Case No: HT-2015-000424

Neutral Citation Number: [2016] EWHC 806 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 15/04/2016

Before :

THE HON. MRS JUSTICE CARR DBE

- -

Between :

JOHN SISK & SON LIMITED **Cla**

- and -

CARMEL BUILDING SERVICES LIMITED (IN ADMINISTRATION) **Defe**

- -

- -

Mr Adrian Williamson Q.C. (instructed by **Weightmans LLP**) for the **Claimant**

Lord Marks Q.C. (instructed by **C.J. Hough & Company Limited**) for the **Defendant**

Hearing date: 23rd March 2016

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Judgment

The Hon. Mrs Justice Carr DBE :

Introduction

1.
This is an appeal brought by the Claimant contractor ("Sisk") by way of Part 8 proceedings pursuant to section 69 of the Arbitration Act 1996 ("the Act") seeking variation, alternatively remission, of a Partial Award dated 20th November 2015 ("the Award"). The Award arose out of arbitral proceedings between Sisk and the Defendant mechanical and services contractor ("Carmel") before Mr Nigel Dight BSc FRICS MCIArb ("the Arbitrator") relating to a mechanical and electrical services sub-contract entered into between Sisk and Carmel in 2008 ("the Sub-Contract").

2.
By the Award the Arbitrator awarded to Carmel £975,965.48, together with VAT, compensation for late payment (in the sum of £100) and interest on the late payment of £975,965.48 (in the sum of £359,329.10). The late payment compensation and interest awards were made pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 ("the Debts Act").

3.
Sisk contends that in doing so the Arbitrator made errors of law on the following three questions :

a)
The burden of proof in relation to Carmel's claim under Clause 7.7.4 of the JCT Conditions incorporated into the Sub-Contract ("Clause 7.7.4") ("Issue 1");

b)
Whether or not Sisk's primary claim to set-off under Clause 7.7.4 was a global claim and thus irrecoverable ("Issue 2");

c)
The rate of interest to be applied to sums awarded to Carmel ("Issue 3").

4.
There is no suggestion that the Arbitrator did not have jurisdiction to rule on these matters. Sisk's sole complaint is that he was wrong in law on each issue. Nor is there any suggestion that this claim falls outside the scope of section 69 of the Act, or that leave to appeal is required under section 69(2)(b) of the Act (since it is common ground that the parties agreed in the Sub-Contract (pursuant to section 69(2)(a) of the Act) that either party could (on notice) appeal to the courts on any question of law arising out of an award made in an arbitration under the Sub-Contract).

5.
Thus, it is open to this Court to confirm the Award, vary the Award or remit to the Arbitrator the Award in whole or in part for reconsideration pursuant to section 69(7) of the Act, or to set the Award aside in whole or in part.

The relevant background

6.
Sisk was engaged by Bolsover Street Limited under a JCT 2005 Rev 1 2007 Without Quantities contract for the construction of a nine-storey reinforced concrete frame mixed-use building at 41-51 Bolsover Street, London W1S 5AQ ("the Project"). The Project was for the creation of forty apartments, together with a new Outpatients Department for the Royal National Orthopaedic Hospital.

7.
By the Sub-Contract, which was dated 22nd September 2008, Carmel agreed with Sisk to carry out the supply and installation of mechanical and electrical services on the Project. The Sub-Contract was contained in and consisted of the following documents :

a)
The Sub-Contractor Order;

b)
The Sub-Contract Particulars published by Sisk (SFQS 12 Rev 06) ("the Sisk Particulars");

c)
The Conditions of Sub-Contract published by Sisk (SFQS 13 Rev 10) ("the Sisk Conditions");

d)
Minutes of Pre-order Meeting of 15th August 2008 (SFQS 15 Rev 13), together with Sub-Contractor's Pre-Order Trade Checklist;

e)

Sub-Contractor Enquiry Sheet 28th February 2008;

f)
Sisk enquiry to tender letter of 28th February 2008 and subsequent tender addendums;

g)
The ascertainment of the Sub-Contract sum, being a breakdown of the Sub-Contract sum and a materials documents;

h)
Carmel's quantified Schedule of Rates of 3rd September 2008 and Carmel's tender of 11th April 2008;

i)
Health and Safety code of practice SFSA (12 Rev 06);

j)
Target Programme IMH/TP/01.

8.
Clause 2.0 of the Sisk Particulars expressly incorporated the conditions of the JCT Conditions of Sub-Contract SBCSub/C2005 Rev 1 2007 ("the JCT Conditions"). In the event of conflict between the JCT Conditions and the Sisk Conditions, the Sisk Conditions were to prevail :

"...In the event of any divergence between the Sub-Contractor Order and the documents expressly referred to therein...the Standard Sub-Contract Conditions and the terms and conditions of the Principal Contract, then the Sub-Contractor Order Documents shall prevail over the Standard Sub-Contract Conditions and the Standard Conditions of Sub-Contract shall prevail over the terms and conditions of the Principal Contract."

9.
Clause 16.4 of the Sisk Conditions provided that any disputes arising out of or in connection with the Sisk Conditions should be referred to arbitration in accordance with the procedures set out in the JCT Conditions.

10.
On 1st June 2009 Carmel submitted its Application for Interim Payment No 8 to Sisk in respect of work carried out up to 29th May 2009. On 4th June 2009 following a joint site inspection earlier that day Sisk notified Carmel that it had valued Carmel's work (for the purpose of determining the amount of further payment to be made by Sisk to Carmel under Interim Payment Application No 8) at £2,688,728.86 (gross) ("Valuation No 8"). Final payment was then due on 3rd July 2009.

11.
However, on 19th June 2009 Carmel entered into administration. It ceased work under the Sub-Contract. Sisk terminated the Sub-Contract on 23rd June 2009 by notice pursuant to Clause 7.5.1 of the JCT Conditions which provided :

"If the Sub-Contractor is insolvent, the Contractor may at any time by notice to the Sub-Contractor terminate the Sub-Contractor's employment under this Sub-Contract."

12.
Clause 7.7 of the JCT Conditions set out various provisions in the event of Carmel's employment were terminated materially as follows :

“7.7.3 The provisions of clause 7.7.4 shall thereupon apply and the other provisions of this Sub-Contract which require any further payment or any release of Retention to the Sub-Contractor shall cease to apply. (“Clause 7.7.3”)

7.7.4 Upon completion of the Sub-Contract Works and the making good of defects of the kind referred to in clause 2.22 or earlier termination of the Contractor’s employment, however arising, the Sub-Contractor may apply to the Contractor and the Contractor shall pay to the Sub-Contractor the value of any work executed or goods and materials supplied by the Sub-Contractor to the extent not included in previous payments. Without prejudice to his other rights, the Contractor may deduct therefrom the amount of any direct loss and/or damage caused to the Contractor as a result of the termination and any other amounts payable to the Contractor under this Sub-Contract. To the extent that the amounts due to the Contractor exceed the amounts due to the Sub-Contractor the balance shall be recoverable from the Sub-Contractor as a debt.”

13.
On 26th April 2013, the Works having completed, Carmel gave notice of reference to arbitration. The Arbitrator was appointed on 5th September 2013. It is common ground that the CIMAR Rules applied. Rule 5.4 provides:

“5.4 The Arbitrator is not bound by the strict rules of evidence and shall determine the admissibility, relevance or weight of any material sought to be tendered on any matters of fact or opinion by any party.”

This of course reflects section 34(2)(f) of the Act.

