Republic of Trinidad and Tobago

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-02353

IN THE MATTER OF THE ARBITRATION ACT CHAPTER 5:01

and

IN THE MATTER OF A DISPUTE REFERRED TO ARBITRATION

and

IN THE MATTER OF AN APPLICATION UNDER SECTION 8 OF THE ARBITRATION ACT AND CPR PART 62

BETWEEN

AIRPORTS AUTHORITY OF TRINIDAD AND TOBAGO

Claimant

and

JUSAMCO PAVERS LIMITED

Defendant

Before the Honourable Mr Justice James C. Aboud

Dated: **17 February 2020**

Representation:

- **Karen Gough, instructed by Samuel Harrison of Mair & Co for the claimant**

- **Russell Martineau SC leading Dominique Martineau, instructed by Romney Thomas of Hobsons for the defendant**

Judgment

[1] The claimant, Airports Authority of Trinidad and Tobago ('AATT') asks the court to exercise its jurisdiction under section 8 of the Arbitration Act, Chap 5:01, to appoint an arbitrator to resolve a dispute between itself and the defendant Jusamco Pavers Limited ('JPL'). JPL resists the application on the grounds of delay. It says that the court's power is discretionary and ought not to be exercised because AATT's claim is stale and/or statute barred. It also says that there is no arbitration dispute between the two parties necessitating the appointment of an arbitrator.

Background facts

[2] On 7 February 2011, a contract was signed between AATT and JPL under the aegis of the FIDIC Conditions of Contract for Plant and Design-Build for Electrical and Mechanical and for Building and Engineering Works Designed by the Contractor, First Edition 1999. The contract and its contract documents included General and Particular Conditions of Contract ('COC').

[3] The works forming the subject matter of the contract were in respect of "Runway 11/29 Rehabilitation" and "Perimeter Road and Fence Upgrade" with "associated works at Crown Point International Airport, Tobago (since renamed ANR Robinson International Airport ('the Tobago airport'). The contract price was $165 million plus VAT.

[4] JPL contends that on 7 September 2011 the paving works were completed and accepted, and "taken over" by AATT.

[5] On 20 October 2011 a notice was issued by AATT to JPL by way of a Report of the Defects in the Asphalt Paving Works according to clause 11.1 of the COC.

[6] On 1 November 2011 JPL wrote to AATT's Engineer, Mr. Varma Joadsingh. Mr. Joadsingh was appointed as AATT's Engineer according to the Appendix to Tender, pursuant to sub-clause 1.1.2.4 of the COC. JPL denied any bleeding defects but categorized the deposits identified in AATT's defects list as deposits of tack that had built up on the truck tyres during the paving and which was was subsequently deposited on Runway 11/29 at the Tobago airport.

[7] AATT contends that the paving works were completed "subject to defects" on or around 10 October 2011 and, as to the balance of the electrical and ancillary works, on 1 March 2012 when a certificate of completion was issued.

[8] Under the authority of clause 3.2 of the COC, Mr Joadsingh appointed Mr Derek Hamilton of C&H Associates Limited as the appointed Resident Engineer. This sub-clause states:

> 3.2 Delegation by the Engineer
>
> The Engineer may from time to time assign duties and delegate authority to assistants, and may also revoke such assignment or delegation. These assistants may include a resident engineer, and/or independent inspectors appointed to inspect and/or test items of Plant and/or Materials. The assignment, delegation or revocation shall be in writing and shall not take effect until copies have been received by both Parties. However, unless otherwise agreed by both Parties, the Engineer shall not delegate the authority to determine any matter in accordance with sub-clause 3.5.

[9] Minute 8.3 records that the Resident Engineer, Mr Hamilton, and JPL's Consultant, Mr Dave Aqui, agreed to revisit the excess bitumen/tack coat seen on the surface of the paving to Runway 11/29 on 25 November 2011.

[10] Mr Aqui testified in his affidavit that on or around 8 December 2011 JPL rectified all of the defects in relation to the paving works on the Defects List.

[11] Between October and December 2011, AATT's Engineer Mr Joadsingh suddenly left the employ of AATT.

[12] On 27 January 2012 a meeting was held between AATT and JPL to obtain an update on the works and discuss how the outstanding works regarding electrical works, the perimeter fence, the blast fence and painting issues may be affected by the Minister's intent to keep the Tobago airport open from 6:00 am to 1:30 am, starting from 10 February 2012. AATT rejected the assertion that it was a normal progress meeting numbered No. 33 as JPL claims. According to JPL, there is no reference to the asphalt issues minuted in this meeting.

[13] On 31 January 2012, the Taking Over Certificate For Part of the Permanent Works (Paving Works) at the Tobago airport was issued by letter to JPL. The letter was addressed to the Senior Project Manager of JPL and signed by Dayanand Birju, the Acting General Manager of AATT and Mr. Derek Hamilton, the Resident Engineer under the contract. The letter stated:

> "Pursuant to your request dated 12 September 2011 and in accordance with Clause 10.1 and 10.2 of the Conditions of Contract, we hereby accept the paving works as completed and thus forms part of the permanent works effective from the 15th September 2011. In accordance with Clause 1.1.3.7 of the Appendix to Tender we acknowledge the commencement of the The Defects Notification Period of 365 days for this part of the works effective from the 10th October 2011."

[14] On 29 February 2012 a letter signed by both the Resident Engineer, Mr Hamilton and the General Manager of AATT, Mr. Birju was sent to the Senior Project Manager of JPL, Mr Kay Bernston. This letter stated that AATT accepted, in accordance with clauses 10.1 and 10.2 of the COC, that the rest of the permanent works were completed effective 1 March 2012.

[15] Pursuant to this, on 18 April 2012 Mr Birju wrote a letter to JPL indicating AATT's decision to release the Take Over Certificate with regard to the rehabilitation of Runway 11/29 at the Tobago airport for all of the permanent works with the exception of the paving works which had been accepted on 12 September, 2011.

[16] JPL contends that the expiry date of the DNP was 6 September 2012 for paving works only. In a letter dated 12 September 2012, the Resident Engineer wrote AATT stating "As a result of the expiry of the Defects Notification Period for the paving works only (which occurred on the 6th September 2012), we are obligated under Clause 14.9 of the Conditions of Contract to release the last half of the retention associated with t his part of the works, the sum is TTD $6,304,167.00 before VAT". The letter stated that the Certificate of Release of Retention on the remaining 50% of the retention associated with paving works only was attached. On 25 September 2012 JPL received $7,249,792.05 (VAT inclusive) in retention money from AATT.

[17] On 12 March 2013 AATT sent an official notice to JPL containing a pavement study that revealed defects in the runway paving.

