenses and the like it was far more important that this Court should see that arbitrations were properly conducted so that the arbitrator could have the confidence of those who appeared before him and here since the conduct of the arbitrator was such as to lose that confidence he ought to be removed…*

[21] It is misconduct for the arbitrator to introduce into the proceedings evidence other than that adduced by the parties-**Owen v. Nichol** [1948] 1 All E.R. 707, 709 per Tucker J., cited by Mr. Graham.

[22] An arbitrator who is indebted to one party to the arbitration has been restrained from acting and removed as an arbitrator on the basis that he would be unsuitable to continue in that role because he would not in all probability exercise his duties with impartiality –**Beddow v. Beddow** (1878) 9 Ch D. 89, cited by Mr. Stimpson.

[23] If an arbitrator assumes an excess of authority, as for example where he failed to take into account the illegality of the contract into which the parties had entered, then he may be held to have misconducted himself -**Taylor v. Barnett** [1953] 1 All E,R, 843 at 844 and 846 per Singleton L.J., cited by Mr. Graham. In this case the English Court of Appeal decided that the proper course was for the award to be set aside under section 23(2) of the English Arbitration Act of 1950, and not to remit it to the arbitrator for re-consideration under section 22(1). It was stated by Singleton L.J. at page 846 that a layman or a lawyer looking at the contract with the relevant statutory instrument must see that it was illegal.

[24] Mr. Graham cited the decision of Mustill J. (as he then was), sitting in the English Queen's Bench Division (Commercial Court), **Bremer Handelsgesellschaft M.B.H. v. ets. Soules et Cie and Anthony G. Scott** [1985] 1 Lloyd's Reports, 161. At 164, under a sub- heading in the law report, "Removal for misconduct: principles", his Lordship stated:

There are three material situations in which the High Court has power to remove an arbitrator for 'misconduct', under section 23 of the Arbitration Act 1950.

(1) Where it is proved that the arbitrator suffers from what may be called 'actual bias'. In this situation, the complaining party satisfies the court that the arbitrator is predisposed to favour one party, or, conversely, to act unfavourably towards him, for reasons peculiar to that party, or to a group of which he is a member. Proof of actual bias entails proof that the arbitrator is in fact incapable of approaching the issues with the impartiality which his office demands.

(2) Where the relationship between the arbitrator and the parties, or between the arbitrator and the subject-matter of the dispute, is such as to create an evident risk that the arbitrator has been, or will in the future be, incapable of acting impartially. To establish a case of misconduct in this category, proof of actual bias is unnecessary. The misconduct consists of assuming or remaining in office in

circumstances where there is a manifest risk of impartiality. This may be called a case of 'imputed bias'.

(3) Where the conduct of the arbitrator is such as to show that, questions of partiality aside, he is, through lack of talent, experience or diligence, incapable of conducting the reference in a manner which the parties are entitled to expect.

BIAS- A FORM OF MISCONDUCT

[25] It would appear that an arbitrator may be removed where there is a real danger of bias in the sense that he might unfairly regard, or have unfairly regarded, with favour or disfavour the case of a party to the issue under consideration by him:– see **R v. Gough** [1993] 1 W.L.R. 904E, and our Court of Appeal's decision in **Henriques v. Tyndall** [2012] J.M.C.A. Civ. 18, cited by Mr. Stimpson. As stated in footnote 46, in paragraph 7-067, page 355 of the well-known work of **Russell on Arbitration**, 21st Edition, which work is referred to in a number of the authorities cited by Mr. Graham, "This case [**R v.Gough**] did not involve an arbitral tribunal but the judge reviewed all the previous authorities including those relating to arbitrators." In **R. v. Gough**, the House of Lords laid down guidance in relation to cases where apparent bias is alleged. It was held that the same test was to be applied whether the case is concerned with justices or members of other inferior tribunals, or with jurors or with arbitrators. At page 904 B-F, Lord Goff of Chieveley expounded on the appropriate test of a real danger of bias. The learned Law Lord stated, (at letters C-E):

> *Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of*

doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, ***there was a real danger of bias on the part of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour, the case of a party to the issue under consideration by him****…*

(My emphasis)

[26] In my judgment, bias is a form of misconduct so there really is one over-arching ground for the application by R. A. Murray, and that is misconduct. Bias is a specie of breach of natural justice, natural justice itself falling under the head of procedural irregularity. This is also encapsulated in the term "misconduct".

