IN THE HIGH COURT OF BELIZE, A.D. 2023

Claim No. 525 of 2021

BETWEEN

CEDRIC FLOWERS	**Claimant**

AND

REGISTRAR OF CREDIT UNIONS	**1st Defendant**
CENTRAL BANK OF BELIZE	**2nd Defendant**

Claim No. 719 of 2021

BETWEEN

CENTRAL BANK OF BELIZE	**1st Claimant**
REGISTRAR OF CREDIT UNIONS	**2nd Claimant**

AND

CEDRIC FLOWERS	**Defendant**

BEFORE The Honourable Madam Justice Geneviève Chabot

Date of Hearing: October 6th, 2022

Appearances:

Naima Barrow, Counsel for Cedric Flowers

Yohhahnseh Cave, Counsel for the Central Bank of Belize and the Registrar of Credit Unions

JUDGMENT

Introduction

1. The Claimant in Claim No. 525 of 2021 and Defendant in Claim No. 719 of 2021 is Cedric Flowers ("Mr. Flowers"). The Defendants in Claim No. 525 of 2021 and Claimants in Claim No. 719 of 2021 are the Central Bank of Belize and the Registrar of Credit Unions (together, the "Institutions"). Mr. Flowers and the Institutions do not agree on much, but they are of the same mind when it comes to an Award made on June 4th, 2021 and published on June 11th, 2021 (the "Award") by Melissa Balderamos Mahler (the "Arbitrator"): it should be set aside or remitted for reconsideration.

2. Mr. Flowers agreed to provide liquidation services to the Institutions. Four credit unions were to be liquidated. The Institutions agreed to remunerate Mr. Flowers. The terms of Mr. Flowers' remuneration for the services provided were not clearly set out in any agreement. The Institutions did not accept Mr. Flowers' invoice. The parties went to arbitration.

3. In Claim No. 525 of 2021, Mr. Flowers claims that the Arbitrator erred in finding that the parties had agreed to remunerate Mr. Flowers for the liquidation of the Mount Carmel Credit Union on a fixed fee basis. Mr. Flowers also contends that the Arbitrator, having decided that the costs of the arbitration would follow the event, erred in holding that each party should bear its own costs. Mr. Flowers claims to have succeeded in recovering 60% of the amount he claimed from the Institutions, and therefore was the successful party in the arbitration.

4. In Claim No. 719 of 2021, the Institutions submit that the Arbitrator erred in applying the legal principles of burden of proof and *quantum meruit*, resulting in an award for the liquidation of the three other credit unions that was not reasonable.

5. Both claims are dismissed. The parties relied on a private dispute resolution mechanism. This Court does not sit on appeal or review of the Award, and its role is limited to determining whether the Arbitrator made errors on the face of the Award or misconducted herself to the point where the Award "smacks of injustice or unfairness". It does not.

6. In Claim No. 525 of 2021, Mr. Flowers' main contention is that the Arbitrator misconstrued two agreements made by the parties. Questions relating to an arbitrator's construction of a legal instrument are not a ground for remitting or setting aside an arbitral award. As to the issue of costs, the Arbitrator properly exercised her discretion in finding that, on the whole, neither party was successful. In Claim No. 719 of 2021, this Court finds no error in the Arbitrator's application of the principles of burden of proof and *quantum meruit*.

Background[1]

7. Mr. Flowers is a Certified Public Accountant. The Central Bank is a body corporate established under the *Central Bank Act*.[2] The Registrar is the person appointed by the Governor General under the *Credit Unions Act*[3] to administer the provisions of the *Credit Unions Act*. Under the *Credit Unions Act* and amendments, the Governor of the Central Bank is designated *ex officio* as the Registrar of Credit Unions.

8. Mr. Flowers was retained by the Central Bank to wind up and liquidate four credit unions, namely:

    a. Mount Carmel Credit Union ("MCCU");

    b. Police Credit Union ("PCU");

    c. Civil Service Credit Union ("CSCU"); and

    d. Citrus Growers and Workers Credit Union ("CGWCU")

9. On December 16th, 2016, Mr. Flowers met with Mrs. Diane Gongora, Manager of the Supervision Department of the Central Bank, to discuss Mr. Flowers' engagement in respect of the liquidation of MCCU. On January 3rd, 2017, Mr. Flowers wrote to the Registrar of Credit Unions indicating his willingness to undertake the work. In that letter, Mr. Flowers proposed an hourly rate of $325, exclusive of GST, for the work to be done. The letter also states as follows:

> *Our fees for assignments of this nature are normally based on a percentage of receipts. However, in these circumstances, where there is uncertainty about collections, and where the duration of the exercise is unpredictable, we believe that an hourly rate would be a reasonable basis for our charges.*
>
> *We are mindful of open-ended arrangements and would wish to work with your office on an agreed-upon estimated time budget for our hourly fee charges. All billings would be itemized.*[4]

10. Mr. Flowers wrote a second letter to the Registrar on January 12th, 2017, stating as follows:

> *Instead of the proposed hourly fee outlined in our letter, I now revise to propose for a fixed fee to undertake the following:*

[1] The information in this section is largely derived from the Arbitrator's findings of facts in the Award.
[2] Chapter 262 of the Substantive Laws of Belize.
[3] Chapter 314 of the Substantive Laws of Belize.
[4] Award at para. 44.