[18] On 26 March 2013, JPL wrote AATT acknowledging receipt of the pavement study. JPL stated that the concerns were understood and that it was fully

committed to resolving them. Notwithstanding this, JPL advised AATT that it had fulfilled all contractual obligations with respect to the project and were entitled to full release of their final retention. The Certificate for Final Payment to JPL was issued on 25 April 2013. AATT paid JPL the final retention money on 3 May 2013 in the sum of $2,237,639.30.

[19] On 10 May 2013 the Resident Engineer, Mr Hamilton of C&H Associates Limited, wrote to JPL, advising that AATT should issue the Performance Certificate in accordance with Clause 11.9 of COC.

Continuing remedial works by JPL, 2013 to 2015

[20] Notwithstanding these ostensible acts of contractual closure, and contrary to the ordinary meaning or effect of them, in October 2011 and between March 2013 and February 2015, the parties collaborated and tried to resolve the asphalt paving issues that seemingly would not go away. Importantly, JPL voluntarily co-operated and undertook works at its own expense to resolve the paving issues during this lengthy period of two years. I will refer to them as 'remedial works'. The scientific intelligence that made JPL's remedial works necessary is a matter for paving and soil experts who have no place as yet in this dispute.

[21] In my view JPL undertook these works because it recognized that defects were emerging or re-emerging, despite its remedial efforts. I am not sure, but I think it was said in oral submissions that completed remedial works needed to be re-remedied. In some cases paved areas that were previously thought faultless became faulty. The Tobago airport runway was, of course, in use at the time and expected to be able to handle air traffic. I state this as a tool of reasoning in an attempt to understand why the parties acted as they did. It was later said by JPL in these proceedings that these remedial works

were done on a voluntary basis because AATT was an important client. Whatever be JPL's private motivations, the fact is that AATT seemed to me to be content enough to allow time to run while its concerns were being helpfully addressed on a cost-free basis.

[22] On 11 March 2015 a report entitled "Final Inspection of Bitumen Removal on Runway 11/29, ANR Robinson International Airport" was sent to AATT by Advanced Asphalt Technologies. According to the report, defects were still evident despite the treatments administered by JPL between 2013 and 2015.

[23] On 27 August 2015, AATT served notice to appoint a new Engineer to replace Mr Varma Joadsingh in ostensible accordance with clause 3.4 of the COC. The letter stated that the replacement Engineer was Trintoplan Consultants Limited of Orange Grove Road, Tacarigua. This need to appoint a new Engineer arose because Mr. Joadsingh ceased to have any real involvement or connection to the project since the end of 2011. AATT further indicated that the appointment was not being made during the currency of the works so the stipulation for notice of 42 days before the intended replacement was not necessary. This was said to be a circumstance where the Engineer had not been required to fulfil any function under the contract for a sufficient period of time and, given that there was no existing appointee in the role of Engineer, there was a requirement for an immediate replacement. AATT invited JPL's agreement to the immediate appointment of Trintoplan Consultants Limited or, if there was a reasonable objection, a notice of objection was required. Clause 3.4 says this:

> Replacement of the Engineer
> If the Employer intends to replace the Engineer, the Employer shall, not less than 42 days before the intended date of replacement, give notice to the Contractor of the name, address and relevant experience of the intended replacement

> Engineer. The Employer shall not replace the Engineer with a person against whom the Contractor raises reasonable objection by notice to the Employer, with supporting particulars.

[24] JPL responded by letter of 2 September 2015 and contended that the contract had been fully satisfied and closed off. The letter, authored by JPL's consultant Mr Aqui, stated that he was extremely baffled over the request by AATT to appoint a replacement Engineer.

[25] A meeting was subsequently held between representatives of AATT and JPL on 29 September 2015 at Piarco International Airport. The meeting was called to discuss issues relating to Runway 11/29 at the Tobago Airport, namely the bleeding on the runway and the depression on the taxilane. There was an acknowledgment that defects still existed, but JPL denied responsibility and stated that the meeting was without prejudice. Furthermore, JPL was of the view that any repair or remedial work undertaken by it was not an admission of liability.

[26] Here are material parapharased sections of the notes of this meeting:

> 1.2. ATT pointed out that the condition of the runway been raised by the Trinidad and Tobago Civil Aviation Authority (TTCA) in their 2015 audit and Caribbean Airlines had concerns about its safety.
>
> 1.5. Discussions had been held between JPL and Mr Hamilton concerning these issues, and Mr Hamilton gave recommendations for the remediation of the two turning bays.
>
> 1.6 A slide presentation of photographs of the defects in the pavement and a chronology of events was shown to JPL. AATT noted that Mr. Bernston was aware of the issues highlighted in the slides as previous documentation was forwarded for his attention.

> 1.7 JPL indicated that based on what they had seen on the slides, the two turning bays seemed to be most critical and they were prepared to repair it. However, due to the difficulty with getting an asphalt plant over to Tobago, the use of a 60/70 bitumen mix was suggested.

[27] On 5 October 2015 AATT's Mr Newton wrote a follow up letter to JPL. I quote it in its entirety:

> Reference is made to our meeting at the offices of the Airports Authority of Trinidad and Tobago ("the Authority") on 29 September 2015. At that meeting, a PowerPoint presentation of the defects to the runway was shown. Your Mr. Dave Aqui informed us that Jusamco would effect repairs. As a result , a site visit has been arranged for 15 October 2015.
> The members of the Authority's management present join me in expressing our appreciation for Jusamco's willingness to remedy the defects to the runway. We look forward to the site visit and do sincerely hope that a swift and effective course of action may be agreed upon and implemented urgently.
>
> We should let you know that the Authority is receiving legal advice on the matter. When we drew your proposal for a site visit to the attention of our Attorneys-at-Law, we were advised firmly that this must be done without prejudice to the Authority's rights. In this regard, we have been advised further by our Attorneys-at-Law that formal notices of claim under the contract and a notice of arbitration must be served so as to preserve the Authority's legal position.
>
> We are constrained to follow the legal advice we have been given. We do believe, however, that the service of any notices under the contract should not deter the parties from working very hard together to solve this problem effectively in the national interest. Please do not therefore interpret the service of any such notice as a negation of the Authority's objective to seek amicable and practical resolution. Once we meet again at the site visit, it is our hope that significant progress can be made.

[28] On 6 October 2015 AATT sent a letter of claim to JPL which stated that the primary basis of the claim was founded under clause 4.1 of the COC. This is what clause 4.1 says:

> The Contractor
> (4.1 Contractor's General Obligations)
> The Contractor shall design, execute and complete the Works in accordance with the Contract, and shall remedy any defects in the Works. When completed, the Works shall be fit for the purposes for which the Works are intended as defined in the Contract.
> The Contractor shall provide the Plant and Contractor's Documents specified in the Contract, and all Contractor's Personnel, Goods, consumables and other things and services, whether of a temporary or permanent nature, required in and for this design, execution, completion and remedying of defects.
> The Works shall include any work which is necessary to satisfy the Employer's Requirements, Contractor's Proposal and Schedules, or is implied by the Contract, and all works which (although mentioned in the Contract) are necessary for stability or for the completion, or safe and proper operation, of the Works.
> The Contractor shall be responsible for the adequacy, stability and safety of all Site operations, of all methods of construction and of all the Works.