[27] Before moving on to refer to other cases cited by Mr. Graham in relation to misconduct, there is an issue raised by Mr. Stimpson which must be dealt with. A number of the authorities cited by Mr. Graham in relation to his written submissions and supplemental written submissions consist of decisions made after the English Arbitration Act of 1996 ("the 1996 Act") came into force. That Act repealed section 23(1) of the 1950 Act. Mr. Stimpson submitted that these cases were not the appropriate cases for the Court to have regard to since the 1996 Act does not speak of "misconduct", whereas our Act, and the English 1950 Act do. He pointed to certain segments of the judgment in **Groundshire v. VHE Construction** [2001] EWHC 8, one of the cases relied upon on behalf of Mr. Goldson, as supporting his submission that these cases do not represent the law in Jamaica. It was the submission that our Act affords wider grounds for removing an arbitrator than does the 1996 Act and allows the court to take into account all matters in which the arbitrator has been involved.

[28] Mr. Graham, on the other hand, whilst conceding that the wording of the Act and the 1996 English Act are different, submitted that some of the principles discussed in the cases relate not only to the 1996 Act, and would be just as applicable to our Act. He submitted that some of the reasoning evinced in these decisions, and the dicta they contain cannot be ignored.

[29] Section 24 of the 1996 Act replaced sections 13 and 23 of the English Arbitration Act of 1950. Upon application by a party to the arbitral proceedings, the court has power to remove an arbitrator under section 24 of the 1996 Act on any of the four grounds specified in that section. These are (1) Partiality; (2) Absence of required qualifications; (3) Incapacity; and (4) Refusal or Failure to Act:-see paragraphs 7-065-7-075 of the **Russell on Arbitration**. I found paragraph 7-076 of the **Russell** to also be instructive. It is there stated:

> *7-076.* ***Misconduct****. This word does not appear in the Arbitration Act of 1996 but it is appropriate to comment briefly on what was meant by "misconduct" under the earlier legislation. It was nowhere defined in the former legislation, but it covered a wide range of errors on the part of an arbitrator. It ranged from a fundamental abuse of his position to what was often referred to as "technical misconduct", i.e. where the arbitrator made errors but not in a culpable way or so as to impugn his integrity. Where the misconduct was more serious in the sense that the arbitrator's integrity was impugned or the parties lost confidence in him, his removal or the setting aside of his award, rather than remitting the award to him, was considered more appropriate.*
>
> *Misconduct could arise in various circumstances. For example, the arbitrator may have failed to deal with all the issues in the award, or may have made an accidental error in the award, or failed to observe the principles of natural justice. He may also have misconducted himself by acting in excess of his jurisdiction by purporting to decide issues which were not within his terms of reference, or by making an error of law in an*

award, although in the last case any challenge to the award had to be by way of appeal.

Under the Arbitration Act 1996 the grounds for removing an arbitrator are confined to the four grounds specified in section 24.

(Underlining emphasis mine)

[30] In addition, at paragraph 7-065 of the **Russell**, it is stated that "In exceptional cases the court is empowered to remove an arbitrator in the course of the reference upon the application of one or more of the parties to the arbitration. The grounds for such an application are specified in section 24 of the Act, and the court will not exercise the discretion in favour of removal unless convinced that this is the only right course to take " (My emphasis). The footnote which is attached to this last sentence refers to and reads as follows- " *Succula Ltd and Pomona Shipping Co. Ltd v. Harland and Wolff Ltd* [1980] 2 Lloyd's Rep. 381 a decision based on Part 1 of the Arbitration Act 1950, which has been replaced by the Arbitration Act 1996."