14.
Pleadings and other documents were exchanged in the arbitration between October 2013 and October 2014. Carmel’s principal claim was to be paid the sums allegedly due to it under Clause 7.7.4 in the sum of £1,975.286.44. Sisk’s position was that, on a proper operation of Clause 7.7.4, no sum was due to Carmel. Moreover, Carmel had a counterclaim pursuant to Clause 7.7.4 in respect of the amount of the direct loss and/or damage caused to it as a result of the termination and other amounts payable to it under the Sub-Contract. The sum claimed by Sisk in was £646,281.99. Each party claimed associated late payment interest and, in the case of Carmel, statutory fixed compensation, from the other. Carmel also had a claim for damages for conversion against Sisk in relation to computer records left on site.

15.
There were multiple interlocutory hearings, culminating in an evidential hearing spanning 7 days between 27th April and 6th May 2015, at which the parties were fully represented. Witnesses of fact and expert opinion gave evidence.

16.
As indicated above, the (thirty-seven page) Award was published on 20th November 2015. This claim was issued on 17th December 2015.

The Award

Issue 1

17.

Before considering the issues, the Arbitrator addressed the question of burden of proof. In the context of Carmel's claim under Clause 7.7.4 he referred to Valuation No. 8. This valuation had, as indicated above, been issued by Sisk on 29th May 2009, some three weeks prior to the termination. It had been prepared by Mr Melges of Sisk, and reviewed during the arbitration by the respective quantity surveyor experts: Mr Collins for Sisk and Mr Simper for Carmel. All three gave evidence before the Arbitrator.

18.
The Arbitrator found materially as follows:

"L Burden of Proof

1. Before considering the issues, I remind myself of the incidence of the burden of proof, and the practical consequences of that burden in relation to the issues in dispute

2. The Party which bears that burden is required to prove its claim to the ordinary civil standard, namely balance of probabilities.

3. Applying that principle to the issues in dispute in this Arbitration means, in practical terms, as follows:-

…

•
In relation to the valuation of the Claimant's work at termination, in respect of which the Claimant contends for one figure and the Respondent contends for a lesser figure, the legal burden falls on the Claimant to prove the value of any work which it carried out but for which it has yet to be paid, and for which it is therefore entitled to payment in accordance with the "first limb" of Clause 7. 7.4

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However, since, three weeks prior to termination, the Respondent produced a valuation of the Claimant's work which was significantly higher than the valuation for which it now contends, the evidential burden falls on the Respondent to show, as it has endeavoured to do, why that earlier valuation was erroneously high

•
In relation to the sums which the Respondent says it is entitled, in accordance with the "second limb" of Clause 7.7.4 to deduct from any balance due under the "first limb" and/or recover from the Claimant, the burden falls on the Respondent to prove that the Claimant is responsible, in terms of both liability and quantum for each such sum…"

19.
He went on to identify the relevant issue in section M as :

"What was the value of work etc completed by the Claimant at the date of termination for which it has yet to receive payment?..."

20.
The Arbitrator considered this issue at paragraphs N8 to N54 of the Award, concluding that the payment to which Carmel was entitled under Clause 7.7.4 was £1,042,853.01. In doing so his reasoning included the following :

“N11 In my judgment, the best available starting point for evidence of the value of the Claimant’s work at termination is Valuation No. 8, which had been agreed between the Parties some three weeks previously…

N14 Valuation No 8 was in the “agreed” gross sum of £2,688.728.66.

N15 I acknowledge the accuracy of the Respondent’s observation that whilst an interim valuation is, as prescribed by Clause 15.18, merely a payment on account, the valuation required by Clause 7.7.4 is a final valuation

N16 However, I do not accept that it is a logical concomitant of Clause 15.18 that interim payments are necessarily inaccurate

N17 The protection afforded by designating a payment as being “on account” is, in my judgment, more likely to deal with the situation when work which has been valued and included in one valuation is subsequently found to be non-compliant, or when the value of what was thought to have been a variation has been included, only for that variation to have subsequently been found not to be a variation

N18 It seems to me most likely that, as the Claimant suggests, Mr Bonye and Mr Melges were the people who operated “at the coal face”, there were the people in the best position to determine the correct value of the Claimant’s work, and that they did so

N19 I find myself un-persuaded by any of the Respondent’s evidence, including, in particular, that of Mr. Collins, that, in effect, Mr. Melges’ valuation of the work as at 29 May 2009 was a significant overstatement…

N32 That, therefore, brings me to the conclusion that the proper gross-valuation of the Claimant’s work at 29 May 2009 was, as Paragraph 24 above, £2,533,449.90.

N33 The final step to resolve this issue is to determine the additional value that was generated in the three week period between Valuation No 8 and the termination on 19 June 2009…

N40 The position, therefore, in summary is as follows:-

- The corrected value of Valuation No 8 is £2,533.449.90 which I consider should be the minimum terminal valuation
- The Claimant's terminal valuation is £3,465.010.19
- The Respondent’s terminal valuation is £2,016.928.03
- Mr Simper's terminal valuation is £2,673,434.40
- Mr Simper’s opinion is that it is “logical to conclude” that the value of the termination account should exceed Valuation No 8 by at least £500,000 but says (despite having seen the Respondent's contemporaneous upstream valuation) that there is no evidence for him to increase his valuation

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Mr Jewell's terminal valuation is £2,091.967.29

N41 Having given the matter considerable careful thought, I have decided that the gross terminal valuation should be the figure resulting from Mr Simper's detailed analysis i.e. £2,673.434.40."

21.
The Arbitrator gave detailed reasons in paragraph N20 for his conclusion (in paragraph N19 as set out above) that Valuation No 8 was not a significant overstatement of value in respect of the work carried out as at 29th May 2009 and by reference to the evidence before him. He then considered certain discrete issues raised by Sisk to decide whether any specific adjustment was required to that valuation as a result. He proceeded to make one adjustment (in respect of an "upfront" payment that had been made by Sisk for light fittings that were not then in fact delivered). He rejected the suggestion that an adjustment needed to be made in respect of some drawing office work. He also declared himself "not satisfied" that Carmel had significantly overstated the progress of its subcontractors or that Carmel's pre-administration applications had been overstated substantially to a degree that was not appreciated at the time. Having reached a value for the works as at 29th May 2009, he went on (as set out above) to consider the value of works carried out in the following three weeks.

Issue 2

22.
In determining what was due to Sisk under Clause 7.7.4 by way of set-off, the Arbitrator was required to consider two alternative claims:

a)
Sisk's primary claim, under Appendix 4 to its Re-amended Defence and Counterclaim, which claimed the sum of £1,344,477.96, being the whole of the losses which Sisk said had been caused to it by the termination and which were recoverable under the said clause;

b)
Sisk's secondary claim, under Appendix 3 to its Re-amended Defence and Counterclaim, which claimed the sum of £1,145,506.93, being the itemised costs which Sisk said had been caused to it by the termination and which were recoverable under this clause.

23.
Carmel submitted that, as a matter of law, Sisk's primary claim was a 'global' claim and thus irrecoverable.

24.
The Arbitrator was thus required to determine whether Sisk's primary claim was a 'global' claim and therefore irrecoverable. He held as follows:

"Issue No 3. Correct method of determining set off pursuant to 'second limb' of Clause 7.7.4.

…

N58 The Respondent has pleaded its claim for set-off under the 'second limb' of Clause 7.7.4 by using two alternative methods of calculation and the point in issue here is which them should be considered.

N59 The first method of calculation produces a claim which, after due consideration by Mr Jewell and adjustment to reflect my decision in respect of Issue No 2, is, as I note at Paragraph 57 above, in the sum of £1,344.477.46.