[29] The claim as articulated in AATT's letter of claim is brought both under the express terms of the contract and/or at common law for damages for breach of contract and/or for abatement of the contract price already paid to JPL in respect of the asphalt paving rehabilitation works at the the Tobago airport.

[30] A notice of arbitration dated 8 October 2015 was subsequently sent to JPL. It identified a potential arbitrator and invited JPL to provide names if they were not in agreement with the arbitrator nominated by AATT.

[31] On 13 October 2015 Mr Aqui replied by email to Mr Newton. Here are pertinent extracts:

> For the sake of clarity I think it important that my statement on behalf of [JPL's] undertaking be understood, i.e., we agreed to effect repairs to the two areas cited in your presentation at the two turn buttons, one at each, that need attention. It was also suggested and agreed that the repairs would be done using a regular pen 60/70 mix design to be approved by the Authority prior to placement. As a consequence, the joint site visit for Thursday was agreed to with a view to determining the extent of the repairs so that we could make the necessary arrangements to effect same as soon as practically possible.
>
> I think it is important to mention that it was made clear that [JPL's] undertaking in this regard is purely a measure of good faith based on our long and healthy relationship, as all of its contractual obligations has (sic) been fully and completely satisfied.

[32] In a follow up "without prejudice" letter on 19 November 2015, Mr Aqui emphasised the good faith undertaking of JPL in effecting repairs and also made it clear that the discussions which concerned the type of material to be used for the repairs were also without prejudice. Mr. Aqui also iterated that it is not correct to say that JPL expressed any willingness to "remedy the defects to the runway" and that JPL's willingness was strictly confined to the repair of the two turn buttons. He also reminded Mr Newton that the runway works were completed and taken over as long ago as September 2012.

[33] I my opinion, the upshot of the meeting and the follow-up correspondence amounted to an alteration of the arrangements that had hitherto existed. The parties were taking tactical positions, AATT indicating that while the continued assistance of JPL was valued it was still intent on preserving its contractual rights and JPL, while agreeing to address only two of the defects,

indicating that the contract was ended, its obligations had ceased, and that all past and future remedial work was done without prejudice. This was a turning point.

[34] On 25 November 2015, AATT wrote Ms Andrea Abel, Managing Director of Trintoplan, and referred to the formal notices of claim and arbitration served on JPL on 7 and 8 October 2015. AATT asserts that notwithstanding AATT's claim for remedial works to Runway 11/29 at the Tobago airport in its entirety, JPL submitted a proposal limited to effecting repairs to only two turn buttons on the runway. As such, AATT called on Trintoplan to determine the claims in accordance to FIDIC sub-clause 3.5. This is what clause 3.5 says:

> 3.5 Determinations
>
> Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.
>
> The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 *[Claims, Disputes and Arbitration].*"

[35] On 23 December 2015 AATT wrote JPL enclosing its letter to Trintoplan of 25 November 2015. Attached to the letter was a series of photographs that show degradation to surfaces of what appears to be tarmac and are alleged to be evidence of unremedied poor workmanship at the Tobago airport. To my untrained eye the photos, if properly adduced and studied by experts, indicate severe degradation of paved surfaces. The authenticity of the photos

has not been denied nor has it been asserted that they were taken at a location other than at the Tobago airport runway. If these photographs prove to be accurate they ought to establish that the runway at the Tobago airport, an international tourism gateway, was in a serious state of disrepair.

[36] On 6 January 2016, JPL replied to AATT's letters of 25 November 2015 and 23 December 2015 and questioned the appointment of Trintoplan. They set out circumstances to show that the entire contract had been completed and as such, JPL did not accept that Trintoplan had any authority or jurisdiction to act as Engineer under the contract at that stage.

[37] On 25 August 2016, AATT wrote JPL to say that on 17 August 2016 their personnel observed signs of severe deformation on Runway 11-20 on and on 21 August 2016, they observed that the defects on the taxi lane had worsened. JPL had been previously notified of these defects.

[38] As a result, AATT stated that repair works to the areas highlighted in the photographs were to be commenced as a matter of urgency. JPL was invited to view the defects highlighted in the photographs but did not to do so.

[39] By letter of 1 September 2016 AATT advised JPL of repair works by another contractor that commenced on 2 September 2016.

[40] On 5 September 2016, JPL wrote AATT questioning the sincerity and intent of the invitation to view repairs which were already commenced on 2 September 2016. It further stated that the AATT letter of 1 September 2016 was received on 2 September 2016.

[41] On 11 November 2016 a draft of Trintoplan's decision was sent to the parties for comment.

[42] At this point, JPL again questioned the authority of Trintoplan which was appointed by AATT as the replacement Engineer for Mr Joadsingh. JPL only recognised the authority of the Resident Engineer, Mr Hamilton of C&H Associates Limited as the *de facto* Engineer in Mr Joadsingh's absence. As such, JPL subsequently replied to Trintoplan's letter on 24 November 2016 and refuted the Engineer's authority under the contract. It stated that C & H Associates Limited had ostensible authority and/or actual authority at the material time to function as the Engineer. Further, the letter denied AATT's findings of defects and stated that any defects identified with regard to the placement of the pavement or any others for that matter were entirely addressed to the client's satisfaction during the DNP. In my view this assertion flies in the face of the post-DNP remedial work voluntarily undertaken by JPL between February 2013 to March 2015.

[43] On 25 November 2015 AATT referred the claim to the replacement Engineer for a determination and on 16 December 2015, Trintoplan wrote to JPL seeking their responses to the claims and notices that were sent to it. No response was given to the findings.

[44] On 19 December 2016 the final determination from Trintoplan was given to AATT. It concluded that defects existed and that JPL was liable for the defects and rectification costs.

[45] Between 9 and 10 February 2017, an addendum to the Engineer's decision was sent to JPL under cover of letter dated 10 February 2016 confirming the quantum.

[46] In mid 2017, remedial works were contracted to third party contractors and works continued in 2018. It seems to me, on the assumption that the photographs are correct, that AATT needed to correct the deformities. No one has said that these works were unnecessary. No one has said the the concerns of the Civil Aviation Authority or Carribean Airlines were spurious.