[31] Further, at paragraphs 5-060-5-062 of the **Russell** referred to at paragraphs 27-29 of the **Groundshire** decision, the learned author discusses section 33(1) of the 1996 Act, which deals with the duty of the arbitrator to act fairly. The author refers to certain cases in a footnote to paragraph 5-060, and states that "These cases were all decided under the old law but the same principles would be applied to determine whether the tribunal has acted fairly under the 1996 Act."

[32] In **Groundshire**, His Honour Judge Bowsher Q.C., sitting as a Judge of the Queen's Bench Division Technology and Commercial Court, discussed the interrelationship, if any, of certain aspects of the 1996 Act and the 1950 Act and decisions decided under "the old law", (i.e. the 1950 Act). Judge Bowsher makes a number of pertinent observations, at paragraphs 18, 19, 27-32, 34, 38 and 40 (inclusive)

D. Removal of Arbitrator

18. It has been submitted that the test for removal of an arbitrator is the same as the test for remission of an award. I reject that submission.

19. Where an arbitrator has failed properly to conduct the proceedings so that substantial injustice has been or will be caused to the applicant, the court has a choice. The court may remit the award to the same arbitrator or it may remove the arbitrator.

….

27. With regard to section 33 of the 1996 Act, counsel for GS relies on paragraphs 5-060 to 5-062 of Russell on Arbitration, 21st Edition, page 195. I will not read those paragraphs, but they can be taken as read into this judgment.

28. As is indicated in a footnote in Russell, all the authorities cited as propositions for this statement were decided under the old law. It is said by the editors of Russell that the same principles would be applied to determine whether a tribunal has acted fairly under the 1996 Act.

*29. Fairness is fairness, but the **results** of a lack of fairness required by statute may be changed. The 1996 Act intended to change the law. It was not merely a codifying statute. The court may be required in some circumstances to enforce or not to disturb an arbitrator's decision, even when the court disagrees with that decision in law or in fact.*

30. So also under the 1996 Act the court may be required to enforce or decline to disturb an arbitrator's decision even when the court discerns an element of unfairness.

*31. Both sections 68 and 24 of the Act justify action only when **substantial injustice has been or will be caused to the applicant**, not when an injustice **may** be caused to the applicant. It follows that even unfairness does not of itself without more vitiate an arbitral award.*

32. It is more important to look at the decisions that the courts made after the 1996 Act came into force than to consider the earlier decisions.

…..

34…….The Act does not require the court to speculate what would have been the result if the principles of fairness had been applied, but the Act requires that the court is only to interfere on the ground of serious irregularity in the form of unfairness if the court considers, not speculates, that the irregularity or unfairness has caused or will cause substantial injustice to the applicant.

….

38. The policy of the 1996 Act is to make it more difficult to question the decisions of arbitrators, not to make challenges easier.

….

40. In the present context, Parliament plainly meant to refer to some injustice that had some real effect as opposed to a failure to deal with arguments that cause affront or disquiet without substantial effect. The highest requirement that justice should manifestly be seen to be done may require that a judicial decision be overturned because of the manner in which it was reached, without it being demonstrated that the result produced injustice. But that is not the system applied to arbitrations under the 1996 Act.