N60 For convenience, I will subsequently refer to this claim as the ‘total costs claim’.

N61 The second alternative, details of which are set out at Appendix 3 to the Respondent's re-amended Statement of Defence and Counterclaim and to which I will subsequently refer as the “itemised claim”, is for £1,145.506.93.

N62 Before considering the two alternatives, I remind myself that my objective here is to determine which of them is the appropriate means of ascertaining, in the words of Clause 7.7.4:-

‘the amount of any direct loss and/or damage caused to the Contractor as a result of the termination and any other amounts payable to the Contractor under this Sub-Contract’

N63 The Claimant submits that the Respondent has pleaded its case for set off on a global basis whereas the judgment in Walter Lilley & Co. Ltd v Mackay (2012) 143 Con LR 79 precludes it from so doing.

N64 The Respondent argues first that its claim is not a global claim, and second, even if it were, it is not precluded from pleading it on that basis.

N65 So far as the Respondent's first point in issue is concerned, I accept that its total costs claim is not a global claim if for no other reason than, as it correctly notes, each part of its post-administration costs claim is purportedly attributed to a single event, namely the termination of the Sub-contract as a consequence of the administration.

N66 So far as the Respondent's second point is concerned, I accept that the judgment in Walter Lilley cannot be said to preclude the pursuit of a claim on a global basis.

N67 What can, however, be taken from the judgment is the principle that the burden which befalls a party endeavouring to prove a global, or, for that matter, a total costs claim is greater than the burden it would bear in having to prove the same claim on an itemised basis.

N68 That is because in order to succeed with a total costs claim, a party must be able to demonstrate not only that every element of the actual cost said to have been incurred is valid and has been properly incurred, but also the financial validity of the hypothetical comparative cost.

N69 In this case, I consider, on the basis of, for example, the oral evidence of Mr White, that sufficient doubt has been established by the Claimant as to the accuracy of the ‘total costs’ alleged to have been incurred by the Respondent to justify the rejection of the claim advanced on that basis.

N70 Accordingly, I have decided that the appropriate way to deal with the Respondent's claim for set off is by consideration of its itemised claim…”.

25.
Thus the Arbitrator rejected Sisk’s primary claim on its set-off.

Issue 3

26.

The Arbitrator was required to determine the amount of interest due to Carmel upon the sums awarded to it, including the rate of interest applicable. Carmel sought statutory interest in accordance with the Debts Act. Sisk argued that Clause 4.10.5 of the JCT Conditions was a term of the Sub-Contract, and constituted a substantial remedy for the late payment of the debt, with the result that the Debts Act had no application.

27.
The Arbitrator found as follows :

“Sub-issue No 8 .1. Interest Rate

N238 The Claimant submits that in the absence of any contractual remedy for late payment, it is entitled to compensation and interest pursuant to terms implied by the Late Payment of Commercial Debts (Interest) Act 1998 ("Late Payment Act") and the Regulations made there-under.

N239 The Respondent says that there is an adequate contractual remedy for late payment, that remedy being set out in Clause 4.10.5, and so the terms of the Late Payment Act are not implied.

N240 If I find that the Claimant is correct, it will have an entitlement to a fixed sum compensation payment and simple interest (calculated in the manner detailed below) at 8½% per annum.

N241 If I find that the Respondent is correct, then the Claimant will be entitled to simple interest (calculated in the manner detailed below) at 5½% per annum and will have no entitlement to any fixed sum as compensation

N242 Clause 15.9, which takes precedence over the JCT conditions, provides an “optional” regime for the payment of interest which the Parties agree is not an “adequate remedy” as defined by the Late Payment Act, and so must be declared void.

N243 Where they part company is in relation to the consequence of Clause 15.9 being declared void.

N244 The Claimant argues that if the clause is declared void, then there is no express contractual provision for interest, and so the Late Payment Act operates as the default.

N245 The Respondent argues that if the clause is declared void, then there is no divergence between it and Clause 4.10.5 and it simply falls away.

N246 I believe the Respondent's analysis is flawed and so prefer that of the Claimant.

N247 The flaw arises as a result of timing.

N248 Clause 15.9 cannot be declared to be void until after it has become a term of the Sub-contract.

N249 Thus, before Clause 15.9 had been declared void, it had been incorporated into the Sub-contract in place of Clause 4.10.5, which was thereby deleted.

N250 Clause 15.9 was then declared void.

N251 However, since Clause 4.10.5 no longer stood as part of the Sub-contract, it could not (without the Parties' agreement) be reinstated and relied upon as if it had not been deleted; there was simply nothing to reinstate.

N252 Thus, I find, as the Claimant correctly submits, that once Clause 15.9 was declared void, there was no contractual remedy for late payment and the provisions of the Late Payment Act were thereupon implied."

The approach on appeal

28.
Sisk contends that the Court must determine whether the Arbitrator's decision was correct and that there is no margin of appreciation : see Mustill and Boyd on Commercial Arbitration, 2nd ed. p.594 :

"3. Nature of the review

As to the remaining question, namely the nature of the review undertaken on questions of law, there is no doubt. Once satisfied that the decision is one in respect of which there is power to intervene, the Court will simply measure the decision against the facts, and if its own judgment differs from that of the arbitrator, the latter will yield. There is no question of exercising a discretion. The Court decides whether the arbitrator was right or wrong, and gives judgment accordingly, although weight is attached to the findings of arbitrators experienced in the trade in question."

29.
Although addressing the law before the Act, this remains an authoritative source.

30.
Nevertheless, appeals from arbitrators are not granted lightly : see Russell on Arbitration, (24th Edition, paragraph 8-132, page 531, citing MRI Trading AG v Erdenet Mining Corp LLC [2012] EWHC 1988 Comm (upheld in the Court of Appeal at [2013] EWCA Civ 156) ("MRI Trading"):

"7. APPEAL ON A QUESTION OF LAW

Introduction…It has been said there are three principles relevant to the overall approach. First, as a matter of general approach, the courts strive to uphold arbitration awards. Secondly, the approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it. Thirdly, not only will the court not be astute to look for defects, but in cases of uncertainty it will so far as possible construe the award in such a way as to make it valid rather than invalid."

31.
Sisk suggests that this section is unreliable, in the sense that it is not clear whether it is directed at applications for leave (where different considerations apply) or at substantive appeals. However, the passage is directed expressly at an "overall approach", suggesting that it is aimed not only at applications for leave but also substantive appeals. This is reinforced by the reference to MRI Trading, which itself involved a substantive appeal. There, albeit that the principles advanced were broadly not in dispute between the parties, Eder J said that he was prepared to proceed on the basis that the following principles reflected the correct legal test as follows :

"15. … there are four principles which a court needs to keep carefully in mind.

First as a matter of general approach, the courts strive to uphold awards. This means that, when looking at an award, it has to be read in a reasonable and commercial way, rather than with a view to picking holes, or finding inconsistencies or faults, in a tribunal's reasoning…This is particularly so when the tribunal comprises market men, since one is entitled to expect from traded arbitrators the accuracy of wording, of cogency of expression, which is required of a judge… .

Secondly, where a tribunal's experience assists it in determining a question of law, such as the interpretation of contractual documents, the court will accord some defence to the tribunal's decision on that question. It will reverse the decision only if satisfied that, despite the benefit of that experience, the tribunal has still come to the wrong answer… .

Thirdly, it is for the tribunal to make the findings of fact in relation to any dispute and any question of law arising from an Award must be decided on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators : see The "Baleares" [1993] 1 Lloyd's Rep 215 at 228 which makes clear that this is so regardless of whether the court thinks a finding of fact was right or wrong.