[47] On 6 October 2017 AATT sent a letter to JPL seeking an agreement on an arbitrator failing which an application would be made to the court. JPL reiterated to AATT on 27 October 2017 that Trintoplan was not the appointed Engineer under the terms of the contract and as such it amounts to a breach of the contract to have appointed them. Further JPL said that it does not recognize the belated claim of AATT. JPL also maintained that there is no dispute that arises under the terms of the Arbitration Agreement between AATT and JPL. Therefore, JPL said that AATT's notice of arbitration and the appointment of any arbitrator was void. Accordingly, JPL said that it cannot concur to AATT's request for the appointment of a proposed arbitrator or any at all.

[48] On 3 July 2018 a Fixed Date Claim ('FDC') was filed in the High Court with the supporting affidavit of Mr. Newton. An amended FDC was filed on 13 September 2018 with a minor immaterial formal amendments.

The applicable statutory law

[49] This is what the material sections of the Arbitration Act Chap 5:01 say:

> 3. An arbitration agreement, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the Court and shall have the same effect in all respects as if it had been made an order of Court.

4. An arbitration agreement, unless a contrary intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule, so far as they are applicable to the reference under the arbitration agreement.

8. (1) In any of the following cases:

(a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator. . .

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire or third arbitrator.

(2) If the appointment is not made within seven clear days after the service of the notice, the Court may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

[50] Section 1 of the First Schedule to the Arbitration Act provides that If no other mode of reference is provided, the reference shall be to a single arbitrator.

[51] The material sections of the Limitations of Certain Actions Act, Chap 7:09 say this:

(3)(1) The following actions shall not be brought after the expiry of four years from the date on which the cause of action accrued, that is to say:

(a) actions founded on contract (other than a contract made by deed) on quasi-contract or in tort;

. . .

(15)(3) (a)For the purpose of this Act and of any such enactment as aforesaid an arbitration shall be deemed to have commenced—

(a) when one party to the arbitration serves on the other party a notice requiring him to appoint an arbitrator or to agree to the appointment of an arbitrator.

Issues to be decided

[52] The issues to be decided are these:

1. Whether the court ought to exercise its discretion to appoint an arbitrator in circumstances where:

   (a) AATT has allegedly delayed in pursuing the claim or has not acted promptly, and

   (b) as a result of the delay, JPL will allegedly suffer prejudice if the arbitration proceeds.

2. Whether the court ought to exercise its discretion if AATT's claim is stale or statute barred.
3. Whether there exists the alleged or any dispute as claimed by AATT at the time that it served its notice of arbitration on 8 October 2015.

Issue 1(a) and (b): whether discretionary relief should be refused because of AATT's delay and the prejudice JPL will suffer if an arbitrator is appointed

Inordinate delay

[53] JPL'S position is that delay whether inordinate or not must always be one of the matters to be taken into account with all the other circumstances when deciding whether or not to grant a discretionary remedy. Mr Martineau SC, JPL's Senior Counsel, heavily relied on this passage from the judgment of His Honour Judge Peter Bowsher QC in *Secretary of State for Foreign and Commonwealth Affairs v Percy Thomas Partnership and Kier International Limited* [1998] 65 ConLR 11 at para 128:

> *"I am not impressed by the submission that no case has been cited where declaratory relief has been refused on the ground of inordinate delay. No authority has been cited for the remarkable proposition that of all the circumstances that may be taken into*

account when considering whether to grant the discretionary remedy of a declaration, the one circumstance which may not be taken into account is delay. Delay whether inordinate or not must always be one of the matters to be taken into account along with all other circumstances when deciding whether or not to grant a discretionary remedy. It would be an extraordinary situation to refuse to appoint an arbitrator on the ground of delay and then to grant declaratory relief whose only object would be to assist the plaintiff in seeking to obtain the appointment of an arbitrator by other means. If the court refuses as a matter of discretion to appoint an arbitrator it can only be because the court considers that the court should not assist the applicant for relief to go to arbitration. It would be totally illogical then to grant other relief the only object of which is to assist the applicant in proceeding to arbitration".

[54] Mr Martineau argued that the court ought not to exercise its discretion to appoint an arbitrator due to the inordinate and inexcusable delay of AATT in applying for the appointment of an arbitrator. This application, according to the his submissions, are supported by *Hashwani v Jivraj* [2015] EWHC 998 (Comm) where it was held at para 148 that the application must be made promptly, and pursued with vigour. See also, *Frota Oceanica Brasiliera v Steamship Mutual Underwriting Association (Bermuda) Ltd. (The Frotanorte)*[1996] 2 Lloyd's Law Rep. 461.

[55] Mr Martineau, in heavy reliance on the *Percy Thomas* case said that in that case, the lapse of time between the two notices of arbitration and the issue of the originating summons to appoint an arbitrator was 4 years and 2 ½ years respectively. Mr Martineau submitted that inordinate delay is an issue that is independent of prejudice, but not divorced from it. Moreover, Mr Martineau submitted that AATT had a spent legal right to pursue its contractual right to arbitration at any time within the period set by the Limitation Acts, but a claimant in an application such as this does not have the same right to be

granted a discretionary remedy at any time after the period set by the Limitation Acts. The former is as of right and the latter a matter of the court's discretion. As a result, of these considerations the plaintiff's application to appoint an arbitrator in *Percy Thomas* was dismissed.

[56] In making his submission for JPL regarding inordinate delay, Mr. Martineau said that in this case, 7 September 2011 was the date that AATT took over the runway and that the DNP therefore ended on 6 September 2012. JPL's contention is that the notice of arbitration was issued on or around 8 October 2015 (three years later) and the FDC another three years after on 3 July 2018. There was a period of 9 months elapsing between the date of JPL's refusal to appoint an arbitrator and AATT's request of the court in appointing an arbitrator.

[57] There was also a waiting period of almost 7 years between completion of the runway works on 7 September 2011 and the service of the FDC on 3 July 2018. Moreover, he submitted that AATT has not put forward any evidence and/or a satisfactory answer for the reason for its delay in seeking relief under section 8 of the Arbitration Act.