(My emphasis)

[33] What is the upshot of all of this? In my judgment, it is as follows. We must start from the premise, that whether under our Act, the old English Act of 1950 or the 1996 Act, this type of arbitration takes place as a result of agreement between the parties. The Court's power to set aside derives not from the common law; it is a jurisdiction that is statutorily created. The Court has a discretion whether or not to remove the arbitrator, and it is a discretion that must be exercised justly and judiciously. This statutory jurisdiction is limited by the grounds set out in the Act

and can be compared and contrasted with the court's supervisory jurisdiction over inferior tribunals, the power of judicial review, which is not dependent on statute. The court does not have any general supervisory jurisdiction over arbitrators. Its role in removing an arbitrator is curtailed by our Act. It is common to arbitration agreements, whether under our Act, or under the English 1950 Act or the 1996 Act, that the parties had agreed to arbitrate, and not to litigate. In **Weldon Plant Ltd. v. The Commission for the New Towns** 2000 Building Law Reports 496, referred to in paragraph 45 of **Groundshire**, Judge Lloyd at paragraph 29, stated one of what he considered to be " arbitration('s)…perceived attributes namely that a final decision may be given more quickly than would be the case with other forms of dispute resolution, including litigation." In my judgment, that attribute also exists for arbitration agreements governed by our Act. To my mind, it is for that reason that under the English 1950 Act, it was held in the **Succula** case that the court will not exercise the discretion in favour of removal unless convinced that this is the only right course to adopt. Indeed, it is clear from the discussion by the English Appellate judges in **Modern Engineering** (Lord Denning M.R. and Dunn L.J.) of their regret in having to say that the arbitrator should be removed, and the inevitable consequences of delay and extra expense in removing the arbitrator, that removal of the arbitrator is only to be decided upon if it is the only right course to adopt. It would be the only right course to adopt if in the instant case, as in **Modern Engineering** , the arbitrator Mr. Goldson's conduct of himself or the proceedings, was such as to destroy the confidence of the parties, or either of them (in this case R. A. Murray), in his ability to come to a fair and just conclusion.

[34] In my judgment, Mr. Stimpson is correct that the English 1996 Act has narrowed the bases upon which an arbitrator can be removed. However, I think that Mr. Graham is correct that some of the discussion in the post 1996 Act cases and the principles underlying the 1996 Act do apply to our Act. Some of the grounds held to be misconduct under the English 1950 Act, and which also would constitute misconduct under our Act, would still fall within the four sole grounds set out in the 1996 Act as being grounds for removal, even though the word "misconduct"

has not been used. However, in relation to our Act, unlike the 1996 Act, the court does not have to go on to look at the issue of whether, and does not need to be satisfied that "substantial injustice has been or will be caused to the applicant". In other words, as stated by Judge Bowsher in **Groundshire**, fairness is fairness, but the results of a lack of fairness required by the statutes are different. Our Act does not require or involve the Court in an examination of whether the ground made out has caused or will cause substantial injustice to the applicant. Thus, in my judgment, under our Act, the highest requirement that justice should be seen to be done, referred to in paragraph 40 of **Groundshire**, which I understand to mean the age old adage that "Justice must not only be done, but must manifestly be seen to be done", applies under our Act, but not the 1996 Act. Thus, in my judgment, whilst removing an arbitrator should only be resorted to if the Court is satisfied that this is the only right course, under our Act, our judges will arrive at the decision whether it is the only right course without examining the "results" of the unfairness, and without examining whether the "wrongdoing" has resulted in or will result in substantial injustice to the applicant.

RESOLUTION OF THE ISSUES

[35] In the instant case, the sole ground stated is that "the Defendant has misconducted himself in his capacity as Arbitrator". This to my mind means that R.A. Murray is alleging that Mr. Goldson has misconducted himself, as opposed to misconducting the Arbitration proceedings relating to the construction of the Bog Walk Bridge in Saint Catherine. In my judgment, Mr. Graham's submission is correct that the grounds for the application relied upon, and having to do with the alleged conduct of Mr. Goldson in relation to the Adjudications or the related court proceedings, can in no way constitute misconduct by Mr. Goldson in his capacity as Arbitrator in respect of the Arbitration proceedings. What Mr. Goldson did or did not do in the Adjudication proceedings cannot in my estimation constitute, whether alone, or in conjunction with other acts, conduct by Mr. Goldson in the Arbitration proceedings. Indeed, the two lawsuits brought by CCL seeking the extension of time were struck out on the ground that the disputes