[…]

c. Prepare a brief written report with an indication of a proposed timetable for completion, identify anticipated costs and including our proposed fixed fee for completion.[5]

11. The parties thereafter entered into two written agreements respectively dated April 24th, 2017 and May 2nd, 2017.

12. Under the April 24th, 2017 Agreement (the "Evaluation Agreement"), Mr. Flowers undertook to conduct an in-depth evaluation of the status of MCCU. The preamble to the Evaluation Agreement states as follows:

> *The Registrar wishes to retain the Accountant pursuant to the authority conferred on the Registrar by the Credit Unions Act, Cap 314 to conduct an in-depth evaluation of the status of the Mount Carmel Credit Union (MCCU) with a view to establish a reasonable estimate of time and resources which will be necessary to conclude the intended liquidation process or any varied services as the parties may agree to from time to time.*[6]

13. Clause 1 of the Evaluation Agreement states that the intent of the evaluation is for Mr. Flowers to provide the Registrar with "*an initial assessment of time frame and costs associated with the intended liquidation of Mount Carmel Credit Union*", and that Mr. Flowers would produce a report with an "*indication of a proposed timetable for completion and identifying anticipated costs that will be required to carry out the liquidation of MCCU*".[7]

14. On May 2nd, 2017, Mr. Flowers was formally appointed as the liquidator for the four above-noted credit unions. An Instrument of Appointment was executed by the parties and is entitled "Appointment of Liquidator". Under an Agreement dated May 2nd, 2017 (the "May Agreement"), Mr. Flowers agreed to provide the following services:

> *The Liquidator shall provide services necessary for the liquidation of Police Credit Union Limited, Mount Carmel Credit Union Limited, Civil Service Credit Union Limited and Citrus Growers and Workers Credit Union Limited in accordance with the Credit Unions Act.*[8]

[5] Award at para. 45.
[6] Award at para. 47.
[7] Award at para. 48.
[8] Mr. Flowers's Submissions at para. 12.

15. Clause 8.6 of the May Agreement provides that the Agreement "*supersedes any prior agreement between the parties whether written or oral and any such prior agreements are cancelled as at the Commencement Date but without prejudice to any rights which have already accrued to either of the parties*".[9]

16. Neither the Instrument of Appointment, nor the May Agreement provide for the compensation or remuneration of Mr. Flowers, or the basis for such remuneration.

17. On June 2nd, 2017, Mr. Flowers provided a report to the Registrar on MCCU and estimated a timeframe of three months for the completion of the liquidation. Mr. Flowers quoted $19,500.00 for his services as "*costs to complete the liquidation process*". The report adds that the amount is a "*flat amount […] which covers all his fees, costs, travel, etc, exclusive of GST. Fees payable as agreed – initial payment upon presentation of this brief report and plan; balance at the conclusion of the liquidation*".[10]

18. Mr. Flowers received an initial sum of $4,900.00 plus GST for the liquidation of MCCU. He also deducted the sum of $17,037.50 from the proceeds of the liquidation of MCCU and applied this sum to his fees. The parties were unable to agree on the remaining sums to be paid to Mr. Flowers.

19. Pursuant to an Arbitration Clause in the May Agreement, the parties appointed the Arbitrator to determine the disputes and differences that had arisen between them. The Arbitrator issued the Award on June 4th, 2021. The Award was published on June 11th, 2021.

The Claims

20. Mr. Flowers filed Claim No. 525 of 2021 on August 6th, 2021. The Central Bank and the Registrar filed Claim No. 719 of 2021 on November 16th, 2021. As both claims seek the partial remission of the Award, both Claims were consolidated and heard together by this Court on October 6th, 2022.

21. Mr. Flowers seeks the following relief in Claim No. 525 of 2021:

    1. An Order that the portions of the Award made in the arbitration between the parties to the arbitration fixing the amount of compensation to be paid to the Claimant in respect of the liquidation of the Mount Carmel Credit Union and ordering that the party bears its own costs be remitted to the Arbitrator for reconsideration on the

[9] Award at para. 50.
[10] Award at paras. 54-55.

ground that the said portions of the Award are on their face erroneous in matter of law in that:

(a) The Arbitrator in awarding a *quantum meruit* for the liquidation of the Mount Carmel Credit Union failed to give any, or any sufficient weight, to the accepted evidence of the Claimant that:

(i) the proposed fixed fee of $19,500.00 for the complete liquidation of Mount Carmel Credit Union contemplated that the liquidation would take only three months to complete; and

(ii) the liquidation of Mount Carmel Credit Union took well in excess of three months because the liquidator was required by the Defendants to take steps to pursue outstanding receivables well beyond what was originally contemplated;

(b) The Arbitrator failed to award compensation or have any regard to overhead costs including the costs of administrative assistance provided by staff of the Claimant in the expanded scope of the liquidation of the Mount Carmel Credit Union;

(c) The Arbitrator failed to take into account or to consider or sufficiently consider the impact of the provisions of the written agreement between the parties appointing the Liquidator which was executed subsequent to the request for a fixed fee for the liquidation of the Mount Carmel Credit Union and which expressly provided for a variable scope of work and left the remuneration payable for the liquidation open-ended to accommodate a variable scope of work;

(d) Having directed that the costs of the arbitration shall be borne by the unsuccessful party, the Arbitrator erred in holding that neither party was successful and failed to award any costs to the Claimant who in fact largely succeeded on his claim.