Fourthly, when a tribunal has reached a conclusion of mixed fact and law, the court cannot interfere with that conclusion just because it would not have reached the same conclusion itself. It can interfere only when convinced that no reasonable person, applying the correct legal test, could have reached the conclusion which the tribunal did: or, to put it another way, it has to be shown that the tribunal's conclusion was necessarily inconsistent with the application of the right test: The "Sylvia" [2010] 2 Lloyd's Rep 81 at [54]-[55]. The same extremely circumscribed power of intervention applies when it is complained that a tribunal has incorrectly applied the law to the facts. It is only if the correct application of the law leads inevitably to one answer, and the tribunal has given another, that the court can interfere. Once a court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the Award: The Chrysalis [1983] 1 Lloyd's Rep 503 at 507."

32.
Certainly, the first of these principles was endorsed expressly by the Court of Appeal (at paragraph 23) (and no disagreement expressed more generally) : as a matter of general approach, the courts strive to uphold arbitration awards; the approach is to read an arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it; not only will the court not be astute to look for defects, but in cases of uncertainty it will so far as possible construe the award in such a way as to make it valid rather than invalid. In Bunge SA v Nibulon Trading BV [2013] EWHC 3936 (Comm) Walker J described these guiding principles were being of "fundamental importance" (albeit, for the purposes of that case, they did not enable the court to give to an award a meaning plainly not intended by its authors).

33.
Sisk did not take issue with these four principles in broad terms. It submitted, and I agree, that the second principle is of little assistance on the facts of this case where the Arbitrator did not have any particular expertise to which deference should be paid on the questions of law before him. And there are limits to the principle of judicial deference to the arbitrator (as exemplified by the first instance and Court of Appeal's judgments in MRI Trading themselves, although that was a case of an arbitrators' decision that was described as "somewhat surprising if not bizarre").

34.
Carmel places significant emphasis on the third and fourth principles. As to the third principle, the arbitrator is master of the facts. As Steyn LJ put it in The "Baleares" (supra):

"The arbitrators are masters of the facts. On an appeal the court must decide any question of law arising from the award based on a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers those findings of fact to be right or wrong. It

also does not matter how obvious a mistake by the arbitrators on issues of fact might be or what the scale of the financial consequences of the mistake of fact might be."

35.
And it is important that the Court does not permit an appellant to dress up what are essentially issues of fact as questions of law. The Court must be constantly vigilant in this regard (see The "Baleares" (supra) (at 228) and also Demco Investments and Commercial SA v S E Banken Forsakring [2005] 2 Lloyd's Rep 650 (per Cooke J at paragraphs 35 to 48).

36.
As to the fourth principle, on appeals by reference to questions of mixed fact and law, reversal of an award can only be justified if it can be shown that the correct legal test must have been misapplied because no arbitrator could have applied that test correctly and reached the conclusion that he or she did. The position is a strong one. By way of example and by reference to Issue 1, only if the Court were to conclude that no arbitrator applying the correct legal burden of proof could possibly have come to the conclusion that the Arbitrator did on the valuation of Carmel's work could the Court interfere.

Issue 1: burden of proof in relation to Carmel's claim

37.
Sisk contends that the Arbitrator was in error in that:

a)
The burden of proof lay on Carmel to establish what was due to it under Clause 7.7.4;

b)
Sisk did not have any burden of proof, whether to show that its earlier valuation was erroneously high, or at all;

c)
Valuation No.8 was not the best available, or any, starting point for the exercise which the Arbitrator was obliged to carry out. The best available, and only starting point for the exercise, which the arbitrator was obliged to carry out, was such account as Carmel were able to render in accordance with Clause 7.7.4;

d)
There is no, or no helpful, distinction to be drawn between legal and evidential burdens in this case.

38.
Mr Williamson QC for Sisk concentrated on the Arbitrator's statement (in paragraph L3 of the Award) that an "evidential burden" fell on Sisk to show why Valuation No 8 was erroneously high. He submitted that in that paragraph the Arbitrator self-directed himself (incorrectly) on the law. He carried that direction through (at paragraph N19 in particular) when he stated that he was "un-persuaded" by any of Sisk's evidence that, in effect, Valuation No 8 was a significant overstatement of value. The Arbitrator thus erroneously imposed a burden on Sisk, when the burden lay throughout on Carmel to prove the value of its works.

39.
Sisk submits that this issue raises a pure question of law. To the extent that it raises a mixed question of law and fact, the Arbitrator's conclusion is necessarily inconsistent with an application of the

correct legal test. Sisk submits that the appropriate remedy in relation to this issue then is for the Court to remit the award to the tribunal for reconsideration in the light of the court's determination. There is simply no way of telling what decision the Arbitrator might have arrived at if he had correctly directed himself as to the burden of proof.

40.
In my judgment, and despite Mr Williamson's able submissions, there was no material error of law in the Arbitrator's approach on Issue 1 and there is no basis for interference with the Arbitrator's decision on Issue 1 as alleged.

41.
First, the Arbitrator correctly identified that, in relation to the valuation of Carmel's work at termination, the legal burden of proof fell throughout on Carmel to prove the value of any work which it had carried out but for which it had yet to be paid. There is nothing in the Award to suggest that he did not adhere faithfully in his approach to that principle in reaching the conclusions that he did. Nor is it (nor could it be) suggested that the Arbitrator did anything other than correctly identify and apply the relevant standard of proof, namely the civil standard of balance of probabilities.

42.
Secondly, as for the reference to "evidential burden" facing Sisk, whilst it can be said to be a legal term of art (see Phipson on Evidence 18th ed. at paragraph 6-02), the Arbitrator was in context doing no more than saying "in practical terms" that Sisk had an evidential hurdle to overcome, given the contents of Valuation No 8 which had been agreed between the parties following a joint site inspection. The valuation figures being advanced by way of defence for Sisk (with a terminal valuation of £2,016,928.03) were significantly below those figures agreed on behalf of Sisk only three weeks before termination and in a neutral pre-dispute context. It was the elephant in Sisk's room. It was an obvious point of substance of which Sisk was fully aware, and one which, as the Arbitrator recorded, Sisk sought to overcome, albeit unsuccessfully.

43.
Thirdly, the central finding of the Arbitrator was that at paragraph N11 of the Award, namely that the best available starting point for evidence of the value of Carmel's work at termination was Valuation No. 8. That was a finding of fact, and one which the Arbitrator was fully entitled to reach, and which cannot be assailed in this jurisdiction. It is not for this Court to evaluate the correctness of the finding. But it can be noted that it was given for careful and lucid reasons and in circumstances where the Arbitrator had expressly considered the "interim" nature of the valuation. In so far as the finding may have trespassed into an area of law, it related to an evidential finding again wholly within the Arbitrator's purview and unchallengeable. It was not a finding reached with any reference to any evidential burden on Sisk.

44.
It is important to note that, having made that finding, the Arbitrator did not treat Valuation No 8 as in any way conclusive of the question of valuation. He simply took it as his starting point. When he described himself as being "un-persuaded" by any of Sisk's evidence that it was a significant overstatement, he identified in detail his reasoning. In reaching his conclusion he was effectively doing no more than accepting Carmel's case, as recorded in paragraph N19 : it seemed most likely to him that Mr Bonye and Mr Melges were the people in the best position to determine the correct value of Carmel's work and they did so in Valuation No 8.

45.