were referred to Adjudication and not to Arbitration so that section 10 of our Act allowing for applications for extension of time for handing down an award were held to be inapplicable. It is therefore quite a leap, indeed even an inconsistency, for Mr. Goldson's conduct in these Adjudication proceedings already held to be of a separate and distinct nature, to be now classified as conduct as an Arbitrator in the Bog Walk Arbitration. However, that is a separate issue from whether, matters and conduct arising out of those Adjudication proceedings could provide a factual matrix demonstrating a real danger of bias, constituting apparent bias. In my view, the matters alleged by R. A. Murray and arising out of the Adjudications which I have itemized at sub-paragraphs 13 (a)-(d) inclusive above, cannot constitute conduct by Mr. Goldson capable of being construed as misconduct by him in his capacity as arbitrator. In my judgment, they also do not constitute circumstances, whether separately or taken together, upon which I can conclude that there is a real danger of bias.

[36] That leaves the issue of Mr. Goldson's "decision to resume the arbitration", discussed at paragraph 13(e) above, and the allegation of bias. I will firstly examine this matter of the evidence to do with resumption of the Arbitration. What precisely is it that transpired? It is necessary to set out some of the correspondence in some detail, in order to appreciate the chronology and relevant circumstances. By a document headed "Request To Proceed" dated 14th March 2012, CCL referred to R. A. Murray's challenge filed 25th November 2011, to the fact that Mr. Goldson was by the Arbitration Agreement appointed sole Arbitrator, and also referred to paragraph 8 of the Agreement. The Request continues as follows:

> *<u>REQUEST TO ARBITRATOR TO PROCEED</u>*
>
> ….
>
> *AND*
>
> *WHEREAS the Applicant's Claim against the Respondent also includes claims for costs and expense incurred for work done AND*

for loss and expense incurred as a consequence of the issue of variation orders thereby requiring the Applicant to incur additional overhead and other costs.

TAKE NOTICE that the Applicant hereby requests that the Arbitrator within FOURTEEN DAYS of the date hereof resume the Reference to hear the Parties in respect of the other matters in dispute namely the claims for loss and expense claimed by the Claimant and which are not the subject of the Respondent's application abovementioned and make a separate ruling in respect thereof.

DATED THE 14TH MARCH 2012

[37] There then follow a number of emails between the parties and Mrs. Wong on behalf of Mr. Goldson. On the 26th of March 2012, Mr. Goldson addressed to both R. A. Murray and CCL a document captioned in the Matter of the Arbitration, and in the Matter of the Arbitration Act, and " Re: Request for Arbitration to Resume By the 28th day of March 2012" . Mr. Goldson wrote:

Further to email from Mrs. Janet Wong on the 16th March, 2012 in respect of subject matter, please advise me of the earliest convenient date to you both to meet to set dates for resumption of the referenced, as requested by the Claimant as soon as possible.

[38] By letter dated March 29 2012, Mr. Jerome Spencer, Partner in the firm of Patterson Mair Hamilton, and Attorney-at-Law for R. A. Murray, responded to Mr. Goldson stating, amongst other matters:

……

Before any discussion can be had regarding the captioned matter, our client is demanding the refund of the sums paid for the ineffective adjudications for Johnson's and Angel's Rivers ($2,254,019.08) together with legal fees thrown away on account of

the said adjudications $4,207,500.00) and interest on the sums paid ($543,960.00); these sums total $7,005,479.18.

We look forward to receiving your cheque in settlement of the aforementioned sums.

[39] Mr. John Ross, Attorney-at-Law for CCL then writes to Mr. Goldson expressing his views with regard to Mr. Spencer's letter dated March 29 2012 addressed to Mr. Goldson, and which had been copied to Mr. Ross. Mr. Ross, in his letter to Mr. Goldson dated April 2, 2012, states:

We do not share the writer's reason for not agreeing to meet as we see no connection between the Bog Walk matter on the one hand and Angels River and the Johnson's River matters on the other hand. We think that our view is well supported by provisions in the Arbitration Agreement between the parties dated August 18, 2010.