2. An Order that the costs of this arbitration claim be paid by the Defendants.

22. The Central Bank and the Registrar seek the following relief in Claim No. 719 of 2021:

1. An Order setting aside those part of the Award which held and ordered as follows:

(a) The Claimant is entitled to be paid the sum of $3,250.00 plus GST for the liquidation of PCU;

(b) The Claimant is entitled to be paid the sum of $9,425.00 plus GST for the liquidation of CGWCU;

(c) The Claimant is entitled to be paid the sum of $195,000.00 plus GST for the liquidation of the CSCU.

2. Alternatively, to remit the said portions of the Award to the Arbitrator for reconsideration.

3. Costs.

4. Such further relief or other relief as this Court deems just.

The Law

23. Sections 11 and 12 of the *Arbitration Act*[11] empower this Court to remit or set aside an arbitration award in certain circumstances. Section 11 is silent as to the circumstances which justify remitting an award to the arbitrator:

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

24. Section 12 of the *Arbitration Act* provides that this Court may set aside an award where an arbitrator has engaged in misconduct. What constitutes "misconduct" in the context of the *Arbitration Act* is not defined:

> 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.

25. Sections 11 and 12 of the *Arbitration Act* were interpreted by the Caribbean Court of Justice ("CCJ") in *Belize Natural Energy Ltd v Maranco Ltd*.[12] In *Maranco*, the CCJ identified four "traditional" grounds entitling a court to order the remittal of an arbitration award. These four grounds are: (1) where the award is bad on its face; (2) where there has

[11] Chapter 125, Rev. Ed. 2020.
[12] CCJ Appeal BZCV2014/004 ("*Maranco*").

been misconduct on the part of the arbitrator; (3) where there has been an admitted mistake and the arbitrator has asked that the matter be remitted; and (4) where additional evidence has been discovered after the making of the award.[13]

26. As noted by the CCJ in *Maranco*, the grounds upon which a court may order the remittal of an arbitration award are not closed. In *King v Thomas McKenna Ltd.*,[14] the court held that other grounds may be considered, such as when an issue has not been fully considered or adjudicated upon due to a mishap or misunderstanding.

27. The instant Claims are based on two grounds, namely that the Award is bad on its face, and that the Arbitrator misconducted herself.

28. An award is "bad on its face" if an error of law can be ascertained from the face of the award. Relying on the Privy Council's decision in *Champsey Bhara & Co. v Jivray Balloo Spinning & Weaving Co. Ltd.*,[15] the CCJ in *Maranco* expanded on this ground, holding that:

> Such an error of law means that one can find in the award, or a document incorporated thereto, some legal proposition which is the basis of the award and which one can say is erroneous. The erroneous application of a legal proposition means that the arbitrator would have misdirected himself and, as pointed out earlier, misdirection can amount to technical misconduct".[16]

29. With respect to the ground of "misconduct", the CCJ in *Maranco* explained that the term is used in its legal sense to denote irregularities in the arbitration process which are so substantial that they "smack of injustice or unfairness":

> The power to set aside, as legislated in Section 12(2), is based on the misconduct of the arbitrator or umpire or the improper procurement of the award. As with remittal "misconduct" here includes both moral shortcomings as well as deficiency in the technical application of the rules. Thus an arbitrator may have so misdirected himself as to the law or his legal duty that his award ought not to stand. Misconduct must be clearly established since setting aside an award is obviously a drastic remedy which unravels and unwinds the affected arbitral award, so resulting in the wastage of time and costs. Not every technical error amounts to misconduct; something substantial is required so that the award smacks of injustice. In deciding whether there has been misconduct the court does not act as an appellate court reviewing the decision of a lower court. Nor are the general standards of judicial review applicable *ex facie* since the discretion of the

[13] See also Halbury's Laws of England, 3rd Ed. Vol. 2 at para. 121.
[14] [1991] 2 QB 480 at 488.
[15] [1923] AC 480 ("*Champsey Bhara*").
[16] *Maranco, supra* at para. 29.

> arbitral tribunal should not be fettered in the same manner as that of a judge. We consider that there is force in the suggestion of Judge Thornton in *Fence Gate Ltd v NEL Construction Ltd* that, in the present context, the criteria for the exercise of the judicial discretion are somewhat similar to the *Wednesbury* principles in that "the overall discretionary exercise must not be perverse nor one that a reasonable arbitration tribunal properly directing itself could not have reached" [emphasis added].[17]

30. Thus, to establish misconduct on the part of an arbitrator, there must be more than a mere error of law or fact.[18] In *Galway City Council v Samuel Kingston Construction Ltd & anor*,[19] the Supreme Court of Ireland cited with approval an excerpt from the High Court's decision appealed from, in which the High Court judge offered, based on the case law, the following examples of actions amounting to misconduct: "refusing to hear evidence on a material issue, adopting procedures placing a party or parties at a clear disadvantage, acting with clear favouritism towards one party, deciding a case on a point not put to the parties or failure to resolve an issue in the proceedings".[20]

Analysis

Claim No. 525 of 2021

Mr. Flowers' Submissions

31. Mr. Flowers challenges two portions of the Award: the Arbitrator's determination of his remuneration for the liquidation of MCCU, and the Arbitrator's determination as to the costs of the arbitration. Mr. Flowers submits that both portions of the Award are erroneous in law on the face of the Award.