It does not seem to me therefore that the Arbitrator's conclusions turned on any misapplication of some evidential burden. Rather the Arbitrator was deciding whether or not Carmel had carried out work to a value for which it had not yet been paid, and if so to what extent, issues on which he correctly understood at all times the legal burden of proof to lie on Carmel. What the Arbitrator was doing at the outset was to identify an obviously important contemporaneous piece of evidence that was at stark odds with the position being adopted by Sisk position in the arbitration as to the value of Carmel's works.

46.
For these reasons, I dismiss the claim on Issue 1.

Issue 2: global or total costs

47.
The question of the correct characterisation of claims for costs was considered by Akenhead J in Walter Lilly v Mackay [2012] 1 BLR 519 ("Walter Lilly") at paragraph 484 in particular :

"484. One needs to be careful in using the expressions "global" or "total" cost claims. These are not terms of art or statutorily defined terms. Some of the cases…were concerned with linking actual delay and the alleged causes of delay. Simply because a contractor claims all the costs on a construction project which it has not yet been paid does not necessarily mean that the claim is a global or a total cost claim, although it may be. What is commonly referred to as a global claim is a contractor's claim which identifies numerous potential or actual causes of delay and/or disruption, a total cost on the job, a net payment from the employer and a claim for the balance between costs and payment which is attributed without more and by inference to the causes of delay and disruption relied on…"

48.
Then at paragraph 486 Akenhead J said this :

"486. Drawing together all the relevant threads together, it can properly be concluded as follows in relation to "global" or "total" cost claims:

(a) Ultimately, claims by contractors for delay or disruption related loss and expense must be proved as a matter of fact. Thus, the Contractor has to demonstrate on a balance of probabilities that, first, events occurred which entitle it to loss and expense, secondly, that those events caused delay and/or disruption and thirdly that such delay or disruption caused it to incur loss and/or expense (or loss and damage as the case may be). I do not accept that, as a matter of principle, it has to be shown by a claimant contractor that it is impossible to plead and prove cause and effect in the normal way or that such impossibility is not the fault of the party seeking to advance the global claim. One needs to see of course what the contractual clause relied upon says to see if there are contractual restrictions on global cost or loss claims. Absent and subject to such restrictions, the claimant contractor simply has to prove its case on a balance of probabilities…

(c)It is open to contractors to prove these three elements with whatever evidence will satisfy the tribunal and the requisite standard of proof. There is no set way for contractors to prove these three elements. For instance, such a claim may be supported or even established by admission evidence or by detailed factual evidence which precisely links reimbursable events with individual days or weeks of delay or with individual instances of disruption and which then demonstrates with precision to the nearest penny what that delay or disruption actually cost.

(d) There is nothing in principle “wrong” with a “total” or “global” cost claim. However, there are added evidential difficulties (in many but not necessarily all cases) which a claimant contractor has to overcome. It will generally have to establish (on a balance of probabilities) that the loss which it has incurred (namely the difference between what it has cost the contractor and what it has been paid) would not have been incurred in any event. Thus, it will need to demonstrate that its accepted tender was sufficiently well priced that it would have made some net return. It will need to demonstrate in effect that there are no other matters which actually occurred (other than those relied upon in its pleaded case and which it has proved are likely to have caused the loss)…

(e) The fact that one or a series of events or factors (un-pleaded or which are the risk or fault of the claimant contractor) caused or contributed (or cannot be proved not to have caused or contributed) to the total or global loss does not necessarily mean that the claimant contractor can recover nothing. It depends on what the impact of those events or factors is…

(f) Obviously, there is no need for the Court to go down the global or total cost route if the actual cost attributable to individual loss causing events can be readily or practicably determined. I do not consider that Vinelott J was saying in the Merton case (at page 102 last paragraph) that a contractor should be debarred from pursuing what he called a "rolled up award" if it could otherwise seek to prove its loss in another way. It may be that the tribunal will be more sceptical about the global cost claim if the direct linkage approach is readily available but is not deployed. That does not mean that the global cost claim should be rejected out of hand.”

49.
Sisk contends that the Arbitrator was obviously wrong to reject its primary claim. The Arbitrator’s reasoning was as follows:

a)
Sisk’s claim was not a global claim but a total costs claim;

b)
In relation to a total costs claim, there was a principle that the burden upon a party seeking to prove such a claim was greater than the burden it would bear in having to prove the same claim on an itemised basis;

c)
For such a claim, this burden required a party to demonstrate not only that every element of the actual cost said to have been incurred is valid and has been properly incurred but also the financial validity of the hypothetical comparative cost.

50.
Sisk contends that its primary claim was not within the principles summarised in Walter Lilly or, if it was, that those principles did not require the Arbitrator to disregard the primary claim, as follows :

a)
The primary claim was not a global, or total costs, claim at all. There is no distinction between these terms, as the Arbitrator seemed to think. This was a claim for all the costs and losses incurred by Sisk due to a single event, namely the termination. Walter Lilly had no application. The Arbitrator correctly found, at one point in the award, that this was not a global claim but then purported to apply the global claim principles to the claim;

b)

Alternatively, insofar as the claim was a global, or total costs, claim, the principles set forth in Walter Lilly did not impose a greater burden of proof upon Sisk in seeking to prove the actual costs incurred than any other claim would impose;

c)
Walter Lilly did not require a party to demonstrate not only that every element of the actual cost said to have been incurred is valid and has been properly incurred but also the financial validity of the hypothetical comparative cost.

51.
Thus, in summary, the Arbitrator is said to have gone up a blind alley in two principal respects : first, he appeared to think (incorrectly) that global and total costs claims were different things : he thought that, whilst Sisk's primary claim was not a global claim, it was nevertheless a total costs claim; secondly, in relation to such a (total costs) claim, he proceeded on the (incorrect) basis that there was a greater evidential burden of proof.

52.
As on issue 1, Sisk contends that the issue that arises is one of pure law and, if one of mixed law and fact, then the Arbitrator reached a conclusion necessarily inconsistent with a correct application of the law. Sisk contends that the appropriate course is for the issue to be remitted to the Arbitrator for reconsideration.

53.
I have concluded that there is no merit in this second challenge to the Award.

54.
The context of the Arbitrator's consideration of Issue 2 was the valuation exercise to be carried out in respect of Sisk's set-off/counterclaim. The question was to identify the correct methodology for that exercise. That is reflected in the heading of the relevant section, namely "Correct method of determining set off pursuant to "second limb" of Clause 7.7.4."

55.
The Arbitrator found in Sisk's favour on its primary two contentions of principle in this regard : he accepted that Sisk's primary claim was not a global claim and accepted in any event that, even if it were, that would not preclude the claim being brought. He went on (correctly) to say that a party endeavouring to prove a global or total costs claim will carry a greater burden than a party endeavouring to prove the same claim on an itemised basis. This was not to introduce some flawed legal principle, but rather to reflect the comments of Akenhead J at paragraph 486 (d) in Walter Lilly (supra). There are added evidential difficulties in proving a global or total costs claim.

56.
I do not consider that, fairly read, the Arbitrator in fact treated global and total costs claims as separate concepts (and then treated Sisk's primary claim as a total costs claim, even though it was not a global claim). That seems to me to be placing undue emphasis on the words "or, for that matter" in Paragraph N67. It would have been an odd mistake to make, given that the Arbitrator otherwise demonstrated a good understanding of the decision in Walter Lilly. At the very least, it is not clear that the Arbitrator was under the impression that global and total costs claims were different animals, falling to be treated differently. The fact that he went on to deal with the added evidential difficulties relating to global or costs claims is consistent with him doing no more than addressing fully the parties' submissions on the law (in particular, Carmel's submission that, were it to be a global claim, it

could not be advanced as a matter of principle). The position is complicated further by the fact that (in paragraph N60) the Arbitrator defined Sisk's primary claim as the "total costs claim" and in paragraph N68 elided the concept of global and total costs claims in the single phrase "total costs claim".