The Claimant is therefore requesting you to fix a date for a meeting to settle the date or dates for the continuation of the hearing and determination of the outstanding issue in this matter namely of the matter indicated in the Claimant's request dated 14th March 2012.

The Claimant parties will be available on any of the following dates- April 10, 11, 12 or 13 2012.

[40] The next relevant development sees Mr. Goldson writing to Mr. Spencer, with a copy to Mr. Ross by letter dated April 4 2012, responding as follows:

I refer to your letter dated March 29, 2012.

Can you explain to me the connection between the claim that your client is making for payment and my obligation under the Arbitration Agreement?

In the meantime the Claimant parties have given the following dates for the continuation of the hearings and determination of the outstanding issues.

April 10, 11, 12, 13/ 2012

Please advise which date will be convenient for you to commence these matters.

[41] Mr. Spencer then writes in response to Mr. Goldson by letter dated April 11 2012, copied to Mr. Ross, describing certain actions of Mr. Goldson as having "broken the proverbial camel's back" and inviting Mr. Goldson to resign as arbitrator, failing which proceedings were to be commenced for his removal. The letter states:

…..

Our client has no confidence in you continuing to serve as the Arbitrator in the Bog Walk Arbitration. The stance taken by you in the recent litigation commenced by Crossings Construction Limited ….and your refusal to even as much as address the refund of the sums paid to you and the legal fees thrown away for the aborted adjudications for Johnson's and Angel's Rivers have broken the proverbial camel's back and affirmed our client's reluctance to see through this matter with you presiding.

We are therefore inviting you to resign as the arbitrator in the Bog Walk Arbitration with immediate effect. If we do not hear from you by April 17, 2012, our instructions are to commence proceedings for your removal.

[42] In my judgment, the question of the stance taken by Mr. Goldson in the Adjudication litigation as I have previously said cannot in my view constitute evidence of misconduct by Mr. Goldson as Arbitrator in the Bog Walk Arbitration Proceedings. Further, without more, the fact that Mr. Goldson has not addressed the question of the claim R. A. Murray is making for wasted costs in the

Adjudication matters is not capable of constituting misconduct in the arbitration proceedings.

[43] Further, in my judgment, Mr. Goldson's decision to resume the Arbitration at the request of CCL cannot be faulted. I note that in his Affidavit filed June 28 2012, Mr. Goldson has not seized the opportunity to explain or give evidence as to why he sought to resume the Arbitration. However, I think that the documentary evidence in this case does bear out Mr. Graham's very well-thought out and logical submissions. These really stem from the fact that as Arbitrator, Mr. Goldson cannot be said to be guilty of misconduct if he is acting in compliance with the Arbitration Agreement. The Arbitration Agreement expressly required expedition. Paragraph 8 stated that the Arbitrator may from time to time make his award upon any question in dispute and shall not by so doing be deemed to have determined his authority until all the matters referred have been dispose of. Further, that any separate award shall be observed and performed without waiting for another award. One party had formally required him to proceed with the Arbitration within 14 days. Importantly, in this case there was no operative stay of the arbitration proceedings. Indeed, I note that separate and apart from raising the question of the wasted expenses and refund of fees paid to Mr. Goldson in respect of the Adjudication proceedings, Mr. Spencer on behalf of R. A. Murray had not initially raised any other objection to the resumption. For example, no mention whatsoever was made in the correspondence or objections on the basis that the challenge to Mr. Goldson's decision about his power to award damages or compensation was still pending in Court. In my judgment, this decision to resume, or at any rate to seek dates for the resumption does not fall comfortably into any of the categories or circumstances considered misconduct in the decided cases.