Prejudice

[58] Mr Martineau also raised the issue of prejudice as a result of the delay. JPL states that it will be now time-barred from making claims against any sub-contractors if found liable to AATT at an arbitration and therefore, it will be unable to pass on any damages claims to sub-contractors. According to JPL the limitation period against these sub-contractors expired since 8 September 2015. According to Mr. Martineau, this is evidence of great prejudice to JPL. He relied on His Honour Judge Peter Bowsher Q.C's judgment in *Percy Thomas* at para 148:

> *148. FCO wishes to make substantial claims against the defendants. If I do not grant the relief prayed, FCO will almost certainly be unable to proceed with those claims. If I do grant any of the relief claimed, and if that relief leads to the appointment of an arbitrator, the arbitrator or arbitrators will at the outset of their task be faced with applications to dismiss the claims for want of prosecution. These are now stale claims. If an arbitration proceeds, the defendants will be unable to pass on any damages claims to sub-contractors. FCO has delayed inexcusably in bringing the matters on, though the defendants have done little to shake them into activity. On behalf of FCO it is said that the defendants have delayed matters by taking false points. I do not regard that as a fair criticism of the defendants. Most of the objections they have taken have raised difficult points of law, and those points of law could have been resolved long ago if FCO had pressed the matter forward.*
>
> *149.Bearing all these matters in mind and balancing the interests of each of the three parties and the court, I refuse to exercise my discretion in favour of FCO against Kier and I would refuse to exercise my discretion in favour of FCO against PTP if I had jurisdiction to grant the relief claimed against PTP.*

[59] According to Mr Martineau the JPL witnesses who were intimately involved with the project left the country and the firms who were integrally involved with the runway work are no longer within the jurisdiction. Therefore, they would be of no assistance to JPL should an arbitration proceed. Furthermore, he said that AATT's delay in having its claim dealt with in a timely manner has delayed the delivery of the Performance Certificate and thereby deprived JPL of the valuable benefit and protection of that certificate.

[60] I have carefully considered Mr Martineau's arguments and the cases he relied on. With due respect, I disagree with Mr Martineau's them. My reasons are set out below.

[61] I will deal first with the issue of inordinate delay. The cases cited and relied on by JPL do not support its submission on this issue. The cases are not applicable since the court took into consideration, not only the extended delays but also the applicant's conduct. For example, in *Percy Thomas*, the application to the courts to appoint an arbitrator was done 4 years after a notice to concur was served on Percy Thomas Partnership in 1992 and approximately 2 ½ years after a notice to concur was served on Kier International Ltd. The latter notice was issued almost 6 years after practical completion of the building. This application was a bare one, filed without supporting evidence/affidavits dormant for a further period of 18 months. His Honour Judge Peter Bowsher QC stated:

> 136. FCO has not pursued its application to the courts with vigour. The delay of 18 months during which FCO failed to comply with a mandatory rule of court requiring filing of evidence is, by itself and without any other feature, a substantial matter to be taken into account in the exercise of discretion.
>
> 137. I asked counsel for FCO for an explanation of the delay since the issue of the originating summonses, thinking that he would be able to give me an explanation in the course of his closing speech, no explanation having been tendered up until then. Counsel was unable to give me a full explanation immediately, and by arrangement, each of the three solicitors involved has provided me with an explanation by letter.

[62] At paragraph 142 Judge Peter Bowsher Q.C. said that after the notice to concur was served , the managing director of Kier sent a letter to Sean Martin the Treasury Solicitor on 29 October 1993, repeating a request to Mr. Martin for details of instructions which Kier were alleged to have disobeyed and clarification of the alleged dispute. It was not until after the passage of 20 ½ months that Mr. Martin replied on 17 July 1995. There was further correspondence ending with a letter of 7 September 1995 from Kier asking

again for clarification of the alleged dispute. A gap of seven months followed, broken by the service of the originating summons. Percy Thomas Partnership also gave a history of similar in nature though different in detail.

[63] In *Frotanorte* the applicant waited 9 ½ years after serving its notice of arbitration to issuing and serving its summons seeking the appointment of an arbitrator. Lord Justice Hirst described the claimant's greatest difficulty as "awe inspiring". The claimants had formed the view that the limitation period did not elapse until six years after their initial claim had been rejected in May 1989, an error which Lord Justice Hirst stated should not be met with too harsh a penalty. The claimants were granted an extension of time until 30 November 1991. Lord Justice Hirst stated, under the sub-heading of overall delay:

> It is the delay that has occurred between November 1991 and October 1994 when Mr. Justice Potter granted leave to issue the originating summons now before me that is inordinate and inexcusable. A party who thinks so little of his rights that he takes no steps to enforce them for nearly three years after the expiry of the last extension of time and for five years after he is aware of is opponent's contention that his cause of action is time barred deserves no sympathy. It is material to remind oneself that the Courts have held, in the context of applications for an extension of time within which to appoint an arbitrator pursuant to s. 27 of the Arbitration Act, that it is important for a claimant to move quickly once he is aware of the allegation of time bar.
>
> However, in my judgment it was up to the plaintiffs to pursue their claim with vigour; moreover this delay has to be evaluated against the background of an interval of over eight years (April 1983 to September 1991) since the claim was first adumbrated, and an interval of nearly seven years (November, 1984 to September 1991) between the date when the alleged *ad hoc* arbitration agreement was made and its resurrection in 1991. On this basis, I

> have no hesitation in concluding that the delay was inordinate and that the club's lack of urgency furnished no excuse. I therefore reject Mr. Tomlinson's argument on this issue of fact on which, in any event, I would be most reluctant to disturb the Judge's conclusion.

[64] Lord Justice Nourse agreed with Lord Justice Hirst and said this:

> Every discretion must be exercised judicially and in accordance with any principles that have been developed in relation to it. But that does not mean that one discretion must be exercised in accordance with principles that have been developed in relation to another. Moreover, where authority has left it more or less at large its exercise ought not to be narrowed without good reason. That is especially so where the discretion is to grant or refuse a remedy. In every case there must come a time when the Court can properly refuse to grant it, not because its dignity has been affronted nor in order to punish the applicant, but simply because it is wrong to grant a remedy to someone who has for so long neglected his right to seek it. The power to refuse relief in such circumstances is one which every Court in the land would wish to preserve.

[65] From the examination of these cases it is clear that they reflect wanton neglect on behalf of those claimants who belatedly pursued an application for arbitration. Even in the case of *Hashwani*, the period of delay assessed by the court was 19 years. When we consider the delay described in those cases, it is incomparable with the case at bar.

[66] Firstly, AATT did not fall asleep at the wheel. Both parties were trying to amicably resolve the defects during and after the DNP. AATT can be excused for not swiftly pursuing a remedy by way of arbitration that was already being offered by way of JPL's voluntary concessions. It was only when JPL stated that the contract was fully performed and that it denied liability for the ongoing defects of the runway, that the claim was brought against JPL. In the

circumstances of this case the delay cannot in my opinion be described as inordinate. I think, in terms of the counting of time for the purposes of evaluating the exercise of my discretion, that it begins to run from that point. Of course, the appointment of a replacement Engineer involved AATT in necessary inter-party correspondence and then Trintoplan needed time to carry out its study, invite responses, and make its scientific determinations. This necessary delay must also be taken into account.