32. With respect to the portion of the Award related to his remuneration for the liquidation of MCCU, Mr. Flowers submits that the Arbitrator failed to give any, or any sufficient weight, to Mr. Flowers' uncontradicted evidence that:

    i. The fixed fee quoted for the liquidation of MCCU contemplated that the liquidation would take only 3 months to complete;

    ii. The liquidation went on in excess of 2 years and required more than originally contemplated.

[17] *Maranco, supra* at para. 26. See also *McCarthy v Keane* [2004] 3 IR 617 at 627.
[18] *Joseph St. Rose v Saint Lucia Electricity Services Limited (Lucelec)*, SLUHCV2016/0233 at para. 19, citing *Moran v Lloyd's (A Statutory Body)* [1983] 1 QB 542 at 549.
[19] [2010] IESC 18 ("*Galway*").
[20] *Galway, supra*.

33. Mr. Flowers further submits that the Arbitrator misconstrued the Evaluation and the May Agreements. According to Mr. Flowers, the Evaluation Agreement was separate from the May Agreement. The Evaluation Agreement did not amount to the fixing of his remuneration for the liquidation of MCCU performed pursuant to the May Agreement. The Arbitrator's reliance on the Evaluation Agreement in determining the existence of an agreement to liquidate MCCU, which is the purpose of the May Agreement, demonstrates the Arbitrator's failure to appreciate the nature of the obligations arising from the Evaluation Agreement, as distinct from that arising from the May Agreement.

34. Mr. Flowers submits that the interpretation of a contract (in this case, both the Evaluation and the May Agreements) to ascertain the nature of the obligation is a question of law. Here, the Arbitrator's failure to distinguish and separate the Evaluation Agreement from the May Agreement constituted an error of law on the face of the Award, which amounts to misconduct on the part of the Arbitrator.

35. According to Mr. Flowers, a refusal to remit the question of the amount due for the liquidation of MCCU would result in a failure of justice. Mr. Flowers spent 440 hours on the liquidation of MCCU. While he would otherwise have been paid $325 per hour, amounting to $143,000, he was only awarded $19,500.

36. In addition, Mr. Flowers contends that, having accepted that the fixed fee was applicable for the liquidation of MCCU, the Arbitrator failed to award compensation or have any regard for the overhead costs incurred by Mr. Flowers.

37. With regard to the costs of the arbitration, Mr. Flowers notes that in a preliminary meeting, the Arbitrator directed that "*costs shall follow the event and the costs of the arbitration, including the fees for the Arbitrator, shall be borne in their entirety by the unsuccessful party*".

38. However, despite the fact that Mr. Flowers secured 60% of the amount he claimed, the Arbitrator found that neither party was successful. Mr. Flowers was more successful than not on an issue-based or percentage basis. The Arbitrator therefore erred in law in misunderstanding the legal concept of "event" and in holding that neither party was successful.

The Institutions' Submissions

39. The Institutions submit that Mr. Flowers' challenge as it relates to the determination of Mr. Flowers' remuneration for the liquidation of MCCU fails on both limbs of the *Champsey Bhara* test. Mr. Flowers failed to either plead or establish that the Award was premised on a legal proposition that is erroneous. The errors complained of by Mr. Flowers cannot be shown by mere reference to the Award itself. Mr. Flowers' Claim is premised on allegations that the Arbitrator either failed to have regard to certain portions of the evidence, or placed insufficient weight on the evidence which Mr. Flowers considers supportive of his case. Mr. Flowers is asking this Court to examine materials such as witness statements, along with primary documents and transcripts of the proceedings and other documents extraneous to the Award itself in order to substantiate his case. Relying on *City of Vancouver v Brandram-Henderson of B.C. Limited*[21] and *City of Saint John v. Irving Oil Co. Ltd.*,[22] the Institutions argue that in the absence of allegations that there was no evidence at all to support the Award, this Court cannot weigh the evidence, or interfere with the Award on the ground that it was against the weight of the evidence.

40. The Institutions further argue that Mr. Flowers has mischaracterized the findings of the Arbitrator relative to MCCU. The Arbitrator did not award *quantum meruit* as alleged by Mr. Flowers. The Arbitrator's determination of the compensation owed to Mr. Flowers by the Institutions was premised on the Arbitrator's finding that there was an agreement between the parties. As a result, the Arbitrator was not required to go further to consider whether the fixed fee contemplated that the liquidation would take 3 months, or whether Mr. Flowers had incurred more costs than originally anticipated. The Arbitrator was not required to investigate the fairness of the bargain, or to determine whether Mr. Flowers had been adequately compensated relative to the work performed.