57.
But, even if the Arbitrator was under the misapprehension that a total costs claim was something different to a global claim, I cannot identify any resulting material error of law. As already identified, there is nothing objectionable in his comments of principle at paragraphs N67 and 68. He was there stating that, in order to succeed, a global or total costs claim has to be proved properly, which may be more difficult than in the case of an itemised claim.

58.
He then turned to consider the facts of the case before him. His central finding was at paragraph N69. He found as a matter of fact, on the basis of all the evidence, that Sisk had failed to prove its primary claim (on the facts). As Lord Marks QC pointed out for Carmel, the oral evidence of Mr White, Sisk's financial controller, to which the Arbitrator referred expressly in paragraph N69, was but an example of why the Arbitrator found Sisk's primary claim not to be made out. The Arbitrator had earlier (in section K) found the evidence of Mr White to be useful and reliable as regards costs booked, but of no assistance in establishing the validity of those costs. The Arbitrator had also set out earlier his findings on all of the various witnesses, including the parties' respective programming and quantum experts, earlier in section K of the Award.

59.
For these reasons, I dismiss the claim on Issue 2.

Issue 3: interest rate

60.
As indicated above, Carmel sought statutory interest on sums found to be due to it in accordance with the Debts Act.

The Debts Act

61.
The Debts Act contains the following sections so far as relevant:

"1(1) It is an implied term in a contract to which this Act applies that any qualifying debt created by the contract carries simple interest subject to and in accordance with this Part…

8(1) Any contract terms are void to the extent that they purport to exclude the right to statutory interest in relation to the debt, unless there is a substantial contractual remedy for late payment of the debt.

(2) Where the parties agree a contractual remedy for late payment of the debt that is a substantial remedy, statutory interest is not carried by the debt (unless they agree otherwise).

(3) The parties may not agree to vary the right to statutory interest in relation to the debt unless either the right to statutory interest as varied or the overall remedy for late payment of the debt is a substantial remedy.

(4) Any contract terms are void to the extent that they purport to—

(a) confer a contractual right to interest that is not a substantial remedy for late payment of the debt, or

(b) vary the right to statutory interest so as to provide for a right to statutory interest that is not a substantial remedy for late payment of the debt, unless the overall remedy for late payment of the debt is a substantial remedy.

(5) Subject to this section, the parties are free to agree contract terms which deal with the consequences of late payment of the debt. …

9(1) A remedy for the late payment of the debt shall be regarded as a substantial remedy unless—

(a) the remedy is insufficient either for the purpose of compensating the supplier for late payment or for deterring late payment; and

(b) it would not be fair or reasonable to allow the remedy to be relied on to oust or (as the case may be) to vary the right to statutory interest that would otherwise apply in relation to the debt.

(2) In determining whether a remedy is not a substantial remedy, regard shall be had to all the relevant circumstances at the time the terms in question are agreed.

(3) In determining whether subsection (1)(b) applies, regard shall be had (without prejudice to the generality of subsection (2)) to the following matters—

(a) the benefits of commercial certainty;

(b) the strength of the bargaining positions of the parties relative to each other;

(c) whether the term was imposed by one party to the detriment of the other (whether by the use of standard terms or otherwise); and

(d) whether the supplier received an inducement to agree to the term.”

Relevant provisions in the Sub-Contract

62.
The Sub-Contract contained the following relevant provisions (relating expressly to interest and/or interim payments under the Sub-Contract) :

“a) Clause 15.9 of the Sisk Conditions provided:

“If Sisk fails to pay in full any sum properly due hereunder by the final date for payment, Sisk may (but shall not be obliged to) pay interest thereon from the final date for payment until payment of such sum is made.” (“Clause 15.9”);

Clause 4.9 of the JCT Conditions provided :

Issue of interim payments

4.9.1 The first interim payment shall be due on the date for issue of the Interim Certificate under the Main Contract immediately following the commencement of the Sub-Contract works. If no date for the issue of Interim Certificates under the Main Contract is stated in the Main Contract Particulars, the first payment shall in any event be due not later than one month after the date of commencement of the Sub-Contract Works on site.

4.9.2 Interim payments shall thereafter be due on the same date in each month as that on which the first payment became due, or on the nearest Business Day in that month, up to and including the month following the date of practical completion of the Sub-Contract works as a whole. Thereafter, as and when further amounts are ascertained as due and payable interim payments shall be due on the same date in each month or the nearest Business Day in that month.

4.9.3 The final date for payment of interim payments shall be 21 days after the date on which they become due." ("Clause 4.9");

Clause 4.10.5 of the JCT Conditions provided :

Interim payments – amounts due

4.10.1 Subject to any agreement between the Sub-Contractor and the Contractor as to stage payments, the amount of each interim payment shall be the Contractor's Gross Valuation as referred to in clause 4.13 less :

.1 any amount which may be deducted and retained as Retention by the Contractor in respect of the Sub- Contract Works in accordance with clause 4.15; and

.2 the total amount previously due as interim payments under this Sub-Contract.

.2 Not later than 5 days on which an interim payment becomes due the Contractor shall give a written notice to the Sub-Contractor which shall specify the amount of the payment which is proposed to be made in respect of the Sub-Contract Works, to what the amount of the payment relates and the basis on which that amount was calculated.

.3 Not later than 5 days before the final date for payment of an interim payment the Contractor may give a written notice to the Sub-Contractor which shall specify any amount proposed to be withheld and/or deducted from the amount notified under clause 4.10.2, the ground or grounds for such withholding and/or deduction and the amount of withholding and/or deduction attributable to each ground.

.4 Subject to any notice given under clause 4.10.3, the Contractor shall no later than the final date for payment pay the amount specified in his notice given under clause 4.10.2 or, in the absence of a notice under clause 4.10.2, the amount calculated in accordance with clause 4.10.1.

...

5 If the Contractor fails properly to pay the amount, or any part of it, due to the Sub-Contractor under these Conditions by the final date for its payment, the Contractor shall pay to the Sub-Contractor in addition to the amount not properly paid simple interest thereon at the Interest Rate for the period until such payment is made. Payment of such interest shall be treated as a debt due to the Sub-Contractor by the Contractor…" ("Clause 4.10.5");

Clause 4.12 of the JCT Conditions provided :

Final Payment

4.12.1 The amount of the Final Payment to the Sub-Contractor shall be the Final Sub-Contract Sum, which shall be calculated by the Contractor in accordance with which of clause 4.3 or 4.4 applies, less only the total amount previously due as interim payments under this Sub-Contract…

4.12.4 If the Contractor fails properly to pay the amount, or any part of it, by the final date for its payment the Contractor shall pay in addition to the amount no properly paid simple interest thereon at the Interest Rate for the period until such payment is made. Payment of such interest shall be treated as a debt due to the Sub-Contractor by the Contractor. The acceptance of any payment of interest under this clause 4.12.14 shall not in any circumstances be construed as a waiver by the Sub-Contractor to his right to proper payment of the amount due."

63.
By Clause 1.1 of the JCT Conditions :

a)
"Conditions" was defined as "the clauses set out in sections 1 to 8 of these Conditions, together with and including the Schedules hereto, as modified by any Schedule of Modifications included in the Numbered Documents";

b)
the phrase "Interest Rate" was defined as "a rate 5% per annum above the official dealing rate of the Bank of England current at the date that a payment due under this Sub-Contract becomes overdue".