[67] While delay is certainly a matter to be taken into account in evaluating whether to exercise a discretion it is not the only matter. As His Honour Peter Bower himself conceded in *Percy Thomas*:

> *Delay whether inordinate or not must always be one of the matters to be taken into account along with all other circumstances when deciding whether or not to grant a discretionary remedy.*

In this case, JPL's election to carry out remedial works between 2013 and 2015, in my opinion, alleviated any insecurity or anxiety that AATT might have had that its runway defects would not be remedied on a voluntary basis. In that sense, the urgency to act was lessened, if not obviated. In coming to this conclusion for the purposes of AATT's application, and its case before me, I do not buy the argument that these works were undertaken 'without prejudice' and are to be disregarded as a factor in exercising my discretion. Of course, the arbitrator will look at this from a different angle. Again, the delay is not, having regard to all the circumstances not inordinate. What I say here are matters that are open to JPL to raise at the arbitration. They are proceedings with different goals. All the contractual and other defences, including delay, are open to JPL at the arbitration.

[68] As to the issue of prejudice, the points raised by JPL are at best assertive of facts. They have not been proven in these proceedings. In a sense, JPL is deducing that extreme prejudice will occur. I am not convinced, for the purposes of exercising my discretion, that the prejudice, if any, disables AATT's application. The potential sub-contractors, and the specific works that they were subcontracted to perform—relative to this proposed arbitration—have not been identified with any sufficient particularity or at all. It seems to me that a witness that is outside the jurisdiction can still be consulted, contacted, or flown into the jurisdiction. It has not been said whether attempts to contact them have failed, or that they cannot be traced to new geographic locations or to new employers.

[69] It is also presumptuous to assert that these witnesses will no longer have any recollection of the events and should be deemed unquestionably useless witnesses at an arbitration. I feel certain that there is sufficient paper in this case to jog anyone's memory, if indeed a witness's memory is more useful than what is contained in paper writing, scientific surveys, soil and engineering surveys and the like.

[70] It seems to me that if, for approximately three years, JPL was voluntarily carrying out works of remediation it ought to have been wise to the fact that its expenses—assuming it felt that the remediation works were attributable to error on the part of a sub-contractor—were recoverable costs and expenses. Perhaps it did not hold these sub-contractors liable to reimburse it for its expenses? I cannot say. Perhaps it was JPL that fell asleep at the wheel in not being proactive with these sub-contractors when it began the process, without recourse to them, of remedying defects within the DNP and continued to do so voluntarily after it had expired.

ISSUE 2 : Claim is stale or statute barred

[71] It is said that AATT's claim for breach of contract is subject to a four-year limitation as set out in section 3(1) of the Limitation of Certain Actions Act. When did the cause of action accrue?

[72] JPL relied on *Chitty on Contracts* Vol. 1, 30th edition at para 28-054: "a cause of action in contract in respect of defective work accrues when the contractor is in breach of his express or implied obligations under the contract". Mr Martineau submitted that the date of substantial completion and the practical completion of the Runway works was on 7 September 2011. Therefore, JPL says that the expiration of this limitation period was 8 September 2015. JPL also rely on section 15 (3) (a) of the Limitation Act which I will re-quote for the sake of convenience:

> (3) For the purpose of this Act and of any such enactment as aforesaid an arbitration shall be deemed to have commenced—
>
> (a) when one party to the arbitration serves on the other party a notice requiring him to appoint an arbitrator or to agree to the appointment of an arbitrator;
>
> . . .

[73] Using this section, JPL leverages its argument by stating that the belated service of the notice of arbitration by AATT on 8 October 2015 was outside of the limitation period. JPL also submits that where a court is entitled to refuse to appoint an arbitrator on the basis of delay where a claim is within the limitation period, so too a stronger argument can be made when the claim falls outside the limitation period: *Percy Thomas*.

[74] In my opinion, the question of limitation is a question that is properly and best answered by the arbitrator. Given that there is a dispute regarding the dates of practical completion, the arbitrator will have to decide the date that

the works were actually completed or deemed (in light of the JPL works between 2013 and 2015) to have been completed, if at all. Ms Gough, who appeared for AATT challenged JPL's submission that practical completion occurred on 7 September 2011 as opposed to the date of the only issued certificate of the taking over of the paving works, namely 10 October 2011. Ms Gough said that this take over certificate was valid. This raises questions as to whether or not the works were taken over on 7 September 2011 that the arbitrator will have to decide. Moreover, the arbitrator will also have to adjudicate on the authority of AATT's Resident Engineer, Mr Hamilton, in certifying the date of practical completion or taking over of that portion of paving works in 2011/2012. The arbitrator will have to assess the validity of his actions and whether or not it was binding on the parties. His motivations, impulses or reasoning may be better unearthed at a full trial before an arbitrator.

[75] Ms Gough also raised another issue that is worthy to be solved at arbitration, which is AATT's refusal to give JPL a Performance Certificate at the end of the DNP. Her submission is that, as it appears in the Report of 20 October 2011, assuming that the paving works were completed at some point between 7 September (JPL's contention) and 10 October 2011 (date of the issuance of the taking over certificate of the paving works), the first notification of defects in the paving works are contained in the report issued at the commencement of the DNP.

[76] Ms. Gough's submission is that there was an obligation on JPL to rectify those defects by the end of the DNP, which would have ended either on 7 September 2012 and 10 October 2012. Given that JPL failed to rectify the defects at the expiry of the DNP, this would have ostensibly marked the date of JPL's breach of contract. Therefore, no performance certificate was issued.

According to Ms Gough AATT has therefore never certified that the works were completed in accordance with the contract. AATT's submission therefore is that there is no conceivable limitation defence because the works were never completed, hence their refusal to issue a performance certificate. This is a matter that an arbitrator would be in a better position to decide, not me.

[77] Again, the arbitrator is best suited to determine whether or not the DNP had indeed expired after the paving works were taken over. A date needs to be determined. This determination is important since after 2011, JPL's work to remedy defects were ongoing for two years between 2013 and 2015. AATT attributes the passage of time to JPL's incomplete or ineffective attempts to remedy the defects since 2011. If the claim is stale or statute barred JPL will tell that to the arbitrator. For the purposes of this application JPL's argument is not incapacitating.

ISSUE 3: Existence of the alleged dispute

Mr. Martineau says that an arbitration dispute does not exist. This in logically inconsistent with the submission that the dispute resolution mechanisms in the contract were not followed, or that AATT is itself in breach of contract. He bases this on three arguments.

(i)Trintoplan's appointment and determination is null and void

[78] Mr Martineau submitted that AATT's contractual obligation to appoint Trintoplan as the new Engineer after the departure of AATT's Engineer in December 2011 was waived by the time that the appointment was made. Further, AATT cannot now rely on the appointment when the evidence shows that the parties treated Derrick Hamilton of C & H Associates Limited as the *de facto* Engineer. As stated above, Mr Hamilton was appointed by Mr

Joadsingh under the aegis of sub-clause 3.2 of the COC. It was submitted that when Mr Joadsingh departed in December 2011 AATT took no steps to appoint a replacement Engineer until 27 August 2015.