41. While the Institutions agree that questions of construction are generally questions of law, Mr. Flowers' contention is not that the Award is based upon any specific or articulable legal proposition that is erroneous. The Award cannot be set aside merely because the Court may have come to a different conclusion. The issue of the materiality and the weight to be attached to the evidence is within the remit of the Arbitrator. The Court is not entitled to interfere with the Award on the basis that it may have regarded the evidence differently. The Court is also not permitted to set aside the Award unless Mr. Flowers can prove that the Arbitrator based her decision on principles of construction which the law does not countenance.

42. With respect to Mr. Flowers' allegation that the Arbitrator misconducted herself, the Institutions reemphasize that courts adopt a very constrained approach in the remission of

[21] [1960] SCR 539.
[22] [1966] SCR 581.

awards on the basis of misconduct. Mr. Flowers' allegation is that the Arbitrator was wrong in her construction of the facts and certain matters, and failed to attach the appropriate, or any weight at all to those matters. Mr. Flowers' contention is inconsistent and unsupported by the case law.

43. As for the issue of costs, the Institutions concede that this Court may intervene if the Arbitrator has exercised her discretion in awarding costs in an unjudicial manner. Here, however, the Arbitrator did not act in an unjudicial manner in the exercise of her discretion. The Arbitrator had expressed in a preliminary meeting that she would rely on the principle that costs follow the event. In applying this principle, she had due regard to the facts and matters at issue to inform her decision. In the circumstances, there were grounds to support the Arbitrator's discretion to order each party to bear its own costs. Citing *Maranco*, the Institutions argue that the determination of the relative success of the parties is a matter for the Arbitrator to determine. The degree of success need not correspond to a simple mathematical calculation of percentage of success on individual aspects of the case.

Analysis

44. This Court has not been persuaded that the Award, as it relates to Mr. Flowers' remuneration for the liquidation of MCCU and the costs of the arbitration, should be remitted or set aside.

45. Mr. Flowers' main contention with respect to the Arbitrator's determination of his remuneration for the liquidation of MCCU is that the Arbitrator misconstrued the Evaluation and the May Agreements. In his submissions, Mr. Flowers contends that both Agreements should have been considered separately by the Arbitrator, and that the Arbitrator erred in interpreting the May Agreement in light of the Evaluation Agreement.

46. Questions relating to an arbitrator's construction of a legal instrument are not a ground for remitting or setting aside an arbitral award. That is because unless the arbitrator relied on principles which are wrong in law on the face of the award, any error would only become apparent to the court on an examination of the evidence. As stated by the Supreme Court of Canada in *City of Saint John v Irving Oil Co. Ltd.*,[23] citing *Government of Kelantan v Duff Development Company Limited*: [24]

> If the learned judge is suggesting an error in law on the part of the arbitrators which can only become apparent after an examination of the evidence is to be treated as an error in law on the face of the award, then with all respect I disagree with him. What was said by Viscount Cave in the *Kelantan Government* case was that where the reference was a reference as to construction:

[23] [1966] SCR 581 ("*Irving*").
[24] [1923] AC 395.

> ...it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally—for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award.[25]

47. In *Willowood Lakes Limited v The Board of Trustees of the Kingston Port Workers Superannuation Fund*,[26] the Court of Appeal of Jamaica upheld a lower court decision refusing to set aside an arbitration award. The arbitrator had fixed the sale price of a property based on the arbitrator's interpretation of a valuation report. The claimant disputed the arbitrator's interpretation of the report. The Court of Appeal noted that the claimant sought to have the court examine documents and substitute its own conclusion for that of the arbitration, which is not permissible. According to the Court of Appeal, unless the claimant showed that the arbitrator took into consideration documents which the arbitrator was not required to interpret, or omitted to consider any relevant documents or applied wrong principles of construction, there was no misconduct on the part of the arbitrator.

48. Here, the Arbitrator came to her determination that there was an agreement between the parties for the liquidation of the MCCU by interpreting the evidence presented by both parties:

> *The Arbitrator finds that there was an agreement between the parties for the completion of the liquidation of MCCU. This is based, inter alia, on the agreement of April 24th, 2017, the conduct of the parties in carrying out the terms of this agreement, the evaluation of MCCU by the Claimant, the preparation and submission of his Memorandum of May 31st, 2017 and the payment made to the Claimant for the initial report.*[27]

[25] *Irving, supra* at 588-589.
[26] Supreme Court Civil Appeal No. 98 of 2007 ("*Willowood*").
[27] Award at para. 59.

49. Mr. Flowers' contention is that the Arbitrator misconstrued the Evaluation and the May Agreement, not that the Arbitrator relied on principles of construction that were erroneous in law. Further, Mr. Flowers does not contend that the Arbitrator failed to consider any relevant evidence in coming to her determination. There is therefore no basis to find misconduct on the part of the Arbitrator.

50. Based on her determination that the parties had entered into an agreement providing for remuneration on a fixed fee basis for the liquidation of MCCU, the Arbitrator did not award *quantum meruit*. Mr. Flowers argues that the Arbitrator only found that there was an agreement between the parties "for the completion of the liquidation of MCCU", not for a specific amount of remuneration. Mr. Flowers therefore contends that the Arbitrator's determination as to the remuneration owed to Mr. Flowers was based on *quantum meruit*. I disagree with Mr. Flowers' characterization of the Award.