64.
By Clause 1.4 of the JCT Conditions, :

"In the Sub-Contract Agreement and these Conditions, unless the context otherwise requires:

.1 the headings are included for convenience only and shall not affect the interpretation of this Sub-Contract…"

<u>The arguments and analysis</u>

65.
Sisk argued before the Arbitrator that Clause 4.10.5 of the JCT Conditions constituted a substantial remedy for the late payment of the debt, with the result that statutory interest was not carried (by virtue of section 8(2) of the Debts Act).

66.
Sisk contends that the Arbitrator's conclusion (that once Clause 15.9 was declared void under section 8(4) of the Debts Act, there was no contractual remedy for late payment and the provisions of the Debts Act were accordingly implied) was wrong as a matter of law. The effect of the conclusion was to declare Clause 15.9 of the Sisk Conditions void but nonetheless having the effect of deleting Clause 4.10.5. Sisk submits that the Arbitrator should have held that, since Clause 15.9 was declared void, there was no divergence between Clause 15.9 and Clause 4.10.5. Clause 15.9 simply fell away in its entirety. There is no scope for "red-pencilling" only parts of Clause 15.9 (as Carmel seeks to do). Clause 4.10.5 was thus an operative term of the Sub-Contract, and constituted a substantial remedy for the late payment of the debt. He should, therefore, have determined as matter of law, that the Debts Act was inapplicable. There was no possible basis to exclude both of these clauses, even if one were incompatible with the other. The Arbitrator should, therefore, have held that Clause 15.9 and Clause 4.10.5 were both provisions of the Sub-Contract. Their combined effect of this was that Sisk had both a power and a duty to pay interest on late payments at the Interest Rate (as defined in the Sub-Contract).

67.

Sisk thus submits that the Award should be varied so as to declare that the applicable interest rate was 5% per annum above the official dealing rate of the Bank of England current at the date that a payment due under the Sub-Contract becomes due, alternatively should remit the issue to the Arbitrator for reconsideration in the light of my findings.

68.
Carmel seeks to support the Arbitrator's conclusion by reference to the following two principal and independent submissions :

a)
Clause 15.9 does not cease to exist as a result of section 8 of the Debts Act. The effect of section 8 of the Debts Act is only to remove the offending words "(but shall not be obliged to)", since it is only those words that "purport to exclude the right to statutory interest in relation to the debt". The result, albeit admittedly an odd one, is that there is a permissive contractual provision alongside a compulsory one, which thus takes effect. That cannot bring to life the inconsistent Clause 4.10.5;

b)
In any event, Clause 4.10.5 only applies to interim payments due from Sisk to Carmel in accordance with the provisions of Clause 4.10. It has no application to debts due to Carmel under Clause 7.7.4. Thus Clause 4.10.5 does not provide a substantial contractual remedy for late payment.

69.
I turn to analyse the competing arguments. It is common ground that the question raised is one of pure law. It is also common ground, as it was before the Arbitrator, that Clause 15.9, with its optional payment regime for the payment of interest, was not a "substantial contractual remedy" for the purpose of section 8 of the Debts Act.

70.
The Arbitrator's reasoning (based on timing and the suggestion that Clause 4.10.5 was somehow "deleted") as set out in paragraphs N246 to N252 of the Award is difficult to follow. In truth, Carmel did not seek to support it, conceding that the Arbitrator's approach was "an odd way of looking at it" and that the issue was not really one of timing. But Carmel maintains that the result is correct. It suggests that the better (and real) question is whether or not the Sub-Contract, interpreted as a whole, provided a substantial contractual remedy for the late payment of the debt. If not, then it is not open to Sisk to rely on the operation of section 8 (1) of the Debts Act to insert Clause 4.10.5, that was not within the Sub-Contract because of the inconsistent Clause 15.9 which remained part of the Sub-Contract, and then to argue that Clause 4.10.5 provides a substantial remedy.

71.
As is apparent, the parties disagree as to the effect and operation of section 8 of the Debts Act on Clause 15.9, and on the proper construction and inter-relation of the relevant provisions of the Sub-Contract in so far as they survived the Debts Act.

72.
In my judgment there is a short answer to the conundrum posed by this disagreement as a result of the proper construction of Clause 4.10.5. Even if Sisk is correct, and Clause 4.10.5 is operative, Clause 4.10.5 does not provide for the payment of interest by Carmel on anything other than late payments by Carmel of amounts due to Sisk by way of interim payment under Clause 4.10. Thus the provisions of the Debts Act are to be implied, as the Arbitrator found.

73.
Clause 4.10 follows on from Clause 4.9 which deals with the issue of interim payments (and nothing else). Clause 4.9 sets the mechanism for interim payments (and no other types of payments) becoming due. Clause 4.10 then deals (again exclusively) with the amounts due by way of interim payment in accordance with Clause 4.9 (and then interest in the event of late payment of such amounts). Clause 4.10.5 is a sub-clause of Clause 4.10. It is the final sub-clause, following logically on the earlier sub-clauses which deal with the anterior questions of the amounts to be due by way of interim payment (Clause 4.10.1) and then the timetable and mechanism for payment (Clauses 4.10.2 to 4.10.4).

74.
That Clause 4.10.5 relates only to payment of interest on interim payments is reflected in the fact that it operates by reference to terms of art defined by reference to interim payments only (and not, for example, to payments under Clause 7.7.4). Thus there is for example reference to payment by "the final date for payment". That is a date defined in Clause 4.9 and only by reference to interim payments. There is no such date for payments under Clause 7.7.4 (or indeed any provision in Clause 7.7.4 for late payment or interest at all). Equally, the reference in Clause 4.10.5 to the fact that acceptance of any payment should not be construed as a waiver of Carmel's right to suspend performance is specific to interim payments only, arising in the context of ongoing performance obligations (as opposed to a post-completion or termination situation under Clause 7.7.4). The significance of this point is underlined by the absence of such a proviso in Clause 4.12 (when dealing with final payments).

75.
Sisk relies on the fact that Clause 4.10.5 refer in its opening two lines to Carmel failing to pay amounts due to Sisk "under these Conditions". "Conditions" are defined in section 1 of the JCT Conditions as all of the Conditions in sections 1 to 8, so encompassing section 4. But read in the context set out above it is clear that the reference to "these Conditions" in Clause 4.10.5 must be a reference to the Conditions in Clause 4 for interim payments, and not more widely so as to encompass Clause 7.7.4. This is made explicit later in the Clause, where there is reference to the acceptance of any payment of interest "under this clause 4.10.5".

76.
This conclusion is reinforced by the heading of Clause 4.10 of "Interim Payments – amounts due", which in context is of relevance to the question of interpretation. It is also consistent with, if not required by, the separate provision in Clause 4.12 for the payment of interest on final payments. The existence of such separate provision makes the suggestion that Clause 4.10.5 was intended, on objective construction, to cover late payment of any sums under any other provision a very difficult one. If Clause 4.10.5 was not wide enough to cover interest payments for late payment of a final payment under Clause 4.12 (where there is at least the parallel concept of a final date for payment), then it cannot be properly read as wide enough to cover interest payments for late payment under Clause 7.7.4.