[44] However, the real and crucial question is whether an allegation of apparent bias can succeed on the basis of the totality of the evidence. The test of whether there is a real danger of bias is a fulfillment of the principle that justice must manifestly be seen to be done-see page 902 C-D of **R. v. Gough** and therefore accords

with the principles underlying section 12 of our Act. Having regard to what occurred in the Adjudication proceedings, R. A. Murray expressed the view that Mr. Goldson is indebted to them in terms of liability for refund of fees paid to him as well as for legal fees thrown away in the Adjudication Hearings. The claim for indebtedness is in the not insubstantial sum of over $ 7 Million dollars. I agree with Mr. Spencer's statement in paragraph 8 of his Affidavit filed on July 13 2012, that what Mr. Goldson stated in his Affidavit at paragraph 14d, represents a misunderstanding of what costs R. A. Murray was talking about. It was seeking for Mr. Goldson to address the question of wasted costs and refund of fees and was not referring to Mr. Goldson's liability to pay costs in the two lawsuits which were struck out. I also agree that the question of whether R. A. Murray was appealing about the order for costs made when the suits were struck out is irrelevant to the point under consideration.

[45] Mr. Goldson has not, either in his Affidavit, or in his letter to Mr. Spencer dated April 4 2012, said anything about whether he considers himself liable to make payments as claimed by R. A. Murray. He has neither admitted nor denied liability. He has, however, at paragraph 15 of his Affidavit stated plainly that R. A. Murray has no basis on which to assert that he has not been impartial in his role as arbitrator and adjudicator. See also paragraph 16. The question that arises however is,having regard to the relevant circumstances, as revealed by the available evidence, is there a real danger, meaning a real possibility, as opposed to a real probability, of bias on the part of Mr. Goldson?- Bias, in the sense that he might unfairly regard with favour or disfavour, the case of R. A. Murray or CCL in respect of the Arbitration?

[46] In my judgment it cannot be said that Mr. Goldson has acted impartially or unfairly towards R. A. Murray. Also, unlike in the **Modern Engineering** case, I do not think that it can justifiably be said that Mr. Goldson has done anything or conducted himself in such a way as to destroy the confidence of R. A. Murray that he can come to a fair and just conclusion of the proceedings. It is also clear

that there is no allegation, and nor could there properly be any allegation of actual bias.

[47] This case is in my view not an easy one. It is very close to the borderline. I appreciate that launching an attack to remove an arbitrator is a course that should not lightly be embarked upon by any party. Further, allegations of bias should not be frivolously or spuriously made. I also appreciate that there may be grave consequences, (though not necessarily rightly so), to Mr. Goldson's personal reputation if he is to be ordered removed as arbitrator by reason of misconduct (see the comments of Mustill J. in his conclusion at page 172 of **Bremer** for similar sentiments). In addition, in **Moran v. Lloyd**, Sir John Donaldson M.R., at page 203 g-j quoting from paragraph 67 of the 1978 Report on Arbitration (Cmmd 7284) of the Commercial Court Committee, remarked that the Committee drew attention to the fact that the term "misconduct" can give a wholly misleading impression of the complaint being made against an arbitrator or an umpire. It said:

"Misconduct"

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

[48] I wish to associate myself with those remarks.