[79] JPL relied on *Hudson's Building and Engineering Contracts* 13th ed., at para 3-150 which contains this passage:

> "The Employer's duty to appoint a Certifier and any further obligations as to the acts or omissions of the Certifier, or interference by the Employer in certification are dealt within Ch.4. It is not uncommon for private developers to place construction contracts with associated companies without any intention of using an Architect, or indeed for private Employers to do so, but nevertheless to use standard forms of contract providing for an Architect, but without naming one. As a matter of elementary draftsmanship, this practice is obviously highly unwise, although if the work is started or carried out the courts will do their best to apply the contract, particularly if the documentation makes it clear that no Certifier is to be appointed. Failure to appoint a Certifier will obviously be waived if work continues for a sufficient length of time and other methods of administering the contract or of effecting interim payment, for example, have been adopted by parties, it is submitted. An Employer cannot appoint itself to replace a Certifier."

[80] JPL said that between December 2011 (the time of Mr Joadsingh's departure) and the date of AATT's letter in August 2015 to appoint a replacement Engineer, no steps were taken to appoint a new Engineer. However, the work continued for a sufficient length of time after the Engineer's departure. So much so, that JPL continued to work on the project and completed all other permanent works on or around 1 March 2012.

[81] Moreover, JPL says that other methods of administering the contract or of effecting interim payments had been adopted by the parties. For example,

the parties administered the contract after Mr Joadsingh's departure and effected payment of the retention monies through Mr Hamilton of C & H Associates who was delegated responsibility for the administration of all activities in connection with the performance of the contract. These activities were said to be the obligations of the Engineer under the contract. Further, Mr Martineau said that at the time of Trintoplan's appointment the Engineer's obligations and duties under the contract were already concluded and the Engineer was therefore *functus officio* on 10 May 2013. JPL says that it never received notice of Trintoplan's intended appointment, but merely a letter on 27 August 2015 stating that the Engineer was appointed. Moreover, JPL was not given the minimum notice period of 42 days and objected to the appointment by letter dated 2 September 2015.

[82] Ms Gough submitted that these arguments are best left to the arbitrator to decide. In AATT's view, Trintpolan was legitimately appointed under 3.4 of the COC given that the defects were, despite JPL's efforts, unremedied, and Mr Joadsingh was no longer in the employ of AATT. Ms Gough says further that C & H Associated could not "replace" Mr Joadsingh in his duties when he was no longer associated with the project. In other words, the position was vacant. There is also a question of fact to determine, namely when did Trintoplan actually begin its work.

[83] In my view, the arbitrator would be best placed to determine these arguments. For example, Mr Martineau argues that C & H Associates Limited was "delegated the responsibility for the administration of all activities in connection with the performance of the contract". I must however assess this assertion in light of Clause 3.4 of the COC:

3.4 Replacement of the Engineer

> Each assistant, to whom duties have been assigned or authority has been delegated shall only be authorised to issue instructions to the Contractor to the extent defined by the delegation.

[84] The arbitrator is best suited to assess the extent of the delegated duties of Mr Hamilton, the scope of his authority and whether or not his duties could be deemed to be that of the *de facto* Engineer for all purposes connected to the contract. Moreover, Mr. Martineau's claims that the office of the Engineer was *functus officio* because his duties were already concluded is a matter in dispute. Clearly, with the appointment of Trintoplan, AATT obtained an authoritative opinion on the status of the works. It is plain to see that, depending on the Trintoplan findings, the appointment was a procedural precursor to the pursuit of an arbitration. I think JPL was aware of this possibility and, it seems to me, its resistance to the Trintoplan appointment was tactical and partly explained by that fact. Any other engineering opinion might not have been authoritative, and it is possible that JPL would have objected to a report by Mr Hamilton on the ground that he lacked authority.

[85] Furthermore, the AATT 27 August 2015 letter which speaks to the appointment of Trintoplan is also a matter for determination by the arbitrator. Mr Martineau said that this letter was not a letter of intention to replace Mr Joadsingh but merely one that stated that Trintoplan was appointed. In my view, the letter is a bit ambiguous: it states that it is a notice of the replacement of Mr Joadsingh under the agreement, yet cites that it is also a notice of an intention to replace him with Trintoplan under 3.4 of the COC. The last paragraph of the letter invites,

> "your [JPL's] agreement to the immediate appointment of Trintoplan Consultants Limited by return or at any rate, should you

> have any reasonable objection to the appointment of Trintoplan Consultants Limited, then we would ask that you provide your notice of objection as required by clause 3.4 of the COC within the next 14 days, in the absence of which we would intend to confirm the appointment of Trintoplan Consultants Limited and invite Trintoplan to take up the appointment forthwith".

[86] JPL did raise an objection to the appointment of Trintoplan within 7 days of receipt of the letter. The reasonableness of this objection, if indeed Trintoplan's appointment is deemed to be valid, will also be a matter for arbitral determination. It should be noted that no objection was taken to Trintoplan's qualifications to act as Engineer.

(ii) No rejection or indication by JPL that the claim was/was not admitted

[87] Mr Martineau said that a dispute does not arise unless and until it emerges that the claim is not admitted. JPL relies on May LJ's judgment in *Amec Civil Engineering v Secretary of State for Transport* [2005] 1 WLR 2339 at paras 28, 29 and 31). At para 29 of *Amec*, the defendants rely on the four instances outlined by the court in which a claim is not admitted.

> The circumstance from which it may emerge that a claim is not admitted are *Protean*. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

[88] JPL's submission is that there is no evidence of the alleged dispute between the parties as none of the four examples of a dispute in *Amec* are present. Firstly, there was no express rejection by JPL upon receipt of the notice of claim by AATT. Secondly, it cannot be objectively inferred from the

discussions between JPL and AATT that the claim was not admitted. Thirdly, there is no evidence of JPL's prevarication giving rise to an inference that it did not admit the claim. The evidence is that in 2011 and then again from 2013 to 2015, the parties were co-operating, and JPL was at all times attending to and rectifying any concerns of AATT in relation to the runway. Fourthly, the evidence does not show that JPL remained silent for a period of time thereby giving rise to any such inference.

[89] I do not agree with the contention that the claim was not admitted. In the meeting which occurred on 29 September 2015, JPL clearly did not accept responsibility for the issues which form the basis of the dispute, namely, the defective runway works. When the formal notice of claim was eventually issued on 6 October 2015 and the notice of arbitration on 8 October 2015, JPL responded to AATT on 14 October 2015 in connection with the outcome of the meeting (the events that occurred at that meeting are set out in a letter of 5 October 2015). In it, JPL denied responsibility for the defects, contending that the contract was complete and that it had no further liability for the defective asphalt paving. This, in my view, sufficiently amounts to a non-admission the claim.