51. A reading of the Award as a whole shows that the Arbitrator came to the conclusion that the agreement between the parties was for the remuneration of Mr. Flowers. While Mr. Flowers notes that paragraph 59 of the Award only refers to an "agreement between the parties for the completion of the liquidation of MCCU", not an agreement "for a specific amount of remuneration", the following paragraph makes it plain that the Arbitrator concluded that the parties had agreed to a remuneration on a fixed fee basis:

> *Based on the evidence presented by the parties, the Arbitrator finds that the Claimant had proposed a fixed fee of $19,500.00 exclusive of GST, and that this fee was accepted by the Defendants as the remuneration to be paid to the Claimant for the completion of the liquidation of MCCU. The Claimant accepted in his own evidence that he did not convey any change in this fee proposal or arrangement to the Defendants.*[28]

52. Read together, paragraphs 59 and 60 of the Award are clear that the Arbitrator found that the agreement between the parties encompassed Mr. Flowers' remuneration. This conclusion is fortified by the fact that the Arbitrator did not opine of a reasonable sum owed to Mr. Flowers for the liquidation of MCCU, as she did for the other three credit unions at paragraph 100 of the Award. Mr. Flowers was awarded the sum of $19,500.00 plus GST for the liquidation of MCCU, corresponding to what the Arbitrator found was agreed by the parties.

53. Having found that the parties had agreed on a remuneration on a fixed fee basis, the Arbitrator did not err in law by "failing to give any, or any sufficient weight, to Mr. Flowers' uncontradicted evidence" that the fixed fee quoted for the liquidation of MCCU assumed that the liquidation would take 3 months to complete, when it in fact went on for 2

[28] Award at para. 60.

years. Similarly, the Arbitrator did not err in law in awarding no compensation for the overhead costs incurred by Mr. Flowers because the Memorandum dated May 31st, 2017 on which the Arbitrator relied to construct the agreement between the parties clearly stated that the quotation was for a flat amount which covered "all his fees, costs, travel, etc.". Even if the Arbitrator erred in those respects, what Mr. Flowers seeks is for this Court to substitute its appreciation of the evidence. It is not the role of this Court to do so.

54. Similarly, it is not the role of this Court to opine on the outcome and to remit the Award to the Arbitrator on the basis that it is unjust to Mr. Flowers. The parties decided to resort to a private dispute resolution mechanism. Absent one of the factors identified in *Maranco,* this Court is not entitled to remit or set aside the Award because it would have come to a different determination.

55. This Court also finds no basis to remit the Award on the ground that the Arbitrator erred in ordering the parties to bear their own costs in the arbitration. As noted by the CCJ in *Maranco*, an arbitrator enjoys an "exceedingly wide discretion" to award costs, and a reviewing court is not entitled to intervene merely because the court would have awarded different costs, or awarded costs on a different basis.[29]

56. The Arbitrator decided that costs of the arbitration would follow the event. The Arbitrator concluded that neither party was the successful party, and ordered each party to bear its own costs. Mr. Flowers contends that he was the successful party because he secured 60% of the amount claimed. Mr. Flowers argues that the Arbitrator's determination amounts to an error of law because the Arbitrator misinterpreted the notion of "event" in this case.

57. The CCJ's decision in *Maranco* deals with a similar argument. In *Maranco,* the appellant argued that the arbitrator misapplied the rule that costs should follow the event by failing to appreciate that the claim raised two distinct and separate issues, or events, rather than one. In considering the definition of the term "event" in the context of costs, the CCJ noted that the definition is "not an exact science", and that "each case depends on its own peculiar facts and much depends on the tribunal's appreciation of how the case was pleaded and presented by the parties".[30]

58. While Mr. Flowers contends that he secured 60% of the amounts he claimed and should therefore be awarded costs in an amount reflecting his degree of success, the CCJ in *Maranco* held that "the determination of the relative success of the parties is first and foremost a matter for the arbitrators and the degree of success need not necessarily

[29] *Maranco, supra* at para. 18.
[30] *Maranco, supra* at para. 34.

correspond to a simple mathematical calculation of percentage of success on individual aspects of the case".[31]

59. The Arbitrator exercised her wide discretion and concluded that, on the whole, neither party to the arbitration could be considered the successful party. This Court finds no basis to intervene and remit the Award for reconsideration.

Claim No. 719 of 2021

The Institutions' Submissions

60. In Claim No. 719 of 2021, the Institutions challenge the Arbitrator's determination of Mr. Flowers' remuneration for the liquidation of the other three credit unions, namely the PCU, the CSCU, and the CGWCU. The Arbitrator awarded Mr. Flowers the following sums:

    i. The sum of $3,250.00 plus GST for the liquidation of PCU;

    ii. The sum of $9,425.00 plus GST for the liquidation of CGWCU;

    iii. The sum of $195,000.00 plus GST for the liquidation of the CSCU.

61. The Institutions argue that, with respect to those determinations, the Arbitrator misconducted herself, and that there is a defect or error of law patent on the face of the Award.

62. First, the Institutions submit that the Arbitrator misconducted herself by impliedly shifting the burden onto the Institutions to disprove the reasonableness of Mr. Flowers' claim for compensation. The burden was on Mr. Flowers to provide sufficient, clear, and convincing evidence to support his claims. The Arbitrator misconducted herself by departing from the principle that the legal and evidentiary burden is to be borne by Mr. Flowers.