77.
This is sufficient to dispose of Issue 3.

78.
However, I should record that Carmel sought also to advance two new arguments which were not before the Arbitrator. Given my conclusion above, it is not necessary for me to address them. However, for the sake of completeness only :

a)
Carmel seeks to argue that Clause 4.10.5 does not amount to a substantial remedy because interest is payable “only if the Contractor fails properly to pay the amount or any part of it due to the Sub-Contractor under these Conditions by the final date for payment” in which case “the Contractor will pay to the Sub-Contractor in addition to the amount not properly paid simple interest thereon at the Interest Rate for the period until such payment is made.” This is said to be an inadequate substantial remedy for late payment under Clause 7.7.4 because Clause 7.7.4 is concerned with balancing what is owed to the contractor for work executed and goods and materials supplied prior to the termination against losses sustained by the contractor arising out of the termination. For such a “netting off” procedure to yield adequate interest to the sub-contractor, interest would have to be added to payments due to the sub-contractor over the whole of the period for which money was outstanding, while the direct loss and damage sustained by the contractor arising from termination would have interest added to it only for the period after the loss was sustained. Where the period for which payment to the subcontractor is long and that following the contractor’s loss attributable to termination short, the interest that ought to be payable to the sub-contractor should be far greater than interest that is merely calculated on the balance. This was a point raised, so far as I am aware, for the first time in Carmel’s skeleton argument;

b)
Carmel seeks to argue that, by reason of Clause 7.7.3 of the JCT Conditions, upon termination of Sisk’s employment under Clause 7.5, Clause 4.10.5 ceased to apply. As set out above, Clause 7.7.3 provided :

“.3 The provisions of clause 7.7.4 shall thereupon apply and the other provisions of this Sub-Contract which require any further payment or any release of Retention to the Sub-Contractor shall cease to apply.”

Clause 4.10.5 was a provision of the Sub-Contract other than Clause 7.7.4 which required further payment. It thus ceased to apply on termination. The only relevant payment provision was then Clause 7.7.4. This was a point was not canvassed until mid-way through the hearing. It necessitated the filing of supplemental written submissions.

79.
As to the first new point, not only was it not advanced by Carmel before the Arbitrator, it is clear that the submission gives rise to broad considerations for which I do not have the necessary material. As Sisk points out, whether or not a remedy is a substantial remedy for the purpose of the Debts Act involves a consideration of all the relevant circumstances at the time that the terms in question are agreed (see section 9(2) of the Debts Act). An assessment has to be made as to whether or not it would be fair or reasonable to allow the remedy to be relied on to oust the right to statutory interest that would otherwise apply. For this purpose regard must be had not only to the benefits of commercial certainty but also the strength of the parties’ relative bargaining positions, detriment and inducement, all in accordance with sections 9(1)(b) and (3) of the Debts Act. Given the nature of the new issues raised and the evidential lacuna, I would dismiss this submission.

80.
As to the second new point, Sisk submits :

a)
That Carmel should not be allowed to raise this new issue now. The court discourages attempts to salvage awards on the basis of arguments not put before the arbitrator in question : see MRI Trading

at paragraphs 38 to 39. Although permission to appeal was not required in this case, the Court should nevertheless be reluctant to admit new arguments to be advanced (particularly when raised for the first time in oral submission). Reliance is placed on the decision of Moore-Bick J (as he then was) in Icon Navigation Corp v Sinochem International Petroleum (Bahamas) Co Ltd [2003] 1 All ER (Comm) 405 (at pages 411 and 412):

"Section 69(7) of the Act forms part of the statutory code providing for appeals on questions of law and as such it sets out the remedies available to the court following the hearing of an appeal. No doubt the court has a measure of discretion when it comes to deciding what order is most appropriate to give effect to its decision. For example, following a successful appeal the court might decide to vary the award itself or remit it to the tribunal for reconsideration. However, s.69(7) must be read in the context of s.69 as a whole. The intention of the legislation is that the powers of the court under this subsection should be exercised in a manner that will best give effect to its conclusions on the issues of law that arise on the appeal, including any issues of law raised by the defendant under para 12.3(3) of the practice direction seeking to uphold the award. It does not, in my view, give the court a wider discretion or allow it to take into account matters outside the scope of the appeal itself. Thus if the court's decision on questions of law means that the award cannot be upheld, I do not think that it has a discretion under this subsection to affirm the award on extraneous grounds such as an irregularity in the conduct of the proceedings."

b)
That Clause 7.7.3 does not in any event have the effect contended for by Carmel. Clause 7.7 addresses the consequences of termination under Clauses 7.4 to 7.6 (where the sub-contractor is in default, insolvent or corrupt). Thus it makes sense that in those circumstances the provisions of Clause 7.7.4 are to apply and other provisions requiring further payment shall cease to apply. It is directed at preventing the sub-contractor from pursuing applications for further interim payment unless and until the sub-contract works were complete and a final reckoning possible. Clause 4.10.5 is not concerned with such a payment, but rather with a failure on the part of the contractor to pay what is due;

c)
That if it does, it is void because of the Debts Act. On Carmel's construction it would exclude the statutory implied term and be void under section 8(1) of the Act.

81.
Carmel maintains its position. Amongst other things, it contends that Sisk's argument on construction ignores the plain meaning of the words in Clause 7.7.3 which expressly require a payment by the contractor. That payment is a further payment if it has not already been made at the date of termination under Clause 7.5. There is no violation of the Debts Act, since Clause 7.7.3 takes effect subject to the statutory implied term.

82.
It is of course highly unsatisfactory for this point to be raised for the first time by Carmel in oral submission. The reason for the lateness has however been frankly explained : the point was simply not identified earlier. (It appears to have been "spotted" by Carmel's solicitor for the first time during the hearing before me.) There is force in the submission that it is a pure question of law the raising of which does not create any prejudice that cannot be compensated for by way of costs. And it was always for Sisk to establish the existence of a contractual substantial remedy for late payment such as to oust the implied term under section 8(1) of the Debts Act. Albeit that I accept Sisk's submission that the general approach of the Court is to support the finality of arbitral awards subject only to

matters properly raised by way of the appeal itself or any timely response thereto, I would allow Carmel to raise this new point of law in all the circumstances of this case.

83.
As indicated, it is not necessary for me to reach a final determination on the question of construction. I have considered the parties' respective written submissions carefully. In short, I would conclude, if necessary, that Clause 7.7.3 did not have the effect that Clause 4.10.5 ceased to apply on termination. This conclusion follows on in a sense from my primary conclusion that Clause 4.10.5 gives rise to a right to interest only where the contractor is late in making a due interim payment under Clause 4 (and my rejection of Sisk's submission by reference to the phrase "these Conditions" in Clause 4.10.5). Clause 7.7.3 is not addressing past accrued rights, but rather looking to the future upon termination of the Sub-Contract for default, insolvency or corruption (which is the meaning of the word "thereupon"). Nor is Clause 4.10.5 addressing the making of a further payment within the meaning of Clause 7.7.3 but rather addressing a failure on the part of Sisk to make an interim payment timeously. It is perhaps for these reasons that what would otherwise have been an obvious point, was not taken until the eleventh hour of an appeal following a full arbitral process.

84.
This conclusion renders Sisk's third objection otiose but, for the sake of completeness again, I would not find, on Carmel's construction of Clause 7.7.3, that it offended the Debts Act. It would not have purported to exclude the implied term in section 1 of the Debts Act.

85.
Putting these new matters aside, in the light of my finding as to the proper scope of Clause 4.10.5, I dismiss the appeal on Issue 3. Although my reasoning differs from that of the Arbitrator, the conclusion remains the same. The applicable interest rate is the statutory rate under the Debts Act.

Conclusion

86.
For the reasons set out above, I dismiss all three limbs of the claim. I invite the parties to draw up an order reflecting the above and to agree all outstanding matters, so far as possible, including costs.