[90] In both *Ellerine Bros (Pty) Ltd v Klinger* [1982] 1 WLR 1375 and *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726 the question was whether there was a dispute sufficient to sustain a stay of court proceedings for arbitration under then existing statutory provisions. In *Ellerine,* Templeman LJ said that if letters were written making some request or demand and the defendant did not reply there was a dispute. It was not necessary, for a dispute to arise, that the defendants should write back and say, "I don't agree".

[91] In *Halki* Swinton Thomas LJ considered that there is a dispute once money is claimed, unless and until the defendants admit that the sum is due and payable. He upheld Templeman LJ's judgment in *Ellerine Bros* and said that if a party has refused to pay a sum which is claimed or has denied that it is owing then in the ordinary use of the English language there is a dispute between the parties.

[92] There is sufficient material in this case for me to make a finding that a dispute existed over JPL's liability for unresolved and new defects.

(iii)The Engineer's determination had not as yet been made

[93] Mr Martineau said that even where the court deems the appointment of Trintoplan to be valid and AATT has given notice of claim pursuant to clause 2.5 of the COC and, under that sub-clause the engineer is to make a determination, AATT ought to have waited until the Engineer's determination was made and finalized before giving notice of arbitration to JPL. Mr Martineau argued that AATT issued its notice of claim on 6 October 2015 and notice of arbitration on 8 October 2015 while the determination of the Engineer had yet not been made. JPL relies on sub clauses 2.5, and 3.5 to ground their submissions. This is what these clauses say:

> (2.5 Employer's Claims)
>
> If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or Engineer shall give notice and particulars to the Contractor.
>
> The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice in relation to any extension of the Defects Notification Period shall be given before the expiry of such period.

The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [Extension of Defects Notification Period].

This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause.

(3.5 Determinations)

Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration].

[94] JPL submits that sub clause 2.5 provides a condition precedent to any claim being brought, namely that it is a requirement to first have a determination by the Engineer. AATT was only entitled to bring a claim to arbitration if it first complied with sub-clause 2.5, 3.5 and 20 of the COC. Ms Gough however countered that the notice under clause 2.5 of the COC had been generated by JPL's recent assertion that it had satisfactorily completed its obligations under the contract. The sufficiency of JPL's performance had already become

a matter of dispute by the time the clause 2.5 notice was issued on 6 October 2015 which provided particulars of the claim.

[95] It seems to me that the determination of JPL's liability for the defects or otherwise is a matter for the arbitrator and not for the court on this application. If the Engineer's determination was not made before the notice under 2.5 was issued it does not alter the presence of a dispute capable of immediate reference to arbitration. The dispute had come into existence and was evidenced by the notice of claim. There was nothing in the contract to prevent AATT from proceeding with and causing the completion of the Engineer's determination of its claim at the same time as the reference to arbitration. Ms. Gough submits that there is nothing in clauses 2.5, 3.5 or 20 (specifically 20.8) which makes the Engineer's decision a condition precedent to the commencement of arbitration proceedings under the contract. Clause 20.8 specifically envisages the commencement of arbitration in default of prior dispute adjudication provisions:

> 20.8 Expiry of Dispute Adjudication Board's Appointment
>
> If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:
>
> a. Sub-Clause 20.4 (Obtaining Dispute Adjudication Boards Decision) and Sub-Clause 20.5 (Amicable Settlement) shall not apply, and
> b. The dispute may be referred directly to arbitration under Sub-Clause 20.6 (Arbitration).

[96] In my opinion it is not condition precedent for the Engineer's decision to be made before the commencement of arbitration proceedings under the contract. JPL contests the legal validity or authority of the determination

made by Trintoplan (not however as to the scientific conclusions). Even if the arbitrator determines that it is a condition precedent to the service of the notice of arbitration, I am hesistant to say that a dispute is no longer eligible for arbitration because of the order in which the notices/determination were served. Furthermore, I accept Ms Gough's analysis that the Engineer's determination is a temporary form of dispute resolution, the results of which bind the parties pending a final and binding determination by arbitration. In other words, the determination by Trinotplan is just the first step but it cannot usurp the final determination that would be made in arbitration. If AATT was such an allegedly valued client, one in whose favour JPL laboured voluntarily for two years in remedying defects it was also possible in a perfect world that Trintoplan's assessment might have triggered non-arbitral dispute resolution.

(iii) Bad faith

[97] JPL says that AATT's conduct was in bad faith and this conduct should be taken into consideration by the court in exercising its discretionary power. Evidence of these bad faith dealings were said to be AATT's acceptance and taking over of the runway and paving work as early as 2011 but waiting to bring its claim in 2015. AATT also met with JPL on 29 September 2015 and allowed JPL to effect repair works but thereafter issued notices of claim and arbitration before approving JPL's bitumen mix proposal or before the site visit occurred. It is also said that it was bad faith to carry out independent repair works to the runway and to give notice to JPL of the works after they were already commenced. The failure to issue the Performance Certificate and to release the Performance Bond were also raised as indicators of bad faith.

[98] According to Ms Gough AATT has been more than indulgent and accommodating to JPL. All assertions of bad faith dealings are denied. Ms. Gough says that AATT continually made attempts to resolve the issues amicably before resorting to arbitration. Furthermore, she said that AATT's entitlement to withhold the issue of the Performance Certificate and release the Performance Security are tied to the satisfactory completion of the works and the provision of a useable runway at the Tobago airport.

[99] In my view, even though AATT took over the runway in 2011 and waited until 2015 to issue a notice of claim, this dispute is about ongoing defects which AATT says have not been satisfactorily remedied by JPL. The first Report on defects was given by AATT to JPL on 20 October 2011. It might even be disingenuous for JPL to assert that AATT waited 4 years to bring a claim when there was constant communication about defects and subsequent repairs carried out during this period. Moreover, independent repair works that were contracted to a third party by AATT were only pursued after a dispute arose. It seems clear enough to me that JPL was not interested in repairing the entire extent of the defects that were highlighted by AATT, and declined to do so. It seems to me that the issuance of the Performance Certificate was withheld because AATT felt that the works were unsatisfactory and JPL's remedial attempts had failed. The arbitrator will have to determine these matters (assuming that bad faith is raised), which I do not consider sufficient to refuse the application.

Conclusion

[100] Having regard to what I have said and considering the evidence and arguments of both parties I have decided to exercise my discretion in favour of AATT. With the assistance of Counsel and Senior Counsel I will now craft the order. The FDC provides me with a variety of eminently qualified persons

to act as the arbitrator but I, of course, invite the input of the parties before making an appointment.

[101] The costs of the FDC shall be payable by JPL to AATT, to be assessed by the Registrar in default of agreement.

James Christopher Aboud

Judge