63. The Institutions allege that Mr. Flowers sought to meet his burden by relying on certain invoices he prepared. The Arbitrator found that Mr. Flowers had not met his burden of proving his claim because the evidence he provided was deficient:

> *The burden is on the Claimant to properly set out the time he has spent on the work done. The Arbitrator finds that he has failed to do so, from the invoices produced by the Claimant.*
>
> *Further the Arbitrator notes that the Claimant has not itemized his bill by actual time spent on each activity. The Claimant did accept under cross-examination that the invoice "does not attempt to identify specific tasks or give an indication*

[31] *Maranco, supra* at para. 44.

> *as to how much time was expended on each individual task". There is a general notation of work done but this was not itemized or separated by activity or date.*[32]

64. Following her finding that the evidence supplied by Mr. Flowers was deficient, the Arbitrator opined that the Institutions' evidence was insufficient to show what a reasonable time would be in the circumstances:

> *The Defendants have asserted that the overall bill and total invoiced is unreasonable, particularly as they had an expectation of total fees similar to the completion of the liquidation of MCCU. However, they have provided no evidence to show or even suggest what time would be reasonable in the circumstances or counter the assertion by the Claimant that certain hours were actually spent on the work as stated in the said invoice.*[33]

65. Despite finding that Mr. Flowers' evidence was deficient, the Arbitrator relied on the time allocation in the invoice in determining what was owed for the liquidation of the PCU, the CSCU, and the CGWCU. The Arbitrator's ruling is erroneous on point of law and highly contradictory when examined in light of her own expressed findings. Once the Arbitrator found that the evidence from Mr. Flowers was unsatisfactory, she was obligated to reject the evidence, irrespective of any evidence coming from the Institutions in opposition to it. The Arbitrator's ruling on the issue of evidence amounts to a mishandling of the arbitration proceedings, which led to a substantial miscarriage of justice.

66. Second, the Institutions submit that the Arbitrator erred in law by misapplying the principle of *quantum meruit*. The Institutions state that, based on the evidence led in the proceedings, the established custom or usage in the industry is to value professional liquidation services on the basis of receipts or the value of the property recovered by the liquidator, not a billing arrangement based on time spent on liquidation without reference to the value of the property recovered. Mr. Flowers did not adduce any evidence upon which the market value of his services could be determined. Mr. Flowers only relied on his own hourly billing arrangement, which he asserted was reasonable. Citing *Beneditti v Sawiris et al*,[34] the Institutions argue that Mr. Flowers' own subjective valuation of the services he rendered, as evidenced through his billing, was not a relevant consideration in determining their objective market value. The Arbitrator erred in treating Mr. Flowers' evidence as such.

67. While they acknowledge that evidence of what the parties had discussed may be relevant in determining *quantum meruit*, the Institutions submit, citing *Way v Latilla*,[35] that evidence of

[32] Award at paras. 85-86. See also para. 99 where the Arbitrator repeats that the evidence provided by Mr. Flowers was lacking.
[33] Award at para. 88.
[34] [2013] 4 All ER 253.
[35] [1937] 3 All ER 759.

those discussions is only relevant insofar as there is no established custom or usage. Here, there is a custom or usage for determining compensation in liquidation matters. In any event, it is clear from the parties' prior discussions that Mr. Flowers' initial fee proposal had been rejected, which indicated that the Institutions were unwilling to value Mr. Flowers' services on the same basis as he had subjectively valued them.

68. The misapplication of the principle of *quantum meruit* by the Arbitrator led to a substantial miscarriage of justice. Mr. Flowers was awarded compensation in the sum of $207,675.00 in respect of the liquidation of the PCU, the CSCU, and the CGWCU. This represents 126% of the value of the property recovered in the liquidation of those credit unions.

Mr. Flowers' Submissions

69. Mr. Flowers disputes that the Arbitrator erred in applying the legal principle of burden of proof. Citing paragraph 88 of the Award (reproduced above), Mr. Flowers contends that the reference to the Institutions' failure to provide evidence was in support of their own assertion that the sum claimed by Mr. Flowers was not a reasonable sum. The legal burden of any party to a dispute is to establish the facts and contentions in support of its case and persuade the tribunal of the correctness of its allegations. The Arbitrator therefore did not err by observing the Institutions' failure.

70. With respect to the Arbitrator's acceptance of Mr. Flower's evidence, Mr. Flowers argues that his claim was a claim for a type of damages. There was a rational and evidential basis on which the Arbitrator was entitled to rely. The Arbitrator "did her best" to determine the sums due to Mr. Flowers, making whatever findings she could on the evidence before her.

Analysis

71. This Court finds no error in the Arbitrator's understanding and application of the principle of burden of proof. The Arbitrator did not "impliedly shift" the burden onto the Institutions to disprove the reasonableness of Mr. Flowers' claim for compensation.

72. The Institutions never disputed that Mr. Flowers had done work and should be compensated for such work. As admitted in the Institutions' written submissions, "the Defendants did concede that the Claimant, in the absence of an agreement for his fees, was entitled to be paid a reasonable sum as a result of the work he had undertaken". This was also noted at paragraphs 72 and 73 of the Award. The question for the Arbitrator was therefore not "if" Mr. Flowers was entitled to compensation, but "how much" he should receive in compensation. This was not a matter where Mr. Flowers had to prove his entitlement to a remedy. At issue was what that remedy would be. It is in the context of the Arbitrator's search for a "reasonable" compensation that the Award must be read.