[49] In my view, the matters complained about in the Adjudication proceedings such as Mr. Goldson's failure to provide his decisions on time, and the nature of his Affidavit evidence in those court proceedings, cannot found a basis for a claim of apparent bias. However, the issue of claimed or possible outstanding financial liability of Mr. Goldson to R. A. Murray poses more serious considerations. In my judgment, having regard to all of the circumstances, and having weighed all considerations carefully, I have come to the decision with heavy regret that there is a real danger of bias on the part of Mr. Goldson which signals the possibility, not at all probability, of him dealing with the Arbitration unfairly to R. A. Murray. Unfairly in this context means that there is a possibility that because R. A. Murray is claiming that he owes it money and refund of fees in respect of futile Adjudications (for which R. A. Murray lay the blame at his feet), the reasonable man would think that there is a possibility that Mr. Goldson would unfairly regard with unfavour the case of R. A. Murray in the Arbitration proceedings, or conversely unfairly regard favourably the case of CCL. This is the applicable test because it is the court's way, in the arena of apparent bias, of satisfying, the ultimate requirements and cardinal test of justice, which is that justice must manifestly be seen to be done. I can see how R. A. Murray would in the circumstances suffer a considerable degree of disquiet. However, I would have without the question of indebtedness or allegations of indebtedness, said that what was here was not sufficient to cross the required threshold. It is solely this issue of the Arbitration proceeding with Mr. Goldson presiding as Arbitrator against a possible backdrop of allegation and counter-allegation between R. A. Murray and Mr. Goldson in relation to indebtedness that has prompted my finding and left me with a feeling of uneasiness. I again wish to emphasize that this has no implications of, nor indeed any taint, of any moral turpitude or corruptness or breach of business morality on the part of Mr. Goldson. At the end of the day, it seems to me that R. A. Murray must succeed in their application to have Mr. Goldson removed on the ground of misconduct only because justice must manifestly be seen to be done. Sometimes the concept of apparent bias may

even protect the party who can be unconsciously afflicted with this condition. As stated by Devlin L.J. in **R. v. Sussex Justices, Ex parte McCarthy** [1924] 1 K.B 256, referred to at page 899 G-H of **Rv. Gough**, "Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so."

[50] I should add that Mr. Graham had addressed a number of his submissions to the fact that Mr. Goldson's decision of 14 October 2011 did not favour R. A. Murray but that this would not support a case for apparent bias. However, I did not understand that to be R. A. Murray's case and Mr. Stimpson did not argue the case in that way. It is in those circumstances that I have not addressed the authorities cited by Mr. Graham on those points.

[51] I have now heard submission from the parties in relation to the issue of costs. Mr. Spencer, who appeared on the date for delivery of judgment, submitted that the Claimant should be awarded costs in accordance with the general rule that the successful party should be awarded costs to be paid by the unsuccessful party.

[52] I however agreed with Mr. Graham that this was an appropriate case for each party to bear their own costs. There were a number of reasons. Firstly, it was only on the ground of apparent bias that I have decided that Mr. Goldson should be removed as Arbitrator. All the other types of misconduct alleged by R.A.Murray, I have rejected. Also, as I have pointed out, there can be instances of unconscious bias. Mr. Goldson was appointed on the basis of an Agreement between the parties. He was asked by one party to that Agreement, CCL to proceed with the Arbitration. He was asked by the other party, R.A.Murray to resign or in other words, remove himself. Mr. Goldson would have been in a very unenviable and difficult position. As Mr. Graham put it, only an adjudication such as that which the Court has now afforded could have allowed Mr. Goldson to exit from the Arbitration proceedings with the least potential repercussions. In other words, having regard to all of the circumstances, it does not seem unreasonable for Mr. Goldson to have awaited the Court's ruling in the matter. As Mr. Spencer stated,

Mr. Goldson could have approached the Court for directions. However, R.A.Murray filed this lawsuit very shortly after asking Mr. Goldson to resign. The narrow basis of my decision that Mr. Goldson should be removed rests on the principle that justice must manifestly be seen to be done. In those circumstances, it would not be a misdescription to say that the Court has in effect given directions to Mr. Goldson and to the parties. These are my reasons for making the costs order below.

[53] It is ordered as follows:

a. The Defendant Brian Goldson, be removed as the single Arbitrator appointed by the Claimant and Crossings Construction Limited pursuant to an Arbitration Agreement executed on August 18, 2010.

b. Each party should bear their own costs.

c. Permission to the parties to apply.

d. Permission is granted to the Claimant to appeal in respect of the order for costs.