73. Mr. Flowers submitted a Tax Invoice purportedly showing time spent in undertaking the services provided. Contrary to the Institutions' submissions, the Arbitrator did not find that the invoice was "unreliable" or had "no probative value". The Arbitrator found that the invoice lacked the necessary details to allow her to determine whether the number of hours claimed was reasonable. The Arbitrator did not err in law by not rejecting this evidence. She was entitled to rely on that evidence and to decide what weight to give to it.

74. Having found that Mr. Flowers had not sufficiently itemized his invoice, the Arbitrator went on to "*undertake a thorough review of all the documents submitted by the Claimant*"[36] to determine what a reasonable amount of time would be. This review included emails, handwritten notes, letters, and multiple reports submitted by Mr. Flowers. It is clear on the face of the Award that the Arbitrator placed the burden on Mr. Flowers to provide evidence of work done.

75. The Institutions asserted that the amount of time submitted by Mr. Flowers was not reasonable. An assertion such as this one must be substantiated. This does not mean that the burden shifted onto the Institutions to disprove Mr. Flowers' claims; however the Arbitrator could not simply rely on the Institutions' assertion without any frame of reference. I agree with Mr. Flowers that paragraph 88 of the Award merely constitutes an observation by the Arbitrator that the Institutions failed to substantiate their position.

76. This Court also disagrees that the Arbitrator erred in applying the principle of *quantum meruit*. The Arbitrator was well aware of the principles applicable to *quantum meruit* and recited them at paragraph 95 of the Award. While she recognized that the starting point of the inquiry is the objective market value, or market price, of the services performed, the Arbitrator had noted earlier in the Award that no evidence had been adduced by either side to indicate what percentage of total collections would be appropriate in the circumstances of this case.[37] Mr. Flowers had testified that he had previously been remunerated based on percentage of estimated receipts, or based on the value of the property sold. He also testified that the percentage of what was collected "*could be 10%, it could be 5%, could be 2½%, it all depends on what the agreement is and it depends on what we expect to be realized from the process*".[38] The Institutions suggested that 5% or 6% of total collections was an appropriate basis to calculate remuneration.[39]

77. Given the lack of clear evidence as to the market value, or market price, of the liquidation services performed by Mr. Flowers, the Arbitrator was entitled to rely on the available evidence, including the previous discussions between the parties, to determine the value conferred on the Institutions in the circumstances. Contrary to the Institutions' submissions,

[36] Award at para. 90.
[37] See paras. 75 to 78 of the Award.
[38] Award at para. 76.
[39] Award at para. 75.

the Arbitrator did not misapply the principles in the House of Lord's decision in *Way v Latilla*.[40] The decision in *Way* was rendered in a context where remuneration could have taken a number of forms, including a fee, a commission share of profits, or a share of proceeds calculated at a percentage. Based on the previous discussions between the parties, the court excluded a fee as the proper basis for remuneration. As for the commission, no evidence had been adduced to support a trade usage or custom in the industry. It is in that context that the Court held that previous discussions between the parties were relevant:

> There are many employments the remuneration of which is, by trade usage, invariably fixed on a commission basis. In such cases, if the amount of the commission has not been finally agreed, the quantum meruit would be fixed after taking into account what would be a reasonable commission, in the circumstances, and fixing a sum accordingly. This has been an everyday practice in the courts for years. But, if no trade usage assists the court as to the amount of the commission, it appears to me clear that the court may take into account the bargainings between the parties, not with a view to completing the bargain for them, but as evidence of the value which each of them puts upon the services [emphasis added].

78. Here, the parties failed to establish a trade usage or custom as to the percentage of total collections used in remunerating liquidation services. The Arbitrator correctly relied on the previous discussions between the parties. She found that there was no agreement between the parties that a percentage of collections would be used as the basis for remuneration. In the circumstances, it was the Arbitrator's role to determine what a fair and reasonable compensation for the services rendered by Mr. Flowers would be, which she did.

79. The Arbitrator determined that an hourly rate of $325 was reasonable in the circumstances. This Court is not entitled to disturb a determination made by the Arbitrator on the basis of the evidence presented by both parties.

80. It bears repeating that an arbitral award cannot be set aside simply because there is an error of law or fact. As stated by the CCJ in *Maranco*, "not every technical error amounts to misconduct; something substantial is required so that the award smacks of injustice".[41] This Award does not "smack of injustice". Even if this Court is wrong and the Arbitrator erred in law in any respect, the error was not substantial. The Arbitrator was tasked with determining the remuneration owed to Mr. Flowers *ex post facto* in a context where the parties themselves had not come to an agreement before the work began. The Arbitrator did the best she could with the evidence that was before her.

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[40] [1937] 3 All ER 759 (*"Way"*).
[41] *Maranco, supra* at para. 26.

IT IS HEREBY ORDERED

(1) Both Claims are dismissed

(2) Each party shall bear its own costs

Dated January 5th, 2023

Geneviève Chabot
Justice of the